(20,267.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 303.

THE WABASH RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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In the Supreme Court of the State of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL., Defendants in Error.

Error to Circuit Court of Lucas County.

RECORD.—VOL. I.—PLEADINGS.

Henry Crawford, Rush Taggart, Attorneys for Plaintiff in Error. George Hoadley, James M. Brown, R. R. Kinkade, John C. F. Gardner, Attorneys for Defendants in Error.

Filed Aug. 8, 1896, in the Supreme Court of Ohio.
J. B. ALLEN, *Clerk.*

1 In the Supreme Court of the State of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
against
THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, JAMES COMPTON, WILLIAM F. REDMOND, JOHN B. MANNING, DAVID KOHN, WILLIAM H. KOHN, and EDWARD POPPER, Partners under the Firm Name of Kohn, Popper & Company; JAMES M. HAM and BENJAMIN F. HAM, Partners under the Firm Name of Ham Bros.; ISRAEL M. SIMON, EDWARD H. LITCHFIELD, IRVING D. FERREY, JOHN S. A. WITTKE, JAMES M. HAM, HENRY W. SMITH, CHARLES S. WEBB, Dr. W. P. ROWE, and T. E. STEPHENS, Executors of James A. Sullivan, Deceased; ELLA R. JOHNSON, CHARLES E. THORN, JAMES MOIR, GUSTAVUS ROLLINS, and EDWARD A. ROLLINS, Partners under the Firm Name of Rollins & Co.; SHELDON WING and WILLIAM H. SHELDON, Executors of Preston Wing, Deceased; EUGENE E. BISHOP, FREDERICK HUBBARD, WILLIAM C. CREAMER, GEORGE B. MEADE; GEORGE
2 B. MEADE and WALTER AIKMAN, Executors, and ELIZA MEADE, Executrix of H. R. Meade, Deceased; JOHN W. ALLING, E. KELLOGG BEACH, CLARENCE MORFIT, JAMES WALKER, VASSAR BROTHERS HOSPITAL, a Corporation of New York; JOSEPHINE L. CADMUS, PRESTON WING, MARY L. OLIVEIRA, CHARLES G. PETERS, HENRY F. JAMES, LEWIS G. HAMPTON, WILSON H. PIERCE, AMBROSE D. HENRY, HOWARD H. HENRY, and FRANK L. HENRY, Executors of Maria C. Henry, Deceased, Defendants in Error.

The Wabash Railroad Company files this its petition in error against the Adelbert College of the Western Reserve University,

James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel H. Simons, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, executors of James A. Sullivan, deceased; Sheldon Wing and William H. Sheldon, executors of Preston Wing, deceased; Ella R. Johnson, Charles E. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade and Walter Aikman, executors, and Eliza Meade, executrix, of H. R. Meade, deceased; George B. Meade, John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing,
Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis
3 G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, executors of Maria C. Henry, deceased, defendants in error, and says that at the January Term of the Circuit Court of Lucas County, Ohio, the said defendants in error recovered a decree against the plaintiff in error, by the consideration of said Court, in a certain action then pending therein, wherein the Adelbert College of the Western Reserve University was plaintiff and the Toledo, Wabash and Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis and Pacific Railway Company, the Wabash Railroad Company, James F. Joy, trustee; Solon Humphreys and Daniel A. Lindley, trustees; James Cheney, trustee; Ossian D. Ashley, Edgar T. Welles, Thomas H. Hubbard, the Farmers' Loan and Trust Company and James Compton were defendants, and the following-named persons were defendants and cross-petitioners, to wit: William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, executors of James A. Sullivan, deceased; Sheldon Wing and William H. Sheldon, executors of Preston Wing, deceased; Ella R. Johnson, Charles E. Thorn, James Moir; Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade; George B. Meade and Walter Aikman, executors, and Eliza Meade, executrix of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York, Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard

H. Henry and Frank L. Henry, executors of Maria C. Henry,
4 deceased; that the said decree adjudged in favor of the said defendants in error that, as owners of certain equipment bonds, they were entitled to a lien upon property now owned by the plaintiff in error, and that unless the said plaintiff in error discharged the said lien by the payment of the amount found due to the said defendants in error severally within a certain time to be named, the said railway property of the plaintiff in error should be sold under the orders of said Court; that a transcript of the docket and journal entries, and final judgment in said action, together with the original papers therein, is herewith filed and made a part of this petition in error; that in the record and proceedings in said Circuit Court in said action there is manifest error to the prejudice of the plaintiff in error in the following, to wit:

(1) That the judgment rendered by the said Circuit Court in favor of the plaintiff below and cross-petitioners was not sustained by sufficient evidence.

(2) That the judgment and decision of the Court below was contrary to the weight of evidence.

(3) That the decision of the Court below and the judgment rendered thereon were contrary to the law.

(4) That the amount awarded to the plaintiff below and cross-petitioners was excessive.

(5) That the Court erred in the decision and judgment thereon that the said plaintiff below and cross-petitioners were entitled to a lien upon the property of the plaintiff in error.

(6) That the said Circuit Court erred in its decision and judgment thereon that the claim of the cross-petitioners below was not barred by the Statute of Limitations.

5 (7) That the said Circuit Court erred in overruling the motion for a new trial filed in said cause by the plaintiff in error.

(8) That the said Court erred in its judgment rendered herein in finding that the said plaintiff below and cross-petitioners were entitled to a remedy by sale for the enforcement of said alleged lien.

(9) That the said Circuit Court erred in deciding that the property of the plaintiff in error in the State of Ohio, subject to the said lien of the plaintiff below and the cross-petitioners, was only subject to the two prior mortgages thereon given to the Farmers' Loan and Trust Company and to Edwin D. Morgan respectively, whereas the Court should have found that the said property was subject to the prior liens in favor of the holders of bonds of the total of first and second mortgage bonds issued under the mortgages executed by the original companies in both Ohio and Indiana to the Farmers' Loan and Trust Company and to Edwin D. Morgan respectively, and also subject to the lien for the Receivers' certificates issued by Humphries and Tutt, Receivers, and paid off and discharged by the Purchasing Committee, Ashley, Joy, Hubbard and Welles.

Wherefore the plaintiff in error prays that said judgment of said Circuit Court be reversed and set aside and held for naught, and that

this plaintiff in error may be restored to all things it has lost by reason thereof.

THE WABASH RAILROAD COMPANY,
By RUSH TAGGART, *Attorney.*

6 In the Supreme Court of the State of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
against
THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, JAMES COMPTON and Others, Defendants in Error.

Service of summons in error in the above-entitled cause is hereby waived, and the appearance of the following-named parties, defendants in error, entered therein, to wit:

The Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn; William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Brothers; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb; Dr. W. P. Rowe and T. E. Stephens, executors of James A. Sullivan, deceased; Ella R. Johnson, Charles R. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Company; Sheldon Wing and William H. Sheldon, executors of Preston Wing, deceased; Eugene E. Bishop, Frederick Hubbard, William G. Creamer, George B. Meade; George B. Meade and Walter Aikman, executors, and Eliza Meade, executrix, of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker;
Vassar Brothers Hospital, a corporation of New York;
7 Josephine L. Cadmus, Preston Wing, Mary L. Oliveira,
Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce; Ambrose D. Henry, Howard H. Henry and Frank L. Henry, executors of Maria C. Henry, deceased.

Toledo, May 13, 1896.

GEORGE HOADLY,
JAMES M. BROWN,
R. R. KINDADE,
JOHN C. F. GARDNER,
Attorneys for Defendants in Error.

Journal Entries in Circuit Court.

THE STATE OF OHIO, *Lucas County:*

The Circuit Court of Lucas County, O.

At a term of the above-named Court, begun and held before the Hon. George K. Haynes, Hon. Charles H. Scribner, Hon. E. B. King, Presiding Justices, on the 6th day of January, A. D. 1896, among

other proceedings had by and before said Court, on the 17th day of February, A. D. 1896, being the 37th day of said term, as appears by its journal of that day, were the following, viz:

901. 22624.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY
against
THE TOLEDO, WABASH AND WESTERN RAILWAY CO.

On motion of the Court The Toledo and Wabash and Western Railway Company has leave to file amendment to its answer and cross-petition instanter.

On the 15th day of April, 1896, being the 55th day of the
8 January Term, 1896, a judgment in said cause was rendered, an entry of which appears on the journal of said Court in words and figures as follows, viz:

901. 22624.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
against
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, THE WABASH RAILROAD COMPANY, JAMES F. JOY, Trustees; SOLON HUMPHREYS and DANIEL A. LINDLEY, Trustees; JAMES CHENEY, Trustee; OSSIAN D. ASHLEY, EDGAR T. WELLES, THOMAS H. HUBBARD, THE FARMERS' LOAN AND TRUST COMPANY, JAMES COMPTON, and the Following-named Cross-petitioners, Namely, WILLIAM F. REDMOND, JOHN B. MANNING, DAVID KOHN, WILLIAM N. KOHN, and EDWARD POPPER, Partners Under the Firm Name of Kohn, Popper & Company; JAMES M. HAM and BENJAMIN F. HAM, Partners Under the Firm Name of Ham Brothers; ISRAEL M. SIMON, EDWARD H. LITCHFIELD, IRVING D. FERREY, JOHN S. A. WITTKE, JAMES M. HAM, HENRY W. SMITH, CHARLES S. WEBB, Dr. W. P. ROWE, and T. E. STEPHENS, Executors of Jane A. Sullivan, Deceased; SHELDON WING and WILLIAM H. SHELDON, Executors of Preston Wing, Deceased; ELLA R. JOHNSON, CHARLES E. THORNE, JAMES MOIR, GUSTAVUS ROLLINS and EDWARD A. ROLLINS, Partners Under the Firm Name of Rollins & Company; EUGENE E. BISHOP, FREDERICK HUBBARD, WILLIAM C. CREAMER, GEORGE B. MEADE and WALTER AIKMAN, Executors, and ELIZA MEADE, Executrix, of H. R. Meade, Deceased; JOHN W. ALLING, E. KELLOG BEACH, CLARENCE MORFIT, JAMES WALKER, VASSAR BROTHERS' HOSPITAL, a Corporation of New York; JOSEPH L. CADMUS, PRESTON WING, MARY L. OLIVEIRA, CHARLES G. PETERS, HENRY F. JAMES, LEWIS G. HAMPTON, WILSON H. PIERCE, AMBROSE D. HENRY, HOWARD H. HENRY, and FRANK L. HENRY, Executors of Maria C. Henry, Deceased.

This cause came on to be heard at this, the January, Term,
9 1896, of the Circuit Court of Lucas County, Ohio, upon the pleadings and proofs, including the first and second amended

and supplemental petitions of the plaintiff, the answer and cross-petition of the several parties hereinbefore named as cross-petitioners, the answer and supplemental answers of James F. Joy, of the Farmers' Loan and Trust Company, of James Compton, Ossian D. Ashley, Edgar T. Welles, James F. Joy and Thomas H. Hubbard, known in this cause as the Purchasing Committee, the answer of the Wabash Railroad Company to the said cross-petitions, the answer of said Purchasing Committee and of said James F. Joy to the cross-petition of Henry F. James, the amendment to the answer of the Wabash Railroad Company, and the several replies of the plaintiff and of the said cross-petitioners to said answers and supplemental answers, and to said amendment to the answer of the Wabash Railroad Company, and upon the agreed statement of facts entered into by and between the parties to this cause and on file, and the exhibits thereto, and upon the testimony, and was argued by counsel and taken under advisement by the Court, whereupon the Court, after maturely considering the premises, is of the opinion that the equities of the cause are with the said plaintiff and with the said several cross-petitioners, and that they are entitled to the relief sought by their said pleadings.

The Court further finds that on the first day of November, 1862, the Toledo and Wabash Railroad Company, a consolidated corporation of Ohio and Indiana, owning and being in possession of a railroad extending from Toledo, in Ohio, to the eastern boundary line of the State of Illinois, being the railroad and franchises hereinafter described, issued and sold its equipment bonds to the total amount of six hundred thousand dollars ($600,000), of different denominations, but all in the form, except as to amount, described in Exhibit "C," to the agreed statement of facts in this cause, and that afterwards, on divers days between the 8th and 29th days of May, 1863, the said Toledo and Wabash Railway Company, the Great Western Railway Company of 1859, the Quincy and Toledo Railroad
10 Company and the Illinois and Southern Iowa Railroad Company, the three last named being corporations organized under the laws of the State of Illinois, entered into articles of consolidation and thereby formed the Toledo, Wabash and Western Railway Company, a consolidated corporation of the States of Ohio, Indiana and Illinois, a true copy of which articles of consolidation are printed in this cause, with and as a part of said statement of facts, entitled therein Exhibit "D."

That thereafter, by intermediate consolidations, foreclosures and deeds of conveyance, the title to the said railway and franchises, with its accretions and additions passed, as stated in said agreed statement of facts to the Wabash, St. Louis and Pacific Railway Company, and from it, after the commencement of this suit, to the Wabash Railroad Company, which company is now in possession of said railroad and franchises and engaged in operating and maintaining said railway, and is seized and possessed of a perfect title thereto, so far as the said railway within the State of Ohio and the jurisdiction of this Court is concerned, subject to the liens hereinafter described.

And the Court further finds that by the issue and sale of said equipment bonds and by the execution of said articles of consolidation there was created and established and duly imposed upon all the said railroad and railroad property within the State of Ohio and the jurisdiction of this Court, and upon said franchises, with the accretions to said property that have since been made, now in the possession and control of the Wabash Railroad Company, a lien in favor of the several holders of the said equipment bonds for the amounts due thereon and the interest thereon, prior, preferable and superior to the title of the Wabash Railroad Company to any part thereof within the State of Ohio and prior to and superior to the title of any mortgagee of said property, whose mortgage was made and delivered after said articles of consolidation, or of any other party to this cause, unless it be the mortgages to the Farmers' Loan
11 and Trust Company and Edward D. Morgan, trustees, respectively, described in said agreed statement of facts.

And the Court further finds that the plaintiff is the holder and owner of two of said equipment bonds to the amount of $500 each, and interest warrants or coupons thereon, beginning May 1, 1875, and that there is due to it thereon the amount hereinafter stated of principal and interest computed until the first day of the present January Term, 1896, of this Court, namely, January 6th, 1896, and the Court further finds that the several cross-petitioners are the holders and owners of said equipment bonds in the several amounts recited and stated in "Exhibit N" to said agreed statement of facts on file in this cause, and that there is due to the said several cross-petitioners for principal and interest warrants or coupons, the amounts hereinafter stated, ascertained by computing interest to the first day of this term, January 6th, 1896, upon said bonds from their several dates of maturity, and upon the said coupons from their dates of maturity, without any rest by reason of the recovery of judgment by the plaintiff and cross-petitioners in the Court of Common Pleas aforesaid, including, however, the coupons maturing between the first day of May, 1875, and the first day of November, 1878, inclusive, for which the plaintiff recovered in the Court of Common Pleas, but as to which the said Court of Common Pleas found that the said cross-petitioners were not entitled to recover, to which finding and judgment of this Court, so far as it rejects the claim of the plaintiff and cross-petitioners that they are entitled, for the purpose of recovering interest, to rest on the first day of the term at which the judgment of the said Court of Common Pleas was rendered, and to compound interest thereon from that date, the said plaintiff and cross-petitioners severally except, and to the extent to which the said judgment includes the amount of said coupons maturing between the first day of May, 1875, and the first day of November, 1878, inclusive, and rejected by the said Court of Common Pleas, but allowed by this Court, and as to which it was held by said Court of
12 Common Pleas that the prosecution of the same was barred by the Statute of Limitations, but is held by this Court to the contrary, the said Wabash Railroad Company excepts.

And the Court further finds that the several sums of money, prin-

cipal and interest, due upon the first day of this term, upon the said several equipment bonds held by the plaintiff and the said cross-petitioners, including interest computed upon the principal aforesaid and on the facts hereinbefore found and adjudged down to the first day of this term—viz., January 6th, 1896—are the several sums hereinafter named, to wit:

To the plaintiff, three thousand four hundred and eleven 93/100 dollars	$3,411 93
To Edward H. Litchfield, eighty-five thousand two hundred and ninety-eight 25/100 dollars	85,298 25
To William F. Redmond, thirty-four thousand one hundred and nineteen 30/100 dollars	34,119 30
To John B. Manning, thirty-four thousand one hundred and nineteen 30/100 dollars	34,119 30
To Irving D. Ferry, twenty-three thousand eight hundred and eighty-three 51/100 dollars	23,883 51
To Kohn, Popper & Co., sixty-one thousand four hundred and fourteen 74/100 dollars	64,414 74
To Ham Brothers, six thousand eight hundred and twenty-three 86/100 dollars	6,823 86
To John S. A. Wittke, ninety-three thousand eight hundred and twenty-eight 07/100 dollars	93,828 07
To James M. Ham, five thousand one hundred and seventeen 89/100	5,117 89
To Henry W. Smith, three thousand four hundred and eleven 93/100 dollars	3,411 93
To Charles S. Webb, seventeen thousand and fifty-nine 65/100 dollars	17,059 65
To Jane A. Sullivan's Estate, ten thousand two hundred and thirty-five 79/100 dollars	10,235 79
To Mrs. E. R. Johnson, seventeen thousand and fifty-nine 65/100 dollars	17,059 65
13 To Charles E. Thorne, three thousand four hundred and eleven 93/100 dollars	$3,411 93
To James Moir, seventeen thousand and fifty-nine 65/100 dollars	17,059 65
To Rollins & Company, fifteen thousand three hundred and fifty-three 68/100 dollars	15,353 68
To Eugene E. Bishop, three thousand four hundred and eleven 93/100 dollars	3,411 93
To Frederick Hubbard, twenty-seven thousand two hundred and ninety-five 44/100 dollars	27,295 44
To William G. Creamer, thirty-four thousand one hundred and nineteen 30/100 dollars	34,119 30
To George B. Mead, eighteen thousand seven hundred and sixty-five 61/100 dollars	18,765 61
To Estate of H. R. Mead, eighteen thousand seven hundred and sixty-five 61/100 dollars	18,765 61
To John W. Alling, three thousand four hundred and eleven 93/100 dollars	3,411 93

To E. Kellogg Beach, eight thousand five hundred and twenty-nine 82/100 dollars..... 8,529 82
To Clarence Morfit, three thousand four hundred and eleven 93/100 dollars..... 3,411 93
To estate of Preston Wing, thirteen thousand six hundred and forty-seven 73/100 dollars..... 13,647 72
To Josephine L. Cadmus, thirty-four thousand one hundred and nineteen 30/100 dollars..... 34,119 30
To Vassar Bros. Hospital, six thousand eight hundred and twenty-three 86/100 dollars..... 6,823 86
To Mary L. Oliveira, thirteen thousand six hundred and forty-seven 72/100 dollars..... 13,647 72
To Charles G. Peters, sixty-eight thousand two hundred and thirty-eight 60/100 dollars..... 68,238 60
To James Walker, three thousand four hundred and eleven 93/100 dollars..... 3,411 93
To Henry F. James, twenty-seven thousand two hundred and ninety-five 44/100 dollars..... 27,295 44
14 Israel M. Simon, seventeen thousand and fifty-nine 65/100 dollars..... 17,059 65
Louis G. Hampton, six thsusand eight hundred and twenty-three 86/100 dollars..... 6,823 86
To Wilson H. Pierce, five thousand one hundred and seventeen 89/100 dollars..... 5,117 89
To estate of Maria C. Henry, eighty-five thousand two hundred and ninety-eight 25/100 dollars..... 85,298 25

And the plaintiff and said cross-petitioners in this Court and the Court of Common Pleas having disclaimed and declined to prosecute or seek the prayer of said petition and of the said cross-petitions praying and demanding judgment for the sale of that part of said railway property and franchises which is situated in or granted by the State of Indiana, or elsewhere out of the State of Ohio, and having expressed the desire to confine their prayer and to limit the effect of the judgment in this Court to the railway property and franchises within the limits of the State of Ohio and the jurisdiction of this Court, it is, therefore, ordered and adjudged, by the consent of the plaintiff and the said cross-petitioners, that all and singular the prayer of the petition, which seeks relief by the sale or by any order with reference to the said railway property and franchises described in the petition, situate, lying and being within the State of Indiana, or elsewhere out of the State of Ohio, is stricken from said answer and said cross-petition respectively, and is no longer to be considered as having been sought in this cause, to which order and action of the Court the said Wabash Railroad Company excepts.

And it is, by the Court, here further ordered and adjudged:

First. That the said plaintiff and cross-petitioners respectively recover against the Toledo, Wabash and Western Railway Company the said several sums of money hereinbefore stated as due to them

respectively with interest thereon from the first day of the
15 present term of this Court, to wit, January 6th, 1896, and execution is awarded therefor, to be issued upon the precipe of the attorney for the plaintiff and cross-petitioners respectively.

Secondly. That at the end of sixty days from the entry of this judgment, but not sooner, that this cause be referred to a Master Commissioner herein to be hereafter named and appointed by the Court, that he proceed to give notice in a daily newspaper published in the City of Toledo, for a reasonable time, at his discretion, not less than five insertions, to all holders of equipment bonds issued by the Toledo and Wabash Railway Company, as aforesaid, not represented in this cause, that they present the same and make proof of their ownership and of the indebtedness thereon, to him, at some suitable time and place in the City of Toledo, to be appointed by him and stated in said advertisement; and

Thirdly. It is further ordered and adjudged that this cause be referred to the same Master Commissioner for the performance of the duty prescribed in the sixty-second paragraph of the agreed statement of facts, namely:

"That he report at his early convenience the exact extent in detail, as far as may be practicable, of the several properties to be embraced in any order of sale to be issued as hereinbefore stated, together with the liens thereon."

And it is further ordered and adjudged that the said Master Commissioner report the amount of unpaid principal and interest due upon the mortgage bonds described in the pleadings secured by the mortgages aforesaid to the Farmers' Loan and Trust Company and James F. Joy respectively, if he find said mortgages do secure mortgage bonds now outstanding and unpaid charged upon said premises or any part thereof.

Fourthly. It is further ordered and adjudged that unless
16 within six months from the entry of this decree the Wabash Railroad Company, or some other person or party for it, pay to the Clerk of this court the costs to be taxed, and to the plaintiff the sum of money so as aforesaid adjudged to be due to it upon its said equipment bonds, and to each of the said several cross-petitioners the sum of money hereinbefore adjudged to be due to and collectible by said cross-petitioners upon said equipment bonds, each with interest from the first day of this term, and the amount due all other holders of equipment bonds whose holdings have been or may be proved herein, the Clerk of this Court shall, upon the precipe of the plaintiff or of any of said cross-petitioners or of their respective attorneys, or of any person entitled thereto issue under the seal of this Court to the Sheriff of Lucas County, an order of sale, commanding him, said Sheriff, that he proceed to sell at public sale, after due appraisement thereof, in accordance with the provisions of the laws of the State of Ohio for the appraisement of real estate upon execution, all and singular the railroad formerly of the Toledo and Wabash Railway Company and the Toledo, Wabash and Western Railroad Company, and now of the Wabash Railway Company, as it existed on the 29th day of May, 1865, and with such ac-

cretions and additions and in such parcels as said Master Commissioner may report and this Court may confirm, together with the franchise thereto pertaining and the equipment thereof. Said railroad begins in the City of Toledo, in the State of Ohio, and extends through the Counties of Lucas, Fulton, Henry, Defiance and Paulding to the western boundary line of the State of Ohio and the eastern boundary line of the State of Indiana, and said Sheriff is also ordered to proceed further to sell at public auction to the highest bidder therefor, complying with the terms of sale and bidding not less than two-thirds of said appraised value payable to him in cash or otherwise, as this Court may hereafter order, at the time of such bidding, all the said railroad and railroad property, in whole or in parcels, as this Court may hereafter direct, with all additions and accretions and franchises, but said order of sale shall not be issued by
17 said Clerk until after the coming in of the report of said Master Commissioner and its confirmation by this Court, and shall embrace said property to be sold as the same may be reported by said Master Commissioner and confirmed by this Court.

This order and judgment shall be without prejudice to the rights of James Compton in the premises, and of the Wabash Railroad Company as against him. Said Compton is hereby adjudged to be the holder of said issue of equipment bonds to the principal sum of one hundred and fifty thousand dollars, of like tenor and effect as to the said equipment bonds held by the said plaintiff and the said cross-petitioners, the same having been included in legal proceedings conducted by himself for his own benefit alone, and resulting in a judgment in his favor for the sale of said railway and railway property and franchises, which judgment is of record in this Court and remains unsatisfied.

The said James Compton may, at his option, either share in the net proceeds of the sale to be made under this order and judgment, in proportion to the amount of his claim, upon giving notice thereof to the said Sheriff at least ten days before the advertised date of sale aforesaid, or if no such notice be given, at his option the said sale may be made, subject to his right to enforce any order and judgment that has been or may be made in the said cause in which he is plaintiff or in any other cause to which he is a party, to the extent of his right, as it may appear in the premises, but without disparagement or prejudice to the claim of the said plaintiff and the said cross-petitioners, that his said right extend no further than to divide proportionately with them the proceeds of any sale of said railway property and franchises, without prejudice to the right of the Wabash Railroad Company to claim that said Compton has no interest in said premises except an equity to redeem the same from the lien of said mortgages on terms prescribed in a decree on the Circuit Court of the United States and now pending in the Supreme Court of the United States.

18 The object of this reservation of this decree is to save to the said Compton as well as to the said plaintiff and cross-petitioners, and to the Wabash Railroad Company as against said Compton, all their rights as between themselves in the premises.

And as to all further proceedings in the premises this cause is continued until the next term of this Court.

And thereupon this cause came on for further hearing to the Court upon the motion for new trial herein filed by the Wabash Railroad Company, within three days from the rendition of the decision of the Court in this cause, and the Court being fully advised in the premises, do overrule the same, to which overruling of the same the Wabash Railroad Company at this time excepted.

And the Wabash Railroad Company thereupon in open court tendered its bill of exceptions and the Court allowed, signed and sealed the same and ordered the same to be filed and made part of the record in this cause.

No other judgments or decrees were rendered or orders or journal entries made in said cause as appears upon the journal of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court at Toledo, Ohio, this 16th day of April, A. D. 1896.

[SEAL.]

L. E. CLARK, *Clerk*,
By J. I. GETZ, *Deputy*.

STATE OF OHIO, *Lucas County, ss:*

I, L. E. Clark, Clerk of the Common Pleas and Circuit Court of Lucas County, Ohio, do hereby certify that the exhibits referred to in the foregoing petition in error contains all the original pleadings, process, papers and records and a full and true transcript of all the docket and journal entries in said cause and proceeding in
19 said Circuit Court and in the Court of Common Pleas of said County in cause The Adelbert *University* of the Western Reserve University *vs.* The Toledo, Wabash and Western Railroad Company *et al.*

In testimony whereof I hereunto subscribe my name and affix the seal of said Court at Toledo, Ohio, this 16th day of April, A. D., 1896.

[SEAL.]

L. E. CLARK, *Clerk*,
By J. I. GETZ, *Deputy*.

Appeal Bond.

Know all men by these presents, That we, The Wabash Railroad Company as principal, and C. L. Reynolds, as surety, are held and firmly bound unto The Adelbert College of the Western Reserve University, William F. Redmond, John B. Manning, David Kohn, William N. Kohn, and Edward Popper (partners under the firm name of *Ham Bros.*) James M. Ham and Benjamin F. Ham, (partners under the firm name of Ham Bros.) Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, executors of Jane A. Sullivan, deceased, Sheldon Wing and William H. Sheldon, executors of Preston Wing, deceased, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and

Edward A. Rillins (partners under the firm name of Rollins & Co.), Eugene E. Bishop, Frederick Hubbard, William G. Craemer; George B. Mead and Walter Aikman, executors and Aliza Meade, executrix of H. R. Meade, deceased; George B. Mead, John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers' Hospital, a corporation of New York, Josephine L. Cadmus, Mary L. Oliveria, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, executors of Maria C. Henry, deceased, in the penal sum of one thousand dollars to the payment of which well and truly be made, we do hereby jointly and severally bind ourselves, our heirs, successors, executors and administrators.

Signed by us, and dated this 24th day of January, A. D. 1895.

The condition of the above obligations is such, that, whereas, the said The Wabash Railroad Company, has taken an appeal from a certain judgment and decree rendered against it in favor of the said obligees in the Court of Common Pleas within and for the County of Lucas in the State of Ohio, at the September Term thereof A. D. 1894, in a certain cause then pending in said Court entitled: The Adelbert College of The Western Reserve University *vs.* The Toledo, Wabash and Western Railway Company, and others, being number 22624 in said Court, in which it is adjudged and decreed that the said obligees are entitled to a lien upon certain property therein described to the gross amount of about $640,195 10/100, and that in default of payment thereof said property shall be sold for the satisfaction of the same which said judgment is duly enrolled in the Volume 96 at page 420, and following of the Journal of said Court in which reference is hereby made to the Circuit Court within and for the County aforesaid.

Now if the said The Wabash Railroad Company shall abide and perform the order and judgment of said Circuit Court, and shall pay all moneys, costs and damages, which may be required of, or awarded against it by said Circuit Court, then this obligation to be void; otherwise to remain in full force and virtue in law.

(Signed) THE WABASH RAILROAD CO.,
By O. D. ASHLEY, *President,* [SEAL.]
C. L. REYNOLDS. [SEAL.]

I approve the above bond with the sureties thereto, this 28th day of January A. D. 1895.

L. E. CLARK, *Clerk.*

[Endorsed:] Filed Jan. 28, 1895.

21 *Pleadings.*

Court of Common Pleas of Lucas County, Ohio.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO., JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, Trustee; JOHN HUMPHREYS and DANIEL A. LINDLEY, as Trustees, Defendants.

Petition.

The plaintiff now comes and for cause of action against the defendants herein says:

That it is a corporation duly incorporated and existing under and pursuant to the laws of the State of Ohio;

That on and prior to the first day of October, 1862, the Toledo and Wabash Railway Company was a corporation duly organized and existing under and pursuant of the laws of the States of Ohio and Indiana, and owning a line of railway extending from the City of Toledo, in the State of Ohio, and passing through the Counties of Lucas, Henry, Fulton, Defiance and Paulding, in said State, and through the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippacanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point in the west line of State Line City in said last-named county;

22 That the said Toledo and Wabash Railway Company was itself a consolidated railroad company, and was formed by the consolidation of the Toledo and Wabash Railroad Company, a corporation existing within and by virtue of the laws of the State of Ohio, and organized to maintain and operate a railroad from Toledo to Harrison Twp., Paulding County, in the State of Ohio; and the Wabash and Western Railway Company, a corporation existing within and by virtue of the laws of the State of Indiana, and organized to maintain and operate a line of railroad from State line, in Allen County, to State Line City, Warren County, in the State of Indiana;

That on or about the first day of October, A. D. 1862, the Board of Directors of the said Toledo and Wabash Railway Company, in pursuance of the power and authority vested in them by law, resolved that the president of said company be authorized and directed to cause to be prepared bonds of the said company to an amount not exceeding six hundred thousand dollars for the purpose of providing further equipment and satisfying other requirements of the said company, which bonds were to bear date November, 1862, and the principal thereof was to be payable to a trustee or the bearer, in the

City of New York, on the first day of May, A. D. 1883, and to bear interest at seven per cent., payable semi-annually at the same place, which interest was to be represented by coupons; that the bonds so to be issued should be executed in the usual manner and under the corporate seal of said company, and should be convertible into the common stock of said company at par, at any time within five years from the date thereof, but should not be entitled to a dividend for any time on which the holder thereof should have received interest; and that the Executive Committee of said company be authorized to issue, sell and dispose of the said bonds in such manner and upon such terms as they should deem to be for the best interests of said company. All of which will more fully appear by reference
23 to a copy of said resolutions hereto attached, marked "Exhibit A," and made a part of this resolution.

That on or about the first day of November, A. D. 1862, the said Toledo and Wabash Railway Company, by its president and secretary, duly authorized thereto, and in accordance with said resolution, under its corporate seal, executed a series of bonds, amounting altogether to the sum of six hundred thousand dollars, known as equipment bonds, severally and consecutively numbered and being all of the same tenor and purport, except the numbers thereof, and the sums thereby severally secured and payable, and that the following is a true copy of one of said bonds in said series:

No. 557. $500.

UNITED STATES OF AMERICA,

States of Ohio and Indiana.

Toledo & Wabash Railway Company.

Issue of Equipment Bonds not to exceed $600,000 in amount.

The Toledo & Wabash Railway Company, a body corporate, acknowledges itself to be indebted to the Bearer hereof for money borrowed in the sum of five hundred dollars, to be paid on the first day of May, 1883, with interest from and after the first day of May, 1863, at the rate of seven per cent. per annum, payable semi-annually on the first day of May and the first day of November in each year, on the surrender of the respective interest warrants hereto appended, both principal and interest payable at the Company's Agency in the City of New York.

This bond is one of a series authorized to be issued under Resolutions of the Board of Directors of said Company, passed on the first day of October, 1862, to an amount not exceeding $600,000, and is convertible into the Common Stock of said Company at par, at any time within five years from the date thereof, but the stock
24 to be issued therefor shall not be entitled to a dividend for any time for which the interest may be paid on this Bond, which is convertible only at the option of the holder hereof.

In Witness whereof, the said Company has caused its Corporate

Seal to be hereto affixed and its President and Treasurer to subscribe their names hereto this first day of November, 1862.

[SEAL.] A. WOODS, *President.*
J. N. DRUMMOND, *Treasurer.*

Revenue Stamp, 25 cents, cancelled.

That annexed or attached to each of said several bonds was a series of interest warrants or coupons for each semi-annual installment of interest, which would become due and payable on said bonds by the terms thereof, until the principal of said bonds should become due and payable; and that all of said interest warrants or coupons were and are of the same tenor and effect, excepting the sums severally secured thereby, and the time when the same would become due and payable and the numbers thereof; that said interest warrants or coupons were and are payable on the first days of May and November in each year, and that the following is a true and correct copy of one of said coupons or interest warrants.

$17 50/100.

Toledo and Wabash Railway Company. Interest warrant for seventeen and fifty one-hundredths dollars, payable in the city of New York, May 1st, 1875, for six months' interest on Equipment Bond for $500.
No. 557.

J. N. DRUMMOND, *Treasurer.*

That each of said coupons or interest warrants was executed and signed by said Toledo and Wabash Railway Company by its treasurer duly authorized thereto.

That after said several bonds and the said several coupons
25 or interest warrants thereunto annexed or attached, had been duly executed as aforesaid by the said Toledo and Wabash Railway Company, certain of said bonds, to wit, numbers five hundred and fifty-seven and five hundred and fifty-eight of the denomination of five hundred dollars each, were long prior to the commencements of this action by the said Toledo and Wabash Railway Company, for value received, sold and delivered to *bona fide* purchasers thereof, who thereupon became the *bona fide* owners and holders thereof for value, and that, prior to the commencement of this action, the said plaintiff—for a valuable consideration and in good faith—purchased the said bonds hereinbefore particularly mentioned, and of which the numbers are hereinbefore particularly mentioned, including the coupons or interest warrants thereto annexed or attached, hereinafter particularly mentioned, being all the said coupons or interest warrants attached or annexed to said bonds, which fell due and became payable on and after the first day of May, 1875—from the *bona fide* holders of said bonds—and that the same were by said *bona fide* holders assigned, transferred and delivered to it, the said plaintiff, and that the said plaintiff is now the *bona fide* holder and

owner for value of said bonds and coupons or interest warrants and of all the money due and to become due thereon.

That on or about the 29th day of May, A. D. 1865, by an agreement signed by its president and secretary, duly authorized therefor, and sealed with its corporate seal, the said Toledo and Wabash Railway Company agreed to consolidate its road, property, and capital stock, with the road, property and capital stock of the following named railroad corporations duly organized and existing under and by virtue of the laws of the State of Illinois, viz.: The Great Western Railway Company of 1859, The Quincy and Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company; and that the new corporation formed by such consolidation became and was known as The Toledo Wabash and Western Railway Company.

26 That by the terms of said agreement for such consolidation the said Toledo and Wabash Railway Company entered therein on the basis of three million four hundred thousand dollars first mortgage bonds; twenty-five hundred thousand dollars second Mortgage bonds; six hundred thousand dollars convertible equipment bonds, being the equipment bonds hereinbefore mentioned, and thirty-five hundred thousand dollars stock, and it was specially provided in said agreement among other things that all the rights, franchises, property, real and personal, debts, choses in action of the respective companies, said parties to said agreement of consolidation, should vest in the said consolidated company, and that all bonds and other debts in said agreement specified, including the said equipment bonds hereinbefore mentioned, should be protected by said consolidated company; that said agreement of consolidation was duly executed by the said The Great Western Railway Company of 1859, the Quincy and Toledo Railroad Company and the Illinois and Southern Iowa Railway Company by the president and secretary of each of said companies respectively duly authorized therefor, and under their corporate seals, and was ratified by the stockholders of said Toledo and Wabash Railway Company in due form of law on the 28th of June, 1865, by the stockholders of the said The Great Western Railway Company of 1859, and of the Quincy and Toledo Railroad Company on the 30th day of June, 1865, and by the stockholders of the Illinois and Southern Iowa Railroad Company on the first day of June, 1865, and was, on or about the sixth day of July, 1865, filed in the office of the Secretary of State of the State of Ohio, and on the 3d day of July, 1865, was filed in the office of the Secretary of State of the State of Indiana, and on the 30th day of June, 1865, was filed in the office of the Secretary of State of the State of Illinois, and the said Toledo, Wabash and Western Railway Company thereupon became a railroad corporation organized and existing under the laws of the States of

27 Ohio, Indiana and Illinois, owning a line of railway consisting of the respective railroads of the companies named in said agreement of consolidation.

That all of the rights, franchises, property, real and personal, debts, choses in action of the said Toledo and Wabash Railway Com-

pany, upon the consummation of said consolidation passed to and became vested in the said Toledo, Wabash and Western Railway Company upon the considerations stated, and that no other provision was made for the payment of the outstanding debts of said Toledo and Wabash Railway Company, including the said equipment bonds, other than that contained in said agreement of consolidation.

That said Toledo, Wabash and Western Railway Company paid the coupons or interest warrants attached to said equipment bonds as they matured from and after the time of said consolidation up to and including that falling due on the first day of May, 1870.

That, on or about the first day of February, 1867, the said Toledo, Wabash and Western Railway Company resolved to make an issue of its bonds to the extent of fifteen million dollars, and to secure the same by a mortgage on its entire property, including the property which it derived from the said Toledo and Wabash Railway Company, which said mortgage became and had been known as its consolidated mortgage, and the bonds secured thereby as its consolidated bonds.

That the said Toledo, Wabash and Western Railway Company on or about said last-mentioned date made and executed its certain mortgage or trust deed to the defendants Isaac H. Knox and James R. Jesup, as trustees, in pursuance of said resolutions, to secure the payment of said consolidated bonds, amounting in the aggregate to the sum of fifteen million dollars, and no more, with interest at the times and in the manner therein mentioned and set forth, as well as to secure the payment of a certain sinking fund, as therein mentioned, which first mortgage or trust deed was dated on said first day of February, 1867, and was duly sealed with the corporate or common seal of said company, and was subscribed by the presi-
28 dent and secretary of said company, duly authorized therefor, and was duly acknowledged, and on or about the said date was delivered by the Toledo, Wabash and Western Railway Company to said trustees therein named, a copy of which said mortgage or trust deed is hereto attached, marked "Exhibit B," and made part of this petition.

That in and by said mortgage or trust deed the said Toledo, Wabash and Western Railway Company, in consideration of one dollar, transferred, assigned, sold and set over to the said trustees Isaac H. Knox and James R. Jesup all its real and personal property then owned or used, or that thereafter might be owned or used, by the said railway company in connection with its railroad, and everything appertaining and appurtenant thereto, and all its franchises, powers, privileges and chartered or other rights then acquired or to be thereafter acquired along its said line of railroad or branches thereof.

That in said mortgage or trust deed it is recited that said Toledo, Wabash and Western Railway Company had been duly formed under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, by the consolidation of the stock, property, rights, franchises and interests of the several companies known

as the Toledo and Wabash Railway Company, the Great Western Railway Company of 1859, the Quincy and Toledo Railway Company and the Illinois and Southern Iowa Railroad Company, and that at the time of each consolidation the property of said various companies was subject to certain bonded debts and mortgages created by said several companies or by other companies which at the time of the creation of said debts and mortgages were then owners of the property so consolidated.

That in said mortgage or trust deed it is further recited that the funded debt of said Toledo, Wabash and Western Railway Company, including that secured by mortgage liens as well as that not so secured, amount in the aggregate to the sum of thirteen million three hundred thousand dollars besides interest, and that said
29 funded debt was represented and made up as follows, to wit:

First mortgage bonds of the Toledo and Illinois Railroad Company for the sum of nine hundred thousand dollars, secured by a first mortgage on that part of the road of said Toledo, Wabash and Western Railway Company in the State of Ohio running from Toledo to the westerly boundary of said State; bonds of the Toledo and Wabash Railroad Company for the sum of one million dollars secured by a second mortgage on the same property last mentioned.

First mortgage bonds of the Lake Erie, Wabash and St. Louis Railroad Company for the sum of twenty-five hundred thousand dollars secured by a first mortgage on that part of the road of the said Toledo, Wabash and Western Railway Company lying in the State of Indiana.

Bonds of the Wabash and Western Railway Company for the sum of one million five hundred thousand dollars secured by a second mortgage on the last aforesaid property.

First mortgage bonds of the Great Western Railway Company for the sum of one million dollars secured by a first mortgage on that part of the property of the said Toledo, Wabash and Western Railway Company in the State of Illinois extending from Decatur to the Illinois River at Naples.

Bonds of the last-named company for the sum of one million three hundred and fifty thousand dollars secured by a mortgage on that part of the road of the said Toledo, Wabash and Western Railway Company in the State of Illinois extending from the State line of Indiana to the Illinois River; there being then outstanding of said bonds the sum of twenty thousand dollars, the rest having been returned by a portion of the bonds next described.

First mortgage bonds of the Great Western Railroad Company of 1859, for the sum of twenty-five hundred thousand dollars secured by a mortgage on that part of the road of the said Toledo, Wabash and Western Railway Company in the State of Illinois extending from Naples and Meredosia as its western termini to the
30 boundary line between the States of Illinois and Indiana, the last-named bonds having been created to retire the aforesaid one million dollars and thirteen hundred and fifty thousand dollars of Great Western Railway Company bonds.

Bonds of the Great Western Railway Company of 1859 for the sum of twenty-five hundred thousand dollars secured by a mortgage on the last aforesaid property.

Bonds of the Illinois and Southern Iowa Railroad Company for the sum of three hundred thousand dollars secured by a first mortgage on that part of the road of the said Toledo, Wabash and Western Railway Company extending from Clayton to Carthage in the State of Illinois.

Bonds of the Toledo and Wabash Railway Company for the sum of six hundred thousand dollars known as equipment bonds.

Bonds of the Toledo, Wabash and Western Railway Company for the sum of one million dollars known as sinking fund bonds.

That in said mortgage or trust deed it is further recited that it is deemed for the interests of the said Toledo, Wabash and Western Railway Company, as well as for the benefit of the holders of all said various classes of bonds that the whole of the same should be consolidated into one and the same mortgage debt upon equitable principles and that of the bonds to be issued and made and secured by the said mortgage to the amount in the aggregate of the sum of fifteen million dollars, there should be retained thirteen million three hundred thousand dollars to retire in such manner and upon such terms as the directors of said company might from time to time prescribe a like amount of the bonds of the various companies thereinbefore enumerated and described and representing the said funded debt and that the balance of said bonds, to wit, one million seven hundred thousand dollars thereof, should be used to obtain additional equipment and improvements and for such additional purposes as the directors might deem advisable.

31 That the said mortgage or trust deed was presently thereafter filed for record and was duly recorded in the manner required by law in the several offices in the counties in the States of Ohio, Indiana and Illinois in which the property then owned by the said Toledo, Wabash and Western Railway Company and which is covered by the said mortgage was then situated.

That said Toledo, Wabash and Western Railway Company made and issued its several bonds in the form and for the amounts mentioned in said mortgage or trust deed and sealed the same with the corporate seal of said company and caused the names of its president and treasurer to be thereto affixed, all of which bonds were equally secured by said mortgage to said trustees.

That interest warrants or coupons for the payment of the interest becoming due on said bonds according to the terms thereof were annexed to each of said bonds. A copy of one of said bonds is fully set out in the copy of said mortgage hereto attached, marked "B."

That the said Toledo, Wabash and Western Railway Company did make, execute and issue one million dollars of said consolidated bonds secured by the said consolidated mortgage or trust deed, and did therewith retire a like amount of certain of the bonds previously issued by the said company and then outstanding and

which bonds are enumerated and described in the said consolidated mortgage or trust deed as bonds of the Toledo, Wabash and Western Railway Company, known as sinking fund bonds, amounting in the aggregate to the said sum of one million dollars; and that said one million dollars of said consolidated bonds so issued are now outstanding, except as the same may have been purchased for the sinking fund mentioned and described in said consolidated mortgage or trust deed, and that there are now outstanding bonds of said issue amounting in the aggregate to the sum of two million six hundred and ten thousand dollars or thereabouts, which have come by transfer, sale and delivery into the possession of and
32 are now held by a large number of individuals, partnerships and corporate bodies who are the owners thereof and are entitled to the moneys thereby agreed to be paid, but whose names are unknown to this plaintiff and are too numerous to be made parties to this action.

That afterwards and on or about the 6th day of October, 1868, the said Toledo, Wabash and Western Railway Company, by an agreement signed by its president and secretary duly authorized thereto, and sealed with its corporate seal in due form of law, agreed to consolidate its road; property and capital stock with the road, property and capital stock of the Decatur and East St. Louis Railroad Company, a railroad company organized and existing under and by virtue of the laws of the State of Illinois;

That by the terms of said agreement for said consolidation it was provided among other things that all the rights, franchises, privileges, property and appurtenances of every description choses in action, debts, dues and demands of the said parties thereto should vest in the said consolidated company and that the terms of the articles of consolidation hereinbefore mentioned whereby the said Toledo, Wabash and Western Railway Company was formed should be and remain in full force and be binding upon the new consolidated company so far as the same could be applicable and so far as the same was not in conflict with the specified provisions therein, and that said consolidated company should retain the name of the Toledo, Wabash and Western Railway Company and be known thereby.

That the provisions contained in said consolidation agreement entered into as aforesaid on the 29th day of May, 1865, to protect the bonds therein referred to, including said equipment bonds, was applicable so as to remain in full force and be binding upon said new consolidated company and was not in conflict with the specified provisions of said consolidated agreement entered into as aforesaid on the 6th day of October, 1868.

That the said Decatur and East St. Louis Railroad Com-
33 pany by its president and secretary duly authorized thereto, duly executed and under its corporate seal, said last mentioned agreement of consolidation on the 3d day of June, 1869, and the same was on the 7th day of October, 1868, in due form of law ratified by the stockholders of the said Toledo, Wabash and

Western Railway Company, and on the 25th day of August, 1869, was ratified in due form of law by the stockholders of the said Decatur and East St. Louis Railroad Company and said last mentioned articles of consolidation were on or about the 10th day of August, 1870, filed in the office of the Secretary of State of the State of Ohio, and were on the 8th day of August, 1870, filed with the Secretary of State of the State of Indiana, and were on the 9th day of August, 1870, filed with the Secretary of State of the State of Illinois.

That all the rights, franchises, property, real and personal, debts and choses in action of the said parties to said last mentioned agreement of consolidation, including all the rights, franchises, property, real and personal, debts, choses in action of the Toledo and Wabash Railway Company hereinbefore mentioned by virtue of such consolidation passed to and vested in said new company which became the owner of the same subject to all the liens and charges thereupon created by said Toledo, Wabash and Western Railway Company, and subject to the lien and charge thereupon of the outstanding indebtedness of the said Toledo and Wabash Railway Company, agreed to be paid in and by the terms of the agreement of consolidation hereinbefore set forth to which the said Toledo and Wabash Railway Company was a party including said equipment bonds, which said equipment bonds the said new company under the provision of said last mentioned consolidation agreement became obligated and agreed to pay.

That said defendant the Toledo, Wabash and Western Railway Company, from and after the time of said last-mentioned consolidation paid the coupons or interest warrants on said equipment bonds, hereinbefore mentioned, as the same matured up to and including that falling due on the 1st day of November, 1874.

34 That on or about the 1st day of April, 1875, the said defendant The Toledo, Wabash and Western Railway Company, as parties of the first part, and the said defendants Isaac H. Knox and James R. Jesup, as trustees named in the consolidated mortgage or trust deed hereinbefore mentioned, as parties of the second part, made and executed a certain indenture and deed of further assurance, wherein the said defendant The Toledo, Wabash and Western Railwey Company expressly covenanted and agreed with the said parties of the second part, and with all persons whom it might in any wise concern, that the said defendant The Toledo, Wabash and Western Railway Company would not make or issue, or attempt to make or issue, any of the then remaining twelve million, three hundred thousand dollars of the reserve bonds secured by said consolidated mortgage theretofore executed to the said parties of the second part, as trustees, except for the purpose of, or simultaneously with, the retiring of an equal amount of the balance then remaining of the funded debt enumerated in said consolidated mortgage or trust deed aforesaid, so that when all of the said reserved bonds should have been used the whole of the balance of the funded debt would be extinguished and discharged. And it is,

in said indenture and deed of further assurance, further covenanted by and on the part of the party of the first part thereto, with said trustees and with all persons whom it might in any wise concern, that the covenants therein contained should be supplementary to said consolidated mortgage or trust deed, and constitute a part of said consolidated mortgage aforesaid, and be of the same effect, to all intents and purposes, as if they had been inserted therein.

That the said indenture and deed of further assurance was duly executed by said defendant The Toledo, Wabash and Western Railway Company, by its president and secretary duly authorized thereto, and was sealed with its corporate seal, and was duly signed and sealed by said trustees, and a copy thereof is hereto
35 attached, marked "Exhibit C," and made a part of this petition.

Plaintiff further says that the directors of the said Toledo, Wabash and Western Railway Company have never yet prescribed the manner and terms in which the various classes of bonds enumerated and described in said consolidated mortgage or trust deed representing the funded debt by said consolidated mortgage especially secured, including said equipment bonds, should be retired, as in said mortgage required, but have wholly neglected and refused so to do, and have never issued such consolidated bonds to retire said equipment bonds outstanding, or any of them, and that said plaintiff is ready and willing, and has hitherto been ready and willing, and the persons from whom it procured said equipment bonds owned by it as aforesaid have always been ready and willing to accept said consolidated bonds in the place and stead of the said equipment bonds now held and owned by the plaintiff hereinbefore enumerated, and which, it claims, are secured by said consolidated mortgage hereinbefore set forth.

That the said defendant The Toledo, Wabash and Western Railway Company, from the time of its organization continued in possession of, and to own and operate, the said line of railroad and property which passed to it and vested in it at the time of its formation, as hereinbefore set forth, including the property and railroad originally owned by The Toledo and Wabash Railway Company, hereinbefore mentioned, lying in the States of Ohio and Indiana, and all the other property described in the said consolidated mortgage or trust deed until the foreclosure proceedings hereinafter set forth were instituted.

That, on or about the 22d day of February, 1875, an action was instituted and a petition filed in the Court of Common Pleas of Lucas County, Ohio; that on or about the 24th day of February, 1875, an action was instituted and a complaint filed in the Cass County Circuit Court of the State of Indiana, and that on or
36 about the 24th day of February, 1875, an action was instituted and a complaint filed in the Vermilion County Circuit Court of Illinois; that all of said actions were instituted at the suit of the Metropolitan National Bank in New York and others, complainants, against the said defendant The Toledo, Wabash

and Western Railway Company and others, defendants; that in said proceedings in all three of said States a cross-bill or cross-petition was filed by one Valentine Ketcham praying that the property of the said Toledo, Wabash and Western Railway Company covered by a certain mortgage executed on or about the first day of February, 1873, by the said Toledo, Wabash and Western Railway Company upon the entire line of railroad then belonging to it, and other property, to the New York Guaranty and Indemnity Company, trustee, to secure the payment of five million dollars, and of which mortgage the said Ketcham was then trustee, might be sold to satisfy the amounts due to the holders of the bonds secured by said last-mentioned mortgage.

That in said proceedings in the State of Ohio, on or about the fourteenth day of December, 1875, a decree was entered in the said Court of Common Pleas of Lucas County, Ohio, by which, among other things, it was ordered and decreed that the said consolidated mortgage or trust deed hereinbefore set forth was duly and legally made and recorded in pursuance of the laws of the several States hereinbefore named; that it was a valid conveyance for the purpose therein mentioned, and, as such, was a lien upon the property therein described.

That said consolidated mortgage or trust deed was the first and best lien upon the whole and consolidated line of railway belonging to said Toledo, Wabash and Western Railway Company, excepting the branch extending from Decatur to East St. Louis one hundred eight and five-tenths miles in length as to which said mortgage was not a lien, but which said consolidated mortgage was subordinate and inferior to several mortgage liens upon separate parts and subdivisions of said road which are more particularly described in said decree excepting the road between Carthage
37 and the Mississippi River, to wit: from Carthage to Evanston, five and four-tenths miles, completed at the date of said decree, and from Evanston to the Mississippi River at Hamilton, a further distance of about seven miles, for which the right of way was owned by said Toledo, Wabash and Western Railway Company, and also except the road from Clayton to Camp Point, a distance of six miles, as to all of which the said consolidated mortgage was thereby found to be a first mortgage.

That in and by said decree it was further ordered and adjudged that to enforce the provisions of the mortgage or trust deed of which said Ketcham was trustee as aforesaid, the real property, equipments and franchises, as an entirety of said Toledo, Wabash and Western Railway Company should be sold by a Special Master Commissioner therein named, subject, however, to the liens of all mortgages and trust deeds prior to the said mortgage of which said Ketcham was trustee, and particularly described in said decree, including said consolidated mortgage, and it was also ordered and adjudged that the sale of the said road, property, equipments and franchises under said decree was to be without prejudice to any claim which might be made by the holders of the aforesaid equip-

ment bonds and that all questions as to those bonds were to be left open.

That subsequently and in the February Term of the year A. D. 1876, of the Circuit Court of Cass County, Indiana, and of the Circuit Court of Vermillion County, Illinois, decrees were made in the actions hereinbefore mentioned therein pending in all particulars adopting the said decree of said Court of Common Pleas of Lucas County, Ohio, as the decree of the said several Courts, respectively.

That in pursuance of said decree a sale was had of all the property, effects, rights and franchises of the said Toledo, Wabash and Western Railway Company on the 10th day of June, A. D. 1876, to John W. Ellis and others, and subsequently thereafter and on or about the first day of January, 1877, a proper deed of
38 conveyance was made, executed and delivered to the said John W. Ellis and others by Jacob D. Cox, who had been appointed by said decree Special Master Commissioner to execute the same, and who had made the said sale, whereby was conveyed to the said John W. Ellis and others all and singular the railroad of the said Toledo, Wabash and Western Railway Company, extending from the City of Toledo, in the State of Ohio, southwesterly to and through the State of Indiana, and to East St. Louis and to Hamilton on the Mississippi River, and to Naples and Camp Point in the State of Illinois, an aggregate length of six hundred and one miles, including the right of way, roadbed and the superstructures of all sorts thereon. All repair and other shops and manufacturies, with the fixed and movable machinery, tools and implements thereunto belonging; all engines, cars, rolling stock and equipments of every kind and description; all supplies of timber, lumber, fuel, iron, steel and other supplies intended for use in running said road; all equities to any real and personal property, debts and demands due the said company, together with the franchises of said railway company and of the several original companies of which it is composed, and the right and franchise to be a corporation, together with all corporate franchises of said company, and of the said companies severally, including the rights and franchises of said several companies to be and act as a corporation, to have and to hold the same with the appurtenances aforesaid, subject, as aforesaid, unto the said John W. Ellis, and others, as joint tenants, and not tenants in common, and to the survivors and survivor of the said parties, and to their assigns, and to the heirs of the last survivor of the said parties.

That the said defendant the Wabash Railway Company is a consolidated railway corporation, existing under and by virtue of the laws of the State of Ohio, Indiana and Illinois and was formed by the consolidation of the Wabash Railway Company of Ohio, The Wabash Railway Company, of Indiana, and the Wabash
39 Railway Company, of Illinois, corporations organized and existing on and prior to the 6th day of January, A. D. 1877, under the laws of said States, respectively; that the said Wabash Railway Company of Ohio was on or about the 28th day

of December, A. D. 1876, organized as a corporation under the law of the State of Ohio, by John W. Ellis, Alexander M. White, John L. Martin, George I. Seney and Henry A. V. Post, who were designated in the articles of association as the purchasers at the judicial sale of the railroad and property of the Toledo, Wabash and Western Railway Company hereinbefore mentioned under and by virtue of the aforesaid decrees, and in said articles of association it was recited that the same were entered into by the parties thereto for the purpose of forming a corporation under the laws of the State of Ohio, referring particularly to an Act of the Legislature of the State of Ohio passed May 7th, 1869, entitled "An Act supplementary to an act entitled an act to authorize Receivers of insolvent railroad companies to sell unfinished roadbeds and franchises," passed May 14th, 1868.

That the said Wabash Railway Company of Indiana and the said Wabash Railway Company of Illinois were organized under the laws of their respective States, for the same purposes as those for which the said Wabash Railway Company of Ohio was organized, to wit: "To take title to the property and succeed to the franchises of the said defendant the Toledo, Wabash and Western Railway Company under the laws of said States, respectively.

That the said Wabash Railway Company of Ohio, The Wabash Railway Company of Indiana, The Wabash Railway Company of Illinois, on or about the first day of January, A. D. 1877, duly entered into articles of consolidation in due form of law, executed by each of said companies by their respective presidents and secretary duly authorized thereto, and sealed with their corporate seals, which said articles of consolidation were duly filed in the office of the Secretary of State of the State of Ohio on or about the 10th day of January, 1877, and that the name of said consolidated company as designated in said articles of consolidation was " the Wabash Railway Company," and that said corporation so formed is the defendant in this action, The Wabash Railway Company.

That on or about the 12th day of January, 1877, said John W. Ellis and the others associated with him as purchasers of the property, rights, franchises and railroad of the said defendant The Toledo, Wabash and Western Railway Company, at the judicial sale hereinbefore mentioned, executed and delivered to the said defendant The Wabash Railway Company a deed of the aforesaid property conveyed to them by the said Jacob D. Cox as Special Master Commissioner, subject to the payment of all liabilities charged upon said property by the aforesaid decrees, and subject to the liens of said consolidated mortgage or trust deed hereinbefore mentioned and the rights of the holders of the bonds secured thereby. That said defendant the Wabash Railway Company forthwith entered into the possession of the property, rights, equipments and franchises conveyed to them as aforesaid, and continued in possession thereof, till its consolidation with the St. Louis, Kansas City and Northern Railroad Company, hereinafter set forth, as the owner and holder

thereof, and in operating and running the said continuous line of railroad, and in exercising the franchises conveyed and transferred to them as aforesaid.

That the property so conveyed to the defendant The Wabash Railway Company included all the property, railroad and franchises originally owned, possessed and exercised by the Toledo and Wabash Railway Company hereinbefore mentioned and owned by said Toledo and Wabash Railway Company at the time of the issue of said equipment bonds, and this plaintiff says that said defendant the Wabash Railway Company took said property and the whole thereof subject to the lien, equity and charge thereupon of such equipment bonds, including the said equipment bonds held and owned by this plaintiff as aforesaid.

This plaintiff further says that said defendant The Wabash
41 Railway Company was in fact and effect the said defendant The Toledo, Wabash and Western Railway Company in a reorganized form and that the capital stock of said Wabash Railway Company, consisting of one hundred and sixty thousand shares, was subscribed for and issued to the stockholders of said defendant The Toledo, Wabash and Western Railway Company except eight hundred shares, the same being issued to such stockholders at the rate of ten dollars per share of stock of one hundred dollars par value.

That at the time of the said sale of the rights, property and franchises of the said defendant The Toledo, Wabash and Western Railway Company under the decrees hereinbefore mentioned the said property, rights, franchises and various parts thereof were, in addition to said consolidated mortgage, subject to the liens of various mortgages issued to secure the payment of bonds then outstanding made and executed by the various companies out of which the Toledo, Wabash and Western Railway Company was formed, and by the Decatur and East St. Louis Railroad Company, and covering the separate properties of those companies or portions thereof owned by said companies at the times said mortgage- were made and executed.

The following is a statement of such mortgage liens:

A first mortgage made by the Toledo and Illinois Railroad Company for the sum of nine hundred thousand dollars, securing first mortgage bonds of that company due as extended August 1st, 1890, for each sum.

A second mortgage made by the said Toledo and Wabash Railroad Company for one million dollars, securing bonds of said company due November 1st, 1878, for that amount.

A first mortgage made by the Lake Erie, Wabash and St. Louis Railroad Company for twenty-five hundred thousand dollars securing first mortgage bonds of that company due as extended August 1st, 1890.

A second mortgage made by the Wabash and Western Railway Company for the sum of fifteen hundred thousand dollars, securing bonds of that company due November 1st, 1878.

42 A mortgage made by the Great Western Railway Company of 1859 for the sum of twenty-five hundred thousand dollars, securing bonds of that company due August 1st, 1888, for that amount.

A second mortgage made by the Great Western Railway Company of 1859, for the sum of twenty-five hundred thousand dollars, securing bonds of that company due May 1st, 1893, for that amount.

A mortgage made by the Illinois and Southern Iowa Railroad Company for the sum of three hundred thousand dollars, securing bonds of that company due August 1st, 1882, for that amount.

A mortgage made by the Toledo and Quincy Railroad Company for the sum of five hundred thousand dollars securing bonds of that company for that amount.

Bonds of the Toledo and Wabash Railway Company due May 1st, 1883, for the sum of six hundred thousand dollars, being the above-mentioned equipment bonds.

A mortgage made — the Decatur and East St. Louis Railroad Company for the sum of twenty-seven hundred thousand dollars, securing bonds of that company for that amount.

Bonds issued under the aforesaid consolidated mortgage made and issued by the Toledo, Wabash and Western Railroad Company amounting to two million six hundred and ten thousand dollars or thereabouts.

That the said mortgages with the exception of that executed by The Decatur and East — Louis Railroad Company and said consolidated mortgage are the same mortgages recited and described in the consolidated mortgage as hereinbefore set forth and cover respectively the various railroad properties and franchises also described in said consolidated mortgage.

That on so much of the property of the said Toledo and Wabash Railway Company as was situated in the State of Ohio, at the time the same came into the possession and ownership of the said Toledo, Wabash and Western Railway Company as hereinbefore set forth, there were only the following mortgage liens thereon:

43 the said mortgage executed by the Toledo and Illinois Railroad Company for the sum of nine hundred thousand dollars, securing bonds of that company to that amount due as extended August 1st, 1890, and the said mortgage executed by the Toledo and Wabash Railroad Company for the sum of one million dollars securing bonds of that company to that amount due and payable November 1st, 1878, and that the property covered by said last-mentioned two mortgages was and is the railroad property of the Toledo and Wabash Railway Company, situated in the State of Ohio, and extending from the City of Toledo, and passing through the counties of Lucas, Henry, Fulton, Paulding and Defiance to the western boundary line of said State of Ohio in Harrison Township in said County of Paulding. That on so much of the property of the Toledo and Wabash Railway Company as was situated in the State of Indiana at the time the same came into the possession and ownership of the Toledo, Wabash

and Western Railway Company there were the following mortgage liens thereon: The said mortgage made and executed by the Lake Erie, Wabash and St. Louis Railroad Company, made on or about the first day of August, A. D. 1853, to secure an issue of bonds to the amount of two million five hundred thousand dollars, due as extended on the first day of August, 1890, and said mortgage made and executed by the Wabash and Western Railway Company on or about the 15th day of October, 1858, to secure an issue of bonds to the total amount of fifteen hundred thousand dollars.

That at the time the consolidated mortgage hereinbefore mentioned was made and executed by the said Toledo, Wabash and Western Railway Company there were no other mortgage liens on the property and railroad of the said Toledo, Wabash and Western Railway Company, situated in the States of Ohio and Indiana, being the property formerly owned by the said Toledo and Wabash Railway Company, excepting the four mortgages last above set forth, and at the time said last-mentioned property situated in the States of Ohio and Indiana came into the possession of the said de-
44 fendant The Wabash Railway Company there were no other mortgage liens thereon, excepting the said four mortgages last set forth and such other additional liens as may have been created and imposed thereupon by the execution and delivery of the aforesaid consolidated mortgage.

That on or about the 13th day of January, A. D. 1877, the said defendant The Wabash Railway Company executed and delivered to one George I. Seney, as trustee, a certain mortgage on its railroad and property to secure certain promissory notes payable at various times until January first, A. D. 1882, amounting in all to one million twenty-six thousand five hundred fifty-five and forty-two-one-hundredths dollars; that said defendant The Wabash Railway Company made its certain promissory notes amounting to said sum and delivered the same to certain persons, who now hold the same and of whose names this plaintiff is ignorant, and that said mortgage was duly recorded on or about the 29th day of January, A. D. 1877.

Plaintiff further says that it is unable to state how much there is now outstanding and due and unpaid on said last-mentioned mortgage, and plaintiff charges and alleges that the holders of said notes secured by the last-mentioned mortgage purchased and took such notes subject to the lien and equity of said bonds known as equipment bonds upon all of the property owned by said Toledo, Wabash and Western Railway Company and all of the property which said Toledo, Wabash and Western Railway Company took and derived at the time of its organization from the said Toledo and Wabash Railway Company, and that the *the* holders of said promissory notes and George I. Seney, as such trustee as aforesaid, were and are chargeable in equity with notice of such lien and equity of said equipment bonds.

That on or about the 17th day of May, A. D. 1879, the said defendant The Wabash Railway Company made and executed its certain mortgage or trust deed, covering its entire railroad property and

franchises, to the defendants John Humphreys and Daniel
45 A. Lindley, as trustees, to secure the payment of an issue of bonds bearing the same date made and executed by said company, amounting in the aggregate to the sum of two million- of dollars, with interest at the times and in the manner therein mentioned and set forth.

That said mortgage or trust deed is dated on the said 17th day of May, A. D. 1879, and was duly sealed with the corporate or common seal of said company, and subscribed by the proper officers of said company duly authorized thereto, and was duly acknowledged and delivered to said trustees.

That said mortgage was thereafter, to wit, on the 11th day of August, A. D. 1879, filed for record in the Recorder's Office of said Lucas County, and was thereafter duly recorded in the manner required by law in said Recorder's Office on the 13th day of August, A. D. 1879, in Volume 76 of Mortgages, at page 281, and also in the several offices in the counties of the States of Ohio, Indiana and Illinois, in which the property owned by the said Wabash Railway Company, and which is covered by said mortgage, was situated.

That bonds secured by said mortgage have been issued, and the amount thereof now outstanding is unknown to this plaintiff.

Plaintiff alleges that said last-mentioned mortgage is inferior and subject to the lien and equity of said bonds known as equipment bonds upon all the property which was owned by the Toledo, Wabash and Western Railway Company, and upon all of the property which said Toledo, Wabash and Western Railway Company took and derived at the time of its organization from the said Toledo and Wabash Railway Company, and that the holders of said bonds and the trustees named in said mortgage were and are chargeable in equity with notice of such lien and equity of said equipment bonds.

Plaintiff further states that in and by the terms of the said consolidated mortgage is was especially provided that, in case there was default in the payment of the interest due upon the said bonds secured thereby or in the payment of the installments payable
46 into the sinking fund therein provided, or of the principal of the said bonds, then and in that case the trustees therein named should, upon the written request of the holder or holders of the majority of the then outstanding bonds, cause the said mortgaged premises to be sold at public auction.

That the holders of the majority of the bonds secured under the said consolidated mortgage and outstanding have heretofore consented to a so-called funding scheme proposed and carried into effect by said defendant The Wabash Railway Company, by which, for certain considerations, they have accepted script for then overdue coupons or interest warrants, so that it is impracticable that the holders of a majority of such bonds should make any such request for the sale of said mortgaged premises.

That the said consolidated mortgage or trust deed provided that the property thereby conveyed should be subject to the possession,

control and management of said Toledo, Wabash and Western Railway Company, parties thereto of the first part, only so long as the said company should well and truly perform all and singular the stipulations of the said consolidated bonds, and of the covenants in the said consolidated mortgage or trust deed.

The said plaintiff further alleges and says that on or about the 14th day of August, A. D. 1879, by an agreement signed by its president and secretary duly authorized thereto, and sealed with its corporate seal, the said defendant The Wabash Railway Company agreed to consolidate its road, property, franchises and capital stock with the road, property, franchises and capital stock of the St. Louis, Kansas City and Northern Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri.

That in said agreement of consolidation it is, among other things, recited that the railway of the party of the first part, the said defendant The Wabash Railway Company extends from the City of Toledo, in the State of Ohio, through the State of Indiana, and
47 thence into the State of Illinois to Mendosia, in the last-named State, with various branch lines in said agreement specified; that the railway of the party of the second part, the said St. Louis, Kansas City and Northern Railway Company, extends from St. Louis, in the State of Missouri, in a northwesterly direction to Kansas City, in the said State, with certain extensions and branch lines in said agreement specially stated; that said lines of railway would, when united, form one continuous line of railway in the same general direction from the waters of Lake Erie at Toledo, Ohio, to the cities of Council Bluffs and Kansas City on the Missouri River, and that it is considered for the advantages of both of said companies that the lines of railway in said agreement described should be united and consolidated and be owned and worked in common.

That it was in and by such agreement provided and agreed that upon the ratification of said agreement by the shareholders of the corporations parties thereto, and the election of directors and other officers of the new corporation provided for in said agreement, all the property, rights and franchises of whatever name or nature belonging to the said defendant The Wabash Railway Company, and the said St. Louis, Kansas City and Northern Railway Company, or either of them, should pass to and be vested in the said new corporation, and the two first-named corporations should thereupon cease and determine;

That it is further provided in and by said agreement that the name of the said new corporation should be "The Wabash, St. Louis and Pacific Railway Company";

That on or about the said 14th of August, A. D. 1879, the said St. Louis, Kansas City and Northern Railway Company duly executed said agreement of consolidation on its part by its president and secretary duly authorized thereto, and sealed the same with its corporate seal;

That said agreement of consolidation, together with a supplemen-

tary agreement entered into between the same companies on
48 or about the 10th day of October, A. D. 1879, were on or about the 14th day of October, A. D. 1879, ratified in due form of law by the stockholders of the said defendant The Wabash Railway Company, and were ratified and confirmed by a vote of more than two-thirds of the whole number of the shares of the capital stock of the said defendant The Wabash Railway Company, and were on or about the 14th day of October, A. D. 1879, ratified and confirmed in due form of law by the stockholders of the said St. Louis, Kansas City and Northern Railway Company;

That the said articles of consolidation were duly filed in the office of the Secretary of State of the State of Ohio on the 25th day of October, A. D. 1879, and that the said corporation thereby formed, the defendant in this action, The Wabash, St. Louis and Pacific Railway Company, thereupon became a railroad corporation duly organized and existing under the laws of the various States of its creation, and all of the rights, franchises and property, real and personal, then owned and possessed by the said defendant The Wabash Railway Company, and the said St. Louis, Kansas City and Northern Railway Company, passed to and became vested in the said new consolidated company, the said Wabash, St. Louis and Pacific Railway Company, and that said last-named company now owns and is in possession of all of the said rights, franchises and property and owns and operates all the various lines of railway hereinbefore mentioned and set forth, including the property and railway originally owned by the Toledo and Wabash Railway Company, hereinbefore mentioned, situated in the States of Ohio and Indiana, and by the defendant in this action, the Toledo, Wabash and Western Railway Company;

That prior to said consolidation of the said defendant The Wabash Railway Company, and the said St. Louis, Kansas City and Northern Railway Company, the said companies, and the stockholders or shareholders of each of said companies, were duly notified of the claim, lien and equity of the equipment bonds heretofore mentioned and enumerated and owned by the plaintiff as aforesaid on
49 the property of the said Toledo and Wabash Railway Company and of the said Toledo, Wabash and Western Railway Company.

Plaintiff further says that the Toledo and Wabash Railway Company hereinbefore mentioned has not, since the year 1865, when it was merged in the said Toledo, Wabash and Western Railway Company, maintained or continued its corporate organization, and has not since that time exercised any of its corporate powers or franchises.

That said last-mentioned company, and said Toledo, Wabash and Western Railway Company, own no property or assets of any kind whatsoever, and that all of the property, assets and franchises which they did own and possess have passed to and become vested in the said defendant The Wabash, St. Louis and Pacific Railway Company, as hereinbefore set forth, which now owns and is in possession of the same, subject to the lien in equity of the holders of said equipment bonds on the property originally owned by said Toledo and

Wabash Railway Company, and upon the property of said Toledo, Wabash and Western Railway Company covered by said consolidated mortgage.

The plaintiff further says that the interest warrants or coupons annexed or attached to all of said bonds, known as equipment bonds, hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of May, 1875, have not nor has either of them been paid; that each of said coupons or interest warrants, due and payable as aforesaid on the first day of May, A. D. 1875, bears the number of the bond to which it is attached and also a separate coupon number, to wit, the number twenty-four.

That each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen and fifty one-hundredths dollars, and that of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on the first day of May, A. D. 1875, there were two of seventeen and fifty one-hundreths dollars each.

That the interest warrants or coupons annexed or attached to the aforesaid equipment bonds numbers five hundred and fifty-seven and five hundred and fifty-eight, hereinbefore mentioned, which by their terms were due and payable on the first day of November, A. D. 1875, have not nor has either of them been paid; that each of said last-mentioned coupons or interest warrants, due and payable as aforesaid on the first day of November, 1875, bears the number of the bond to which it is attached, and also a separate coupon number, to wit, the number twenty-five; that each of said last-mentioned coupons or interest warrants are attached to the said bonds of the denomination of five hundred dollars, and are for the sum of seventeen and fifty one-hundredth dollars, and that there were two of said coupons and interest warrants attached to the bond known as equipment bonds, hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of November, A. D. 1875, for the sum of seventeen and fifty one-hundredths dollars each.

That the interest warrants or coupons annexed or attached to the said bonds owned by plaintiff and known as equipment bonds, hereinbefore specifically mentioned and enumerated, which by their terms became due and payable on the first day of May, A. D. 1876, have not nor has either of them been paid.

That each of said interest warrants or coupons, due and payable as aforesaid on the first day of May, 1876, bears the number of the bond to which it is attached and has also a separate coupon number, to wit, the number twenty-six.

That each of said last-mentioned coupons or interest warrants are attached to bonds of the denomination of five hundred dollars, and are for the sum of seventeen and fifty one-hundredths dollars, and that there were two of said coupons or interest warrants attached to

the bonds hereinbefore specifically enumerated and men-
51 tioned, which became due and payable on said first day of May, A. D. 1876, for the sum of seventeen and fifty one-hundredths dollars each.

That the interest warrants or coupons annexed or attached to said bonds owned by plaintiff and known as equipment bonds, as hereinbefore specifically mentioned and enumerated, and which by their terms became due and payable on the first day of November, A. D. 1876, have not nor has either of them been paid.

That each of said last-mentioned interest warrants or coupons due and payable as aforesaid on the 1st day of November, A. D. 1876, bears the number of the bond to which it is attached and also a separate coupon number to wit, the number twenty-seven.

That each of said last-mentioned coupons or interest warrants are attached to bonds of the denomination of five hundred dollars, and are for seventeen and fifty one-hundredths dollars, and that there were two of said coupons or interest warrants attached to the said bonds hereinbefore specifically mentioned and enumerated, which became due and payable on the first day of November, 1876, and are for seventeen and fifty one-hundredths dollars each.

That the interest warrants or coupons annexed or attached to the said bonds owned by plaintiff and known as equipment bonds, as hereinbefore specifically mentioned and enumerated, and which by their terms became due and payable on the first day of May, 1877, have not nor has either of them been paid.

That each of said last-mentioned coupons or interest warrants due and payable as aforesaid on the first day of May, 1877, bears the number of the bond to which it is attached and also a separate coupon number, to wit, the number twenty-eight.

That each of said last-mentioned coupons or interest warrants are attached to bonds of the denomination of five hundred dollars and are for the sum of seventeen and fifty one-hundredths dollars each, and that of said coupons or interest warrants attached to the bonds hereinbefore specifically enumerated, which became due and
52 payable on said first day of May, 1877, there are two for the sum of seventeen and fifty one-hundredths dollars each.

That the interest warrants or coupons annexed or attached to the bonds owned by plaintiff and known as equipment bonds, as hereinbefore specifically mentioned and enumerated and which by their terms became due and payable on the first day of November, 1877, have not nor has either of them been paid.

That each of said last-mentioned coupons or interest warrants due and payable as aforesaid bears the number of the bond to which it is annexed or attached, and also a separate coupon number, to wit, number twenty-nine.

That each of said last aforesaid coupons or interest warrants are attached to bonds of the denomination of five hundred dollars and are for the sum of seventeen and fifty one hundredths dollars each, and that there are two coupons or interest warrants attached to said bonds hereinbefore specifically mentioned and enumerated for seven-

teen and fifty one-hundredths dollars each, which became due and payable on said first day of November, A. D. 1877.

That the interest warrants or coupons annexed or attached to the said bonds, owned by plaintiff and known as equipment bonds, as hereinbefore specifically mentioned and enumerated, which, by their terms, became due and payable May 1st, 1878, have not, nor has any of them, been paid.

That each of said last-mentioned coupons or interest warrants due as aforesaid bears the number of the bond to which it is attached and a separate coupon number, to wit, number thirty.

That each of the aforesaid coupons or interest warrants are attached to bonds of the denomination of five hundred dollars and are for seventeen and fifty one-hundredths dollars each; that there are two of the coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on the first day of May, A. D. 1878, and are for seventeen and fifty one-hundredths dollars each.

53 That the interest warrants or coupons annexed or attached to the said bonds, owned and held by plaintiff, and known as equipment bonds, as hereinbefore specifically mentioned and enumerated, and which, by their terms, became due and payable on the first day of November A. D. 1878, have not, nor has any of them, been paid.

That each of the last aforesaid coupons or interest warrants, due and payable as aforesaid, bears the number of the bond to which they are attached, and also a separate coupon number, to wit, number thirty-one.

That said last-mentioned coupons or interest warrants are attached to bonds of the denomination of five hundred dollars, and are for seventeen and fifty one-hundredths dollars each, and that, of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on the said first day of November, A. D. 1878, there are two for the sum of seventeen and fifty one-hundredths dollars each.

That the interest warrants or coupons annexed or attached to the bonds, owned and held by plaintiff, and known as equipment bonds, as hereinbefore specifically mentioned and enumerated, and which, by their terms, became due and payable on the first day of May, A. D. 1879, have not, nor has any of them, been paid.

That each of the last aforesaid coupons or interest warrants due and payable as aforesaid bears the number of the bond to which it is attached or annexed, also a separate coupon number, to wit, the number thirty-two.

That each of said last-mentioned coupons or interest warrants are attached to bonds of the denomination of five hundred dollars, and are for seventeen and fifty one-hundredths dollars each, and that there are two of said coupons or interest warrants for seventeen and fifty one-hundredths dollars each attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on the said first day of May, A. D. 1879.

54 That the interest warrants or coupons attached or annexed to the said bonds owned and held by plaintiff and known as equipment bonds, as hereinbefore specifically mentioned and enumerated, and which, by the terms thereof, became due and payable on the first day of November, A. D. 1879, have not nor has any of them been paid.

That each of the last aforesaid coupons or interest warrants due and payable as aforesaid bears the number of the bond to which it is annexed or attached, and also a separate coupon number, to wit, the number thirty-three.

That each of said last mentioned coupons or interest warrants are attached or annexed to bonds of the denomination of five hundred dollars, and are each for seventeen and fifty one-hundredths dollars, and that there are two of said coupons or interest warrants for seventeen and fifty one-hundredths dollars attached to the said bonds hereinbefore specifically mentioned and enumerated, which became due and payable on the said first day of November, 1879.

That the interest warrants or coupons annexed or attached to the bonds owned and held by plaintiff and known as equipment bonds as is hereinbefore specifically mentioned and enumerated, and which by their terms became due and payable on the first day of May, A. D. 1880, have not nor has either of them been paid.

That each of the last aforesaid coupons or interest warrants bears the number of the bond to which it is attached, and also a separate coupon number, to wit, the number thirty-four.

That each of said last-mentioned coupons or interest warrants is attached to bonds of the denomination of five hundred dollars, and is for the sum of seventeen and fifty one-hundredths dollars each and that there are two of said coupons or interest warrants for seventeen and fifty one-hundredths dollars each, attached to the said bonds hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of May, A. D. 1880.

55 That the interest warrants or coupons annexed or attached to the said bonds owned and held by plaintiff, and known as equipment bonds as is hereinbefore specifically mentioned and enumerated, and which by their terms became due and payable on the first day of November, A. D. 1880;

That each of the last aforesaid coupons and interest warrants due and payable as aforesaid bears the number of the bond to which it is annexed or attached and also a separate coupon number, to wit, the number thirty-five;

That each of said last-mentioned coupons or interest warrants is attached to bonds of the denomination of five hundred dollars, and is for the sum of seventeen and fifty one-hundredths dollars each, and that two of said coupon- or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, for seventeen and fifty one-hundredths dollars each became due and payable on the said first day of November, A. D. 1880;

That the interest warrants or coupon- annexed or attached to the said bonds, owned and held by plaintiff, and known as equipment bonds as hereinbefore specifically mentioned and enumerated, which

by their terms became due and payable on the first day of May, A. D. 1881, have not nor has either of them been paid;

That each of the last aforesaid coupons or interest warrants due and payable at the time aforesaid bears the number of the bond to which it is annexed or attached, and also a corporate coupon number, to wit, the number thirty-six;

That each of said last-mentioned coupons or interest warrants is attached to a bond of the denomination of five hundred dollars, and is for the sum of seventeen and fifty one-hundredths dollars, and two of said coupons or interest warrants attached to said bonds hereinbefore specifically mentioned and enumerated for seventeen and fifty one-hundredths dollars each became due and payable on said first day of May, A. D. 1881;

That the interest warrants or coupons annexed or attached
56 to the said bonds owned and held by said plaintiff and known as equipment bonds as hereinbefore specifically mentioned and enumerated, which by their terms became due and payable on the first day of November, A. D. 1881, have not nor has either of them been paid;

That each of the last aforesaid coupons or interest warrants due and payable as aforesaid, bears the number of the bond to which it is annexed or attached and also a separate coupon number, to wit, the number thirty-seven;

That each of said last-mentioned coupons or interest warrants is attached to a bond of the denomination of five hundred dollars, and is for seventeen and fifty one-hundredths dollars, and two of said coupons or interest warrants so attached to said bonds, as hereinbefore mentioned and enumerated, for seventeen and fifty one-hundredths dollars each became due and payable on said first day of November, A. D. 1881;

That the interest warrants or coupons annexed or attached to the said bonds owned and held by plaintiff, and known as equipment bonds, as hereinbefore specifically mentioned and enumerated, which by their terms became due and payable on the first day of May, A. D. 1882, have not nor has either of them been paid.

That each of the last aforesaid coupons or interest warrants due and payable at the time aforesaid, bears the number of the bond to which it is annexed or attached, and also a separate coupon number, to wit, the number thirty-eight.

That each of said last-mentioned coupons or interest warrants are attached to bonds of the denomination of five hundred dollars, and are for seventeen and fifty one-hundredths dollars, and two of said coupons or interest warrants, so attached to said bonds, as hereinbefore specifically mentioned and enumerated, for the sum of seventeen and fifty one-hundredths dollars each, became due and payable on said first day of May, 1882.

That the interest warrants or coupons annexed or attached
57 to the said bonds owned and held by the plaintiff, and known as equipment bonds, as hereinbefore specifically mentioned and enumerated,which by their terms became due and payable on

the first day of November, A. D. 1882, have not nor has either of them been paid.

That each of the last-aforesaid coupons or interest warrants, due and payable at the time aforesaid, bears the number of the bond to which it is annexed or attached, and also a separate coupon number, to wit, the number thirty-nine.

That each of the last-mentioned coupons or interest warrants are annexed or attached to bonds of the denomination of five hundred dollars, and are for the sum of seventeen and fifty one-hundredths dollars, and two of said coupons or interest warrants so attached to said bonds as hereinbefore specifically mentioned and enumerated for seventeen and fifty one-hundredths dollars each, became due and payable on the said first day of November, A. D. 1882.

That no part of the interest falling due on said bonds known as equipment bonds, hereinbefore particularly mentioned and enumerated, on and since the first day of May, 1875, according to the terms thereof, and of the said coupons or interest warrants thereto attached, has been paid, though payment thereof has been duly demanded, and that all of said defendants which were obliged to pay the same have wholly failed to pay said interest which has fallen due on said equipment bonds since the aforesaid date, and which fell due on that day, and have refused to pay the same.

That the aggregate amount due and payable for interest as aforesaid upon said bonds known as equipment bonds hereinbefore particularly mentioned and enumerated, pursuant to the coupons or interest warrants hereinbefore particularly mentioned, and now owned and held by plaintiff, was on the first day of May, 1875, thirty-five dollars, and was on the first day of November, 1875, thirty-five dollars, and was on the first day of May, 1876, thirty-five dollars, and on the first day of November, 1876, thirty-five dollars; and on the first day of May, 1877, thirty-five dollars;
58 and on the first day of November A. D. 1877, thirty-five dollars; and *and* on the first day of May, 1878, thirty-five dollars; and on the first day of November, 1878, thirty-five dollars, and on the first day of May, 1879, thirty-five dollars; and on the first day of November, 1879, thirty-five dollars; and on the first day of May, 1880, thirty-five dollars; and on the first day of November, A. D. 1880, thirty-five dollars; and on the first day of May, 1881, thirty-five dollars; and on the first day of November, 1881, thirty-five dollars; and on the first day of May, 1882, thirty-five dollars; and on the first day of November, A. D. 1882, thirty-five dollars, and there will become due as interest on the first day of May, A. D. 1883, the further sum of thirty-five dollars, and the principal of said bonds, to wit, one thousand dollars will be due and payable on said first day of May, A. D. 1883.

That said plaintiff further says, that upon the transfer of the property and franchises of the said Toledo and Wabash Railway Company to the said Toledo, Wabash and Western Railway Company, as hereinbefore set forth, part of the consideration for such transfer was the agreement on the part of the said Toledo, Wabash

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and Western Railway Company to pay the said bonds known as equipment bonds, and that such transfer and agreement constituted said bonds known as equipment bonds and all the moneys to become due thereon, a lien on the said property and franchises of said Toledo and Wabash Railway Company transferred by the last-named company to the said Toledo, Wabash and Western Railway Company in favor of the holders of such bonds.

That thereafter, and on the first day of February, A. D. 1867, said Toledo, Wabash and Western Railway Company, recognizing the lien of said bonds known as equipment bonds, executed as hereinbefore set forth, the consolidated mortgage for the purpose of consolidating said equipment bonds and the other bonds recited in said consolidated mortgage into one and the same mortgage debt, and thereby secured to the holders of said equipment bonds not
59 only a lien in equity on the road and property of said Toledo and Wabash Railway Company, so transferred to said consolidated company for such unpaid purchase price thereof, but also the right in equity to have said bonds further secured by said consolidated mortgage upon all the property and franchises of said consolidated company on an equality with all other bonds issued under said mortgage.

Whereupon plaintiff prays that this Court will ascertain and determine the amount due to the said bonds known as equipment bonds, and held and owned by the plaintiff herein; and will adjudge and determine the said bonds known as equipment bonds, and all the moneys due and to become due thereon to be a charge and lien upon all of the property of said defendant, The Wabash, St. Louis and Pacific Railway Company, that is situated in the States of Ohio and Indiana, so far as the same was owned by the Toledo and Wabash Railway Company at the time the property and franchises of the company last named were transferred to the Toledo, Wabash and Western Railway Company; and will further adjudge that the lien of said bonds on the property last mentioned has priority over all liens of all kinds now existing upon the same, excepting the said mortgage executed by the Toledo and Illinois Railroad Company for the sum of nine hundred thousand dollars, and the said mortgage executed by the Toledo and Wabash Railway Company for the sum of one million dollars, which two mortgages are liens on that part of the said property situated in the State of Ohio, and also excepting the mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company for the sum of twenty-five hundred thousand dollars, and the said mortgage executed by the Wabash and Western Railroad Company for the sum of fifteen hundred thousand dollars, which two last mortgages are liens on that part of said property situated in the State of Indiana.

Plaintiff further prays that the defendant, the Wabash, St. Louis and Pacific Railway Company, may be decreed to pay the
60 amount due to the plaintiff upon the said bonds herein known as equipment bonds, which it holds and owns by a short

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day to be named by this Court, together with all proper costs and expenses, and in default thereof that the railroad and all the property, and the appurtenances thereto originally owned by the Toledo and Wabash Railway Company situated in the States of Ohio and Indiana, and which is now in the possession of the said Wabash, St. Louis and Pacific Railway Company, may be ordered and decreed to be sold for the payment of said indebtedness to this plaintiff and the said bonds owned by it, subject, however, to the said mortgage liens thereupon which are prior to the liens of said plaintiffs as the owner of said bonds known as equipment bonds, and that the money realized from such sale, after deducting all just allowances for the disbursements and expenses of such sale, be distributed in accordance with the equities of the parties entitled thereto, and that the said defendants above named, or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said premises so decreed to be sold.

The said plaintiff further prays that this Court will order, adjudge and decree that the said bonds known as equipment bonds, held and owned by plaintiff, shall be considered secured by the said consolidated mortgage; that an *an* account be taken of all the debts secured by the said consolidated mortgage and the amounts thereof, and their relative priorities, and that the said Wabash, St. Louis and Pacific Railway Company may be decreed to pay to the plaintiff and others whose debts or bonds are secured by said consolidated mortgage all arrears of interest now due, or that may hereafter become due and payable, together with all costs and expenses in this behalf incurred, and in default thereof that all and singular the property covered by and described in said consolidated mortgage with the appurtenances, rights and franchises in the said consolidated mortgage mentioned and described may be sold under a decree of this Court, and that the proceeds thereof, after deducting
61 all the costs and expenses of such sale, may be applied and distributed in accordance with the equities of the parties entitled to the same, as ascertained by this Court; and that the said defendants above named and all persons claiming under them may be forever barred and foreclosed of any and from all equity of redemption, in and to the said mortgaged premises.

The plaintiff further prays that an injunction may be issued according to the form of the statute in such case made and provided directing, commanding and enjoining the said defendants and each of them from transferring, selling, incumbering or in any way disposing of any of the property or franchises situated in the States of Ohio and Indiana which was transferred by the said Toledo and Wabash Railway Company to the said Toledo, Wabash and Western Railway Company at the time of the consolidation of the former company in the year 1865, with the other railroad companies hereinbefore specified, or any of the property mentioned

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in and covered by said consolidated mortgage, and for other and proper relief.

LEE, BROWN & LEE,
Attorneys for Plaintiff.

STATE OF OHIO, *Lucas County, ss:*

Henry E. Lee, being first duly sworn according to law, says that he believes the facts contained in the foregoing petition are true, and that he makes this affidavit because he is one of the attorneys for plaintiff in this action, and all of plaintiff's officers are now absent from Lucas County, Ohio.

HENRY E. LEE.

Sworn to before me and subscribed in my presence this 26th day of April, 1883.

W. S. HARRIS,
[SEAL.] *Notary Public, Lucas County, Ohio.*

62 EXHIBIT A.

Resolved, That, for the purpose of providing further equipment and satisfying other requirements of the Company, the President be authorized and directed to have prepared bonds of this Company of denominations of one hundred, five hundred and one thousand dollars each, or of such other denominations as may be deemed advisable, to an amount not exceeding six hundred thousand dollars. Said bonds to bear date November 1st, 1862, and the principal made payable to a trustee or bearer in the city of New York on the first day of May, 1883, and bear interest at seven per cent. payable semi-annually at the same place, said interest to be represented by coupons; and the bonds so to be issued shall be executed in the usual manner and under the corporate seal; and they shall be convertible into the common stock of the Company at par at any time within five years from the date thereof, but shall not be entitled to a dividend for any time on which the holder thereof has received interest.

Resolved, That the Executive Committee be authorized to issue, sell and dispose of the said bonds in such manner and upon such terms as they may deem for the best interests of the Company.

EXHIBIT "B."

Consolidated Mortgage.

This Indenture, made the first day of February, in the year of our Lord one thousand — and sixty-seven, between the Toledo, Wabash and Western Railway Company, a corporation created and existing under the laws and consolidated statutes of the several States

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of Ohio, Indiana and Illinois, and having continuous lines
63 of railroad in said States, of the first part, and Isaac Knox and James R. Jessup, of the city, county and State of New York, of the second party.

Whereas the said Company has been duly formed under the laws and consolidation statutes of the said several States of Ohio, Indiana and Illinois by the consolidation of the stock, property, rights, franchises and interests of the several companies known as the Toledo, Wabash and Western Railway Company, the Great Western Railway Company of 1859, the Quincy and Toledo Railroad Company and the Illinois and Southern Iowa Railroad Company;

And whereas, at the time of such consolidation the property of said various Companies was subject to certain bonded debts and mortgages created by said several companies or by other railroad corporations, which, at the time of the creation of said debts and mortgages, were the then owners of the property so consolidated.

And whereas, all the funded debt of said company, parties of the first part, including that secured by said mortgages, as well as that not secured by any mortgage, now amounts in the aggregate to the sum of thirteen million three hundred thousand dollars, besides interest;

And whereas, said funded debt, as it now exists, is represented and made up as follows, to wit:

First mortgage bonds of the Toledo and Illinois Railroad Company, due as extended August 1st, 1890, for the sum of nine hundred thousand dollars, secured by a first mortgage on the part of the road of the parties of the first part, running from Toledo to the westerly boundary of the State of Ohio, about seventy-five miles.

Bonds of the Toledo and Wabash Railway Company, due November 1", 1878, for one million of dollars, secured by a second mortgage on that portion of the road of the parties of the first part last above named.

First mortgage bonds of the Lake Erie, Wabash and St. Louis Railroad Company, due as extended August 1st, 1890, for the sum of two million five hundred thousand dollars, secured by a first
64 mortgage on the part of the road of the parties of the first part, running entirely through the State of Indiana, about one hundred and sixty-eight miles.

Bonds of the Wabash and Western Railway Company, due November 1st, 1878, for one million five hundred thousand dollars, secured by a second mortgage on that portion of the road of the parties of the first part last named.

First mortgage bonds of the Great Western Railroad Company, due April 1st, 1868, for the sum of one million dollars, secured by a first mortgage on the part of the said road of the parties of the first part, running in the State of Illinois, from Decatur to the Illinois River at Naples, about one hundred miles.

Also bonds of the last-named company, due August 1st, 1865, for the sum of one million three hundred and fifty thousand dollars, secured by a mortgage on the part of said road of the parties of the first part, running in the State of Illinois, from the State line of

Indiana on the west to the Illinois River, about one hundred and seventy-nine miles; there being at present outstanding of said bonds the sum of about twenty thousand dollars, the rest having been retired by a portion of the bonds next described.

First mortgage bonds of the Great Western Railroad Company of 1859, due August 1st, 1888, for the sum of two million five hundred thousand dollars, secured by a mortgage on that part of the road of the parties of the first part, extending in the State of Illinois from Naples and Mendosia, as its western termini, to the boundary line between the States of Illinois and Indiana, about one hundred and seventy-nine miles; the last-named bonds having been created to retire the aforesaid $1,000,000 and $1,350,000 of Great Western Railroad Company bonds.

Bonds of the Great Western Railroad Company of 1859, due May 1", 1893, for two million five hundred thousand dollars, secured by mortgage on that part of the road of the parties of the first part last named, about one hundred and seventy-nine.

65 Bonds of the Illinois and Southern Iowa Railroad Company, due August 1st, 1882, for three hundred thousand dollars, secured by a first mortgage on that part of the road of the parties of the first part, extending from Clayton to Carthage in said State of Illinois, about thirty miles.

Bonds of the Toledo and Wabash Railway Company, due May 1st 1883, for the sum of six hundred thousand dollars, and known as "Equipment Bonds."

Bonds of the Toledo, Wabash and Western Railway Company, due April 1st, 1871, for the sum of one million of dollars, and known as "Sinking Fund Bonds." The last two classes of bonds not being secured by any mortgage on any of the property of the parties of the first part.

And whereas, it has been deemed for the interest of the said parties of the first part, as well as for the benefit of the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt, upon equitable principles.

And whereas, the increasing freight business of the road of the parties of the first part requires additional equipment to do the same.

And whereas, it has been deemed expedient for the preservation of the bridges on the line of said road, that the same should be covered and that additional depot accommodations should be obtained, and that the road through its entire length should be fenced.

And whereas, the expenses to be incurred for the above should be provided for by the creation of new capital.

And whereas, for the purposes aforesaid, and for the objects herein stated, the said Company, Parties of the first part, has resolved to make and issue its bonds to the extent of fifteen million of dollars, and to secure the payment of the same by a mortgage upon its entire property; and that of the amount of said bonds so to be made and issued, there should be retained thirteen million three hundred thousand dollars to retire, in such manner and

66 upon such terms as the Directors of said Company may from time to time prescribe, a like amount of the bonds of the

various companies hereinbefore enumerated and described and representing the aforesaid funded debt; and that the balance of said bonds, to wit, one million seven hundred thousand dollars thereof, should be used to provide the said additional equipment and other improvements hereinbefore mentioned, and for such additional purposes as the said Directors may deem advisable; and that all of said bonds should be for the sum of one thousand dollars each, except two hundred, which should be for the sum of five thousand dollars each, and that all should bear date on the first day of February, A. D. 1867, and become due and payable in forty years from their date, with interest at the rate of seven per cent. per annum, payable quarterly on the first day of May, August, November and February, in each year, in the city of New York, and to be all convertible into the common stock of said Company at par, at the option of the holder, at any time within ten years from their date.

And whereas, the said Company has further resolved that a sinking fund of fifty thousand dollars per annum should be created payable to commissioners at the times and in the manner hereinafter stated and agreed, and to be used by said commissioners for the purposes and in the manner as hereinafter directed by these presents.

And whereas, it is the intention of these presents, and it is hereby so declared, that all of the said bonds to be issued shall stand equally secured by these presents, without reference to the times of the actual issue of said bonds and that said bonds shall be substantially in the form following, viz.:

67 UNITED STATES OF AMERICA,
States of Ohio, Indiana and Illinois:

Toledo, Wabash and Western Railway Company.

Consolidated Mortgage.

Sinking Fund. Convertible Bond.

Know all men by these presents: that the Toledo, Wabash and Western Railway Company, a corporation created and existing under the laws and consolidated statutes of the several States of Ohio, Indiana and Illinois, acknowledge themselves indebted to Isaac H. Knox and James R. Jessup, of the city of New York, or bearer, in the sum of — Dollars, lawful money of the United States of America, which sum the said Company promises to pay to the said Isaac H. Knox and James R. Jessup, or the bearer hereof, on the first day of February, which will be in the year — thousand nine hundred and seven, at their office or agency in the city of New York, with interest thereon at the rate of seven per centum per annum, payable quarter yearly at their said office or agency in the city of New York on the first days of May, August, November and February in each year on the presentation and surrender of the coupon or interest warrants hereto annexed as the- severally become due; and in case of the non-payment of any quarter-yearly installment of interest which

shall have become payable and shall have been demanded, if such default shall continue for the space of six months after the maturity and demand of the said installment, the principal of this bond shall become due in the manner and with the effect as provided in the deed of trust hereinafter mentioned, it is agreed between the said Company and the holder of this bond, that in case of any default in the payment thereof, the said company hereby waives the
68 benefit of any extension, stay, or appraisement laws now existing, or that may hereafter exist.

And the said company further agree, that on the surrender of this bond, together with all outstanding coupons for interest thereon, and at any time within ten years from the date hereof the proprietor of this bond shall be entitled to the common stock of this Company at par, for the face of this bond, in satisfaction thereof and to a certificate of such stock entitled to draw *pro rata* dividends from the maturity of the last interest due on said bonds, at or immediately prior to the time of such conversion.

And the said Company further agree that they will pay the Commissoners named in the deed of trust, at the time and in the manner herein stated, the sum of fifty thousand dollars per year, for the purpose of being applied and used by such commissioners as a sinking fund for the payment and extinguishment of the principal of all the bonds issued under and secured by said deed of trust; and that this bond shall be entitled to all the benefits of said sinking fund as therein provided. This bond shall pass by delivery or by transfer on the books of the Company in the City of New York after a registration of ownership certified thereon by the Transfer Agent of the Company. No transfer, except on the Books of the Company, shall be valid unless the transfer be to bearer, which shall restore transferability by delivery; but this bond shall continue subject to the successive registrations and transfers to bearer as aforesaid at the option of each holder.

This bond is one of a series of fourteen thousand two hundred bonds, 14,000 of which number consecutively from one to fourteen thousand inclusive, are each for the sum of one thousand dollars; two hundred of which number consecutively from fourteen thousand and one to fourteen thousand two hundred, inclusive, are each for the sum of five thousand dollars; and the whole series, amounting in the aggregate to fifteen millions of dollars and no more are all of like tenor, and all dated February 1st, 1867, and are made
69 and issued to retire all the various classes of bonds and securities now composing the funded debt of said Company, and to provide means of additional equipment, and for the special improvement of the property of said Company, and the payment of all said bonds is secured by an indenture of mortgage or deed of trust dated February 1st, 1867, made by said Company to Isaac H. Knox and James R. Jessup, of the City, County and State of New York, Trustees, conveying the Railroad, Equipment, franchises and property of said Company, as therein described and stated, and subject only to such prior liens on any part of said property as therein stated.

This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed thereon and duly signed by said Trustees.

In witness whereof, the said Company have caused their corporate seal to be affixed hereto, and the same to be attested by the signatures of their President and Secretary, this first day of February, one thousand eight hundred and sixty-seven.

—— ——, *President.*

[SEAL.] —— ——, *Secretary.*

[Indorsement on Bond.]

Payment on this bond, being one of a series of $15,000,000, is secured by a mortgage deed of trust dated February 1st, 1867. Made by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup, Trustees, which is recorded in the States of Ohio, Indiana and Illinois.

—— ——, *Trustees.*

Now, therefore, this Indenture witnesseth, that the said parties of the first part the better to secure the payment of the said bonds, amounting in the aggregate to the sum of $15,000,000 and no more, with interest at the times and in the manner therein mentioned and set forth, as well as to secure the payment of the sinking fund as therein agreed; and for and in the consideration of the sum of one dollar by the parties of the second part in hand paid, the receipt whereof is hereby acknowledged, granted, bargained, sold, transferred and set over, and by these presents do grant, bargain, sell and set over, unto the said parties of the second part, their successors in the trust and assigns forever, all the right of way and railroad of the said parties of the first part extending from Toledo, in the State of Ohio, to and through the State of Indiana; and thence, in the State of Illinois, Mendosia with branch of said road to Naples, and from said Mendosia to Camp Point, in said State of Illinois; and also with branch of said road from Clayton, in said State, to the East bank of the Mississippi River at Hamilton, in said State, as now made, or as hereinafter may be made, and as now used or as hereinafter may be used, together with all embankments, bridges, turnouts, side-tracks, structures water tanks and fixtures, shops, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all other things, real and personal, now owned or used, or that hereafter may be owned or used, by the parties of the first part in connection with the said road, and everything appertaining and appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said Toledo, Wabash and Western Railway Company, together with all the property, real and personal, of said parties of the first part now acquired or to be hereafter acquired at Quincy, in said State of Illinois, as also a certain contract made betwen the said Company and the Chicago, Burlington and

Quincy Railroad Company, dated October 26th, 1866, with all the rights and privileges secured by said contracts to said parties of the first part, and all other contracts. To have and to hold all and singular the above-granted and described premises, with the appurtenances thereto, belonging unto the said parties of the second part, the successors in the trust and assigns forever, in trust, nevertheless, for the person or persons and bodies politic or corporate who now or shall become holders of the said bonds or any of
71 them, subject to the terms and stipulations of said bonds and the laws of the said several States of Ohio, Indiana and Illinois, and also subject to the possession, control and management of the said company, parties of the first part, so long as the said Company shall well and truly perform all and singular the stipulations of the bonds aforesaid and the covenants contained in this Indenture.

And the said parties of the first part hereby covenant with the said parties of the second part, and for the benefit of all those persons who shall become holders of said bonds or any of them, and their assigns, that the said parties of the first part will pay all of said bonds, principal and interest in the manner as stated in said bonds, and that they will also pay to the persons herein appointed as Commissioners the sum of fifty thousand dollars per year for the purpose of being used and applied by said Commissioners as a sinking fund for the payment and extinguishment of the principal of all of said bonds so to be issued and secured by this mortgage or deed of trust, and that said sum shall be paid to said Commissioners in installments of twenty-five thousand dollars every six months on the first days of February and August in every year until and including the maturity of said bonds, and that the first payment of said installment shall be made on the first day of February, A. D. 1868.

It being hereby understood and agreed that the said Commissioners having the custody of said sinking fund shall be the President of said Company, Parties of the first part, and two members of the Board of Directors, one of which two members shall be changed every year.

And it is hereby understood and declared that it shall be the duty of the said Commissioners above named and their successors in the trust, in respect to all the monies that shall be paid them on account of said sinking fund as herein above provided, as well as to all the accumulations thereof, to invest the same by purchasing the bonds secured by these presents on the best terms the same can be bought, but not at a rate exceeding the par value of said
72 bonds and five per cent. additional, and that the bonds so purchased shall be held by said commissioners or deposited by them with some trust company or other safe depository, and be immediately registered, stamped or endorsed as belonging to the said sinking fund, but shall remain in force and the interest thereon shall continue to be paid by the said parties of the first part, and the amount of such interest shall be added and applied

as a part of the capital of the sinking fund hereby established, and be used in the same manner as the semi-annual payments of twenty-five thousand dollars herein provided for; and that preparatory to such purchase of bonds said Commissioners shall give twenty days' notice thereof in one or more daily papers published in the city of New York, and shall make the purchase at the lowest price or prices at which the bonds may be offered pursuant to such notice, or at such lower price or prices as they may be able to obtain the same, but not exceeding the par value of said bonds and five per cent. additional, and in case the bonds cannot be purchased at the above limit within one month after said advertisement, then the said Commissioners shall invest the said money in any of the bonds in the various corporations creating the funded debt of this company hereinbefore described, said last-named bonds to be purchased at the lowest market price not exceeding the par — of said bonds; and in case of inability to purchase said bonds at that limit the said Commissioners shall invest said moneys in the bonds of the United States. The said Commissioners, through the agency of the Company, and such other assistants as they may find it necessary to employ, shall have regular books of account and registers kept of all their proceedings, which, with all the papers and documents held by them shall at all times be open to the inspection of the Directors of the Company.

The receipt of said money by said Commissioners shall impose upon them the same duty to perform this trust as if they had formerly signed an agreement to execute the same in accordance with the above directions.

73 And the said Company, parties of the first part, for themselves, their successors and assigns, do hereby further covenant and agree to and with the said Trustees, their successors and assigns, that in case default shall be made in any of the quarter-yearly installments of interest on any of the aforesaid bonds, at the times and in the manner in the coupons or interest warrants therewith provided and shall have been demanded, and such default shall continue for the period of six months after the maturity and demand for payment of the said installments, or in any case default shall be made in the payment to the Commissioners of the whole or any part of any semi-annual installment of the sinking fund as herein provided, and such default shall continue for the period of six months, then, and in either of such cases, the principal of all the bonds secured by these presents shall become immediately due at the option of the holder or holders of a majority in interest of said bonds then outstanding, to be expressed by them in writing to said Trustees, and in either of such cases of default in the non-payment of interest or non-payment of the sinking fund, as well as in the case of non-payment of the principal of said bonds when due, and such default in either of the three cases shall continue for said period of six months, upon the request of the holder or holders of a majority in interest of said bonds outstanding, said Trustees shall take actual possession of all and singular the prop-

erty and effects mortgaged, and the agent or agents of said Railway Company actually in possession thereof are hereby ordered to give such possession to said trustees, Parties of the second part; and the said Trustees shall cause the said mortgaged premises, or so much thereof as shall be necessary to pay and discharge the entire principal and interest of all of said bonds as may be then outstanding and unpaid, together with all the expenses of sale, to be sold at public auction in the city of New York or in the city of Toledo, in the State of Ohio, or in the city of La Fayette, in the State of
74 Indiana, or in the city of Springfield, in the State of Illinois; as they may be directed by the holder or holders of a majority in interest of said bonds, giving at least sixty days' notice of the time, place and terms of sale, and of the specific property to be sold, by publishing the same in at least three newspapers of good circulation in said city of New York, and in one newspaper published in said cities of Toledo, Ohio; La Fayette, Indiana, and Springfield, Illinois, or adjourn the said sale from time to time in the discretion of the Trustees; and, if so adjourned, to make the sale without further notice at the time and place to which the same may be adjourned, and to execute to the purchaser or purchasers thereof on such sale a good and sufficient deed or deeds of conveyance in fee simple for the same, which shall be a bar against the parties of the first and second parts, their and each of their successors and assigns, and all persons claiming under them or either of them, of all right, title, interest, claim or demand in and to the said mortgaged premises or any part thereof, and out of the proceeds of such sale and the income next mentioned, after deducting just allowances and expenses, to pay, first, the interest in arrear on the said bonds secured by these presents and then outstanding, and then to pay the principal in full or ratably, so far as such proceeds and income shall suffice; and on and after such request to take possession, and until such sale, said Trustees and their successors in the trust shall operate said road by such agents, receivers and superintendents as they may appoint; and said trustees shall receive and collect all the incomes, revenues and profits of the said railroad and mortgaged premises; and, after defraying the necessary expenses of operating the same, and all needed repairs thereto, and the necessary taxes imposed thereon, shall apply the net income so received to the payment of the interest and principal of said bonds in the order above expressed; and for the charges and expenses of so conducting the road and its needful repairs and taxes, and the management of said business, the said Trustees shall
75 be indemnified out of the proceeds of the sale of said road, if needful, as well as out of its receipts and income; and in case any surplus shall remain in the hands of the said Trustees, or their successors, the same shall be paid to the said parties of the first —, their successors or assigns. It being hereby expressly understood and agreed that in no case shall any claim or advantage be taken by the parties hereto of the first part, of any valuation, appraisement, stay or extension laws now existing, or that may here-

after exist, nor any injunction or stay of proceedings, or any process to be applied for or obtained or used by or for them to prevent such entry or sale as aforesaid.

It is understood and further agreed that at any sale of the aforesaid property or any part thereof, whether made by the power therein granted or by judicial authority, the Trustees, at the request of the holder or holders of a majority in interest of the bonds then outstanding secured by this instrument, shall be bid for and purchased, or cause to bid for and purchase, the property so sold or any part thereof, on behalf of all the owners of the bonds secured by this instrument and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of such property be sold, or if all of it be sold at a price not exceeding the whole amount of such bonds then outstanding with the interest thereon, and necessary expenses of such sale. And it is understood and hereby declared that this mortgage is intended and shall be a first lien on the portions of railroad and property of the parties of the first part, extending in the State of Illinois from Clayton to Camp Point the distance of about six miles, more or less, and from Carthage to the east bank of the Mississippi River at Hamilton, as now built and as thereafter may be built, but is subject as to the rest of said Railroad and property to prior liens thereon by mortgage, amounting in the aggregate to the principal sum of three million seven hundred thousand dollars, the same being security for that amount of the funded debt of said Company, as aforesaid described, and
76 which is intended to be retired by the issue of a part of the bonds secured by these presents, and when all of said eleven million seven hundred thousand dollars of bonds shall have been retired, these presents are intended to be and become a first lien on all the railroad and property of the parties of the first part.

It is further understood and agreed by and between the parties hereto, that in case of the death or resignation of either of the Trustees, or in the event of the incapacity of either of s[illegible] Trustees to act in the matter of the Trust, the parties of the first part by their Board of Directors and the surviving or remaining Trustee, as the case may be, shall elect a new trustee to supply the vacancy thereby created, who shall by such election have all the powers of the Trustee whose place he may take; and in the case of the death, resignation or incapacity to act of both of said trustees or their successors, the holder or the holders of a majority in interest of the then outstanding bonds secured by these presents, shall with the said Company elect or appoint new Trustees, who on such election or appointment shall be invested with all the powers herein granted to the parties of the second part, and upon the death, resignation or removal of the Trustees herein appointed or of either of them, or their or either of their successors, all the estate, right, title and interest in any Trustee so dying, resigning or being removed, shall wholly cease and determine, and the Trustee so resigning or being removed shall, upon the written request of the New Trustee so appointed, execute and deliver a deed or deeds of conveyance, to vest in such New Trustee, upon the trusts herein expressed, all the property, right and

franchises which may be at the time held upon the said trusts. And the parties of the first part do hereby covenant and agree with the said parties of the second part, their successors and assigns, for the benefit of those to whom said bonds shall be delivered and their assigns, to make, execute and deliver to the said parties of the second part, their successors and assigns, and on their reasonable re-
77 quest, all such further assurances, conveyances and instruments in the law as counsel may reasonably devise and advise, the more effectually to vest in the said parties of the second part, their successors and assigns, all and singular the premises hereby conveyed or intended to be, for the purposes hereinbefore, for that purpose mentioned or intended, and that the said Trustees shall be liable, responsible and accountable only for the exercise of reasonable diligence in the management of the trust, and not one for the acts or negligence of the other, and not for the acts of the agent or agents by them at any time appointed under these presents.

This conveyance is upon the express condition and limitation that, upon the payment and satisfaction of the principal and interest of each and every of said bonds, and of the expenses and reasonable charges attending the execution of this trust, the Estate hereby granted shall immediately be revested in law, and, in fact, in said company, Parties of the first part hereto, its successors and assigns, without any entry or other act.

In Witness whereof, the said The Toledo, Wabash and Western Railway Company, the Parties hereto of the first part, the day and year first above written, caused their corporate seal to be hereto affixed, and the same to be attested by their Secretary, and the name of their President to be signed to these presents, the Parties of the second part hereto have also respectively signed and sealed the same day and year first above written.

[SEAL.] A. BOODY, *President.*

Sealed and delivered in the presence of
CHARLES NETTLETON.
C. H. PIERCE.

Attest: I. N. DRUMMOND, *Secretary.*

ISAAC H. KNOX. [SEAL.]
JAMES R. JESSUP. [SEAL.]

78 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this twenty-third day of March, A. D. one thousand eight hundred and sixty-seven, before me, Charles Nettleton, a Notary Public of the State of New York, duly commissioned and sworn, and dwelling in said city and county of New York, personally appeared A. Boody, the President of the Toledo, Wabash and Western Railway Company, to me known to be the real person as such President, who, being by me duly sworn, did depose

and say that he resided in the city, county and State of New York; that he was the President of the said Toledo, Wabash and Western Railroad Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing indenture or instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed his name thereto by the like order, as President of said Company, and the said A. Boody acknowledged to me that he had executed the said indeature or instrument and signed, seated and delivered the same as the free and voluntary act and deed of the said Toledo, Wabash and Western Railway Company for the uses and purposes therein expressed, and on this same day before me also personally appeared Isaac H. Knox and James R. Jessup, who are personally known to me to be the real persons whose names are subscribed to the foregoing indenture or instrument as trustees therein named and severally acknowledged the signing and sealing of the foregoing inndenture or instrument to be their voluntary act and deed, for the uses and purposes therein expressed.

In Witness whereof, I have hereunto set my hand and affixed my notarial seal the 23rd day of March, A. D. 1867.

[SEAL.] CHARLES NETTLETON,
Notary Public in and for the City of New York.

79 EXHIBIT "C."

This indenture, made the 1st day of April in the year one thousand eight hundred and seventy-three, between the Toledo, Wabash and Western Railway Company, a corporation created and existing under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, of the first part, and Isaac H. Knox and James R. Jessup, of the city, county and State of New York, of the second part.

Whereas, a certain indenture of a mortgage bearing date the 1st day of February in the year one thousand eight hundred and sixty-seven, and made by and between the parties hereto, the said Party of the first part did mortgage all of its railroad extending from Toledo, in the State of Ohio, through the State of Indiana to Mendosia, in the State of Illinois, together with other premises in said mortgage described, to the parties hereto of the second part, as Trustees, in order to secure the payment of certain consolidated mortgage sinking fund convertible bonds of the said party of the first part, to the amount altogether, of fifteen millions of dollars, as by reference to the said Indenture of Mortgage will more fully and at large appear.

And whereas, of the said bonds to be made and issued under and secured by the said Indenture of Mortgage, thirteen million three hundred thousand dollars in amount were reserved for the purpose of being used to retire a like amount of certain other bonds enumerated and described in the said Indenture of mortgage, which were

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outstanding at the time said mortgage was given, and then constituted the funded debt of the said party of the first part.

And whereas, of the said funded debt one million dollars in amount, has since matured and been retired, and for that purpose an equal amount of the said reserved bonds have been used, leaving now unused and reserved for the purpose of being used to retire the remainder of the said funded debt, the amount of twelve
80 million three hundred thousand of the said fifteen million dollars of bonds originally secured by the said Indenture of Mortgage.

And whereas, it is the desire of the parties hereto, by more express and specific stipulations than are contained in the said Indenture of Mortgage, to give assurance to all persons whom it may in any wise concern, that the said reserve bonds shall not, nor shall any or either of them be used for any other purpose than the retiring of the said *funded debt*, or some part thereof:

Now, therefore, this indenture witnesseth, that the party of the first part for and in consideration of the premises, and of the sum of one dollar, lawful money of the United States, to it duly paid at or before the ensealing and delivery of these presents by the parties of the second part, and for divers other good causes and considerations hath covenanted and agreed, and by these presents doth covenant and agree with the parties of the second —, and with all persons whom it may in any wise concern, that the said party of the first part will not make or issue, or attempt to make or issue any of the remaining twelve million three hundred thousand dollars of reserved bonds secured by the said Indenture of mortgage, except for the purpose of and subsequent to, or simultaneously with the retiring of an equal amount of the balance remaining of the said funded debt, so that, when all the said reserved bonds shall have been issued, the whole of the balance of the said funded debt will have been also extinguished and discharged, and whenever the said party of the first part shall call upon or request the said parties of the second part, or their successors, to sign the Trustees' certificate endorsed upon any of the said reserved bonds, the said party of the first — shall produce and exhibit to them at the same time, cancelled or for cancellation, an equal amount at least of the bonds constituting the balance of said funded debt, and that without such production of the said last-mentioned bonds and the cancellation of the same, the parties of the second part shall not, nor shall either of them,
81 or the successor of either of them, sign the Trustees' certificate upon either of said reserved bonds.

And the said parties of the second part do hereby, each for himself, covenant and agree that they will not sign the Trustees' certificate upon either of the said reserved bonds, except as hereinbefore provided.

And the party of the first part doth further covenant and agree with the parties of the second part, and their successors, and with all persons whom it may in any wise concern, that the covenants herein contained shall be supplementary to and constitute a part of the said

Indenture of Mortgage, and be of the same effect to all intents and purposes as if they were inserted therein.

In witness, the said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be signed by its President and Secretary; and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

TOLEDO, WABASH AND WESTERN RAILWAY COMPANY,
[SEAL.] By A. BOODY, *President.*
JAMES R. JESSUP.
ISAAC H. KNOX.

Attest: WM. B. CORNEAU, *Secretary.*

Sealed and delivered in the presence of
ALEX. M. WHITE,
As to the signature of A Boody, President;
CHARLES NETTLETON,
Of James R. Jessup and Isaac H. Knox.

82 Lucas Common Pleas Court.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY
against
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, JAMES R. JESSUP, ISAAC H. KNOX, GEORGE I. SENEY, JOHN HUMPHREYS, and DANIEL A. LINDLEY, Trustees.

Clerk will issue summons for defendants to the Sheriff of Lucas County, Ohio, returnable according to law. Action for injunction and relief.

LEE, BROWN & LEE,
Attorneys for Plaintiff.

STATE OF OHIO, *Lucas County, ss:*

I, John P. Bronson, Clerk of the Court of Common Pleas of Lucas County, Ohio, do hereby certify that the foregoing is a true copy of the original petition filed herein on the 28th day of April, A. D. 1883.

Witness my hand and seal of said Court of Common Pleas hereto attached this 22d day of January, A. D. 1889.

J. P. BRONSON,
[SEAL.] *Clerk of Common Pleas Court of Lucas County.*

83 DISTRICT OF COLUMBIA, *Washington City, ss:*

I, Joseph L. Atkins, being duly sworn, do depose and say that on the 28th day of January, A. D. 1889, I delivered, personally, to

James Compton, of Washington City, D. C., a true and full copy of the foregoing petition, and further say not.

JOSEPH L. ATKINS.

Sworn to before me and subscribed in my presence this 29th day of January, A. D. 1889.

Witness my hand and official seal the day and year aforesaid.

THOS. S. HOPKINS,
[SEAL.] *Notary Public, Dist. Col.*

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Cl'k.

84 Lucas County Court of Common Pleas.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY, Plaintiff,

against

THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, SAINT LOUIS AND PACIFIC RAILWAY COMPANY, JAMES R. JESSUP and ISAAC K. KNOX as Trustees, and SOLON H. HUMPHREYS and DAVID A. LINDLEY as Trustees, Defendants.

Answer of the Wabash, Saint Louis and Pacific Railway Company.

This defendant, for answer, says:

First. That it has no knowledge other than from the averments contained in the petition that the plaintiff is the owner and holder of the bonds or coupons described in the petition, or either of them, and therefore denies the averments of the petition in that behalf.

Second. For a second answer this defendant says that it is not true, and it, therefore, denies, that the Wabash Railway Company held its property or any portion of it subject to the pretended liens which the plaintiff claims to hold thereon in behalf of or on account of the bonds, coupons, or any of them, which are described in the petition; and it denies that the Wabash, Saint Louis and Pacific Railway Company holds its property, or any part of it, subject to any such pretended lien.

Third. For a third answer this defendant says that it is not true, and it, therefore, denies, that the Toledo, Wabash and Western Railway Company agreed to pay the equipment bonds of the
85 Toledo and Wabash Railway Company as a part of the consideration for the purchase of the property of that company. It avers, on the contrary, that the Toledo and Wabash Railway Company did not, in fact, sell its property to the Toledo, Wabash and Western Railway Company; but by reason of certain proceedings in consolidation it became merged into that company, and, as a separate corporation, became thereby extinct, and the unsecured debts thereof became the unsecured debts of the Toledo, Wabash and Western Railway Company, and received no additional guaranty and underwent no change by reason of said merger.

Fourth. This defendant, for further answer, says that it is not true, as alleged in the petition, that the directors of the Toledo, Wabash and Western Railway Company never prescribed any terms of exchange of said bonds, and never issued any of the consolidated bonds in exchange for the equipment bonds. But this defendant denies that the said directors ever neglected or refused to prescribe any terms of exchange, or that said directors refused or neglected to do any other matter or thing which they were bound to do under said consolidated mortgage. On the contrary, this defendant avers that the said directors were never required or solicited by the holder or holders of said bonds to make an exchange for consolidated bonds, nor were they ever requested by any such holder or holders to prescribe any terms for an exchange of said bonds, nor were they ever notified by any holder of equipment bonds that any exchange would be made upon any terms whatever. And this defendant denies all of the averments of the petition that the holders of said equipment bonds stood ready and were willing to exchange the same for said consolidated bonds.

Fifth. The Wabash, Saint Louis and Pacific Railway Company, further answering, denies that the Wabash Railway Company is identical with the Toledo, Wabash and Western Railway
86 Company. On the contrary, it was a new, distinct and separate organization, and that it was organized by virtue of the laws of Ohio, Indiana and Illinois for the purpose of operating a railway in said several States, and became the owner of a roadway, rolling stock and property of the Toledo, Wabash and Western Railway Company by purchase at a judicial sale and by means of the conveyance recited in the petition, and it avers that the property so conveyed to it is subject to the liens and encumbrances which are described in said conveyances and no others, and it avers and charges that the pretended lien set up in plaintiff's petition is not one of said enumerated liens, and neither the Wabash Railway Company nor this defendant had any notice thereof, nor was there any such lien upon such property, nor is there any such lien now upon the same or any parts or portions thereof.

Sixth. This answering defendant further answers and says that it is not true, and it therefore denies that the Toledo, Wabash and Western Railroad Company, by virtue of the execution of the consolidated mortgage, gave any lien or right of equity of any kind upon its property, or that it acknowledged such lien, or secured to holders of equipment bonds any equitable right of payment, either as an unpaid portion of purchase money or for any other reason or consideration whatever.

Seventh. This defendant further says, upon information and belief, that before the time when plaintiffs so obtained possession and acquired title to said bonds in its petition named, if it ever really did acquire said title, the said bonds were owned by other persons not parties to this cause. That from the time of the execution of the said consolidated mortgage by the said Toledo, Wabash and Western Railway Company up to the time when the decree of foreclosure was rendered upon which said property was sold, as mentioned in

plaintiff's petition, the several persons holding and owning
87 said two bonds described in plaintiff's petition, did not set up or assert or claim to be entitled to any lien upon any of the property of the Toledo, Wabash and Western Railway Company by reason of the ownership of said bonds, but, on the contrary, said persons, up to July, 1874, continued to hold said bonds as subsisting obligations, and wholly neglected and failed to set up any right or lien whatever by virtue of the same. That during the said period the Toledo, Wabash and Western Railway Company executed the mortgage which was foreclosed by said decree, and sold large amounts of bonds secured thereby, and that neither before nor at the time of the execution and recording of said mortgage, nor from thence until the foreclosure of the same, did any person or persons holding any of said equipment bonds set up or claim any lien upon the property of the said last-mentioned railway company because of said ownership. And this defendant further avers that from the time of the rendering of the decree of foreclosure aforesaid up to the time when plaintiff acquired possession of said bonds the holders of the same did not in any way set up any claim to a lien upon said property, legal or equitable, by virtue of said ownership. That during said last-mentioned period the Wabash Railway Company, which had acquired the property formerly owned by the Toledo, Wabash and Western Railway Company, through and under said foreclosure sale executed on all of said property the said Seney mortgage and also a subsequent mortgage in which said Solon Humphreys and David A. Lindley were named as trustees. That said mortgages were executed to secure bonds and other obligations to a large amount, many of which are still outstanding and still unsatisfied. That said bonds and obligations were sold and negotiated, and are now owned by many persons who are not parties to this cause. That from the time of said foreclosure sale up to the time of the commencement of this suit neither the plaintiff nor any former holder of the bonds placed
88 in judgment as aforesaid, set up any lien upon any part of said property as security for said bonds, but, on the contrary, it avers that when said last-mentioned mortgages were being executed, and the bonds and obligations secured thereby sold, and while this defendant was being formed by the consolidation of the said Toledo, Wabash and Western Railway Company with other companies, the holders of said bonds remained wholly quiescent and took no steps whatever to assert the lien which they now allege, although well knowing the execution of said mortgage and the sale of said bonds.

And this defendant further avers that the trustees named in said several mortgages hereinbefore mentioned, and the several persons purchasing the bonds and obligations secured thereby, at the time when they acquired an interest under said mortgages, either as trustees or purchasers, had no notice of the said pretended lien now claimed by the plaintiff, but on, the contrary the said George I. Seney, trustee, and the said Humphreys and Lindley, when they

became trustees as aforesaid, did so under the belief that if the holders of the bonds so placed in judgment ever claimed any lien, said claim was not only unfounded but had been long ago abandoned; and this defendant avers, upon information and belief, that the then holders of the bonds which the plaintiff now claims to own tacitly permitted the execution of the mortgages and sale of bonds secured thereby, raising no claim of lien, although aware of such proceedings. And this defendant now and again denies that any such lien as plaintiff now claims ever existed in law or in equity, and avers that if any equities existed on the part of the holders of said bonds, such equities have long since lapsed, such holders and the plaintiff and all others claiming through or under them are by the facts aforesaid estopped from asserting such lien.

This defendant, moreover, avers, upon information and belief, that large amounts of its capital stock have been repeatedly sold and transferred to persons who relied upon the claims of said bonds to a lien upon the property of this defendant as abandoned, and who did not reckon the amount of said bonds among the
89 liabilities of this defendant, many of such transfers being made within the knowledge of persons who then owned some of the same series of bonds which plaintiff now claims to own, and that such transfers were made under circumstances in the conduct of such persons as induced such purchasers to remain under the impression that no lien in favor of said bonds would be thereafter asserted.

Defendant further avers that if any such lien ever existed in law or equity in favor of the holders of the equipment bonds now claimed by the plaintiff, the same was subordinate to the several mortgage liens hereinbefore mentioned, as no mortgage or other instrument in writing, executing such supposed lien for security of said equipment bonds, was ever sealed, acknowledged or recorded as required by the laws of Ohio to so operate as to execute such lien.

J. R. OSBORN,
Attorney for the Wabash, St. Louis and Pacific Railway Company.

STATE OF OHIO, *County of Lucas, ss:*

John Osborn, being duly sworn, says that he is one of the attorneys for the Wabash, St. Louis and Pacific Railway Company, and is authorized to make this affidavit in its behalf, and that the statements of the foregoing answer are true, as he believes.

J. R. OSBORN.

Sworn to before me and subscribed in my presence this 22d day of November, A. D., 1883.

[SEAL.] ALEXANDER L. SMITH,
Notary Public in and for Lucas County, Ohio.

[Endorsed:] Filed in C. C. Jan. 14, 95. L. E. Clark.

90 THE STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of Lucas County:

You are commanded to notify the Toledo, Wabash and Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis and Pacific Railway Company, James R. Jesup and Isaac H. Knox, as trustees, and George I. Seney, trustee; John Humphreys and David A. Lindley, as trustees, that they have been sued by the Adelbert College of Western Reserve University, in the Court of Common Pleas of Lucas County, and that unless they answer by the 26th day of May, A. D. 1883, the petition of the said plaintiff against them filed in the Clerk's Office of the said Court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 7th day of May, A. D. 1883.

Witness R. C. Quiggle, Clerk of said Court, and the seal thereof, at Toledo this 28th day of April, A. D. 1883.

R. C. QUIGGLE, *Clerk,*
By N. HODNETT,
Deputy Clerk.

[Endorsed:] Filed in C. C. Jan. 14, '95, L. E. Clark, Clerk.

THE STATE OF OHIO, *Lucas County, ss:*

Received this writ April 28th, 1883, and pursuant to its command I summoned on the 5th day of May, 1883, the within-named defendant the Wabash, St. Louis and Pacific Railway Company by
91 delivering a true and certified copy of this writ and of the endorsements hereon to J. E. Haviland, a regular freight agent of said company, at Toledo, in said county, the president, vice-president, secretary, treasurer or other chief officer being not found in Lucas County, Ohio. The president, vice-president or other chief officer of the Toledo, Wabash and Western Railway Company, or the Wabash Railway Company, and James R. Jessup, Isaac H. Knox, George I. Seney, John Humphreys and D. A. Lindley were not found in Lucas county, Ohio.

Sheriff's Fees.

Service	$ 30
Cop	1 28
Mileage	48
Return	08
	$2 14

JOHN S. HARBECK, JR., *Sheriff,*
By J. E. HOWE, *Deputy.*

92 Court of Common Pleas of Lucas County.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, SAINT LOUIS AND PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and SOLON HUMPHREYS and DANIEL A. LINDLEY, as Trustees, Defendants.

Amended Answer of the Wabash, Saint Louis and Pacific Railway Company.

This defendant, by leave of Court first had, now files its amended answer to the petition of the plaintiff and says:

First. That it has no knowledge other than from the averments contained in the petition that the plaintiff is the owner and holder of the bonds or coupons described in the petition, or either of them, and therefore denies the averments of the petition in that behalf.

Second. For a second answer this defendant says that it is not true, and it therefore denies that the Wabash Railway Company held its property or any portion of it subject to the pretended liens which the plaintiff claims to hold thereon in behalf of or on account of the bonds, coupons, or any of them, which are described in the petition; and it denies that the Wabash, Saint Louis and Pacific Railway Company holds its property, or any part of it, subject to any such pretended lien.

Third. For a third answer this defendant says that it is not
93 true, and it therefore denies that the Toledo, Wabash and Western Railway Company agreed to pay the equipment bonds of the Toledo and Wabash Railway Company as a part of the consideration for the purchase of the property of that company.

It avers on the contrary, that the Toledo and Wabash Railway Company did not in fact sell its property to the Toledo, Wabash and Western Railway Company, but by reason of certain proceedings in consolidation it became merged into that company, and, as a separate corporation, became thereby extinct, and the unsecured debts thereof became the unsecured debts of the Toledo, Wabash and Western Railway Company, and received no additional guaranty and underwent no change by reason of said merger.

Fourth. This defendant for further answer says that it is not true as alleged in the petition that the directors of the Toledo, Wabash and Western Railway Company never prescribed any terms of exchange of said bonds, and never issued any of the consolidated bonds in exchange for the equipment bonds. But this defendant denies that the said directors ever neglected or refused to prescribe any terms of exchange or that said directors refused or neglected to do any other matter or thing, which they were bound to do under said consolidated mortgage. On the contrary, this de-

fendant avers that the said directors were never required or solicited by the holder or holders of said bonds to make an exchange for consolidated bonds, nor were they ever requested by any such holder or holders to prescribe any terms for an exchange of said bonds, nor were they ever notified by any holder of equipment bonds that any exchange would be made upon any terms whatever; and this defendant denies all of the averments of the petition that the holders of said equipment bonds stood ready and were willing to exchange the same for said consolidation bonds.

Fifth. The Wabash, St. Louis and Pacific Railway Company, further answering, denies that the Wabash Railway Company
94 is identical with the Toledo, Wabash and Western Railway Company. On the contrary, it was a new, distinct and separate organization, and that it was organized by virtue of the laws of Ohio, Indiana and Illinois for the purpore of operating a railway in said several States, and became the owner of the roadway, rolling stock and property of the Toledo, Wabash and Western Railway Company by the purchase at a judicial sale and by reason of the conveyances recited in the petition; and it avers that the property so conveyed to it is subject to the liens and encumbrances which are described in said conveyances, and no others; and it avers and charges that the pretended lien set up in plaintiff's petition is not one of said enumerated liens, and neither the Wabash Railway Company nor this defendant had any notice thereof, nor was there any such lien upon such property, nor is there any such lien now upon the same, or any parts or portions thereof.

Sixth. This answering defendant further answers and says that it is not true, and it therefore denies, that the Toledo, Wabash and Western Railway Company, by virtue of the execution of the consolidated mortgage, gave any lien or right of equity of any kind upon its property, or that it acknowledged such lien, or secured to holders of equipment bonds any equitable right of payment, either as an unpaid portion of purchase money or for any other reason or consideration whatever.

Seventh. This defendant further says, upon information and belief, that before the time when plaintiff so obtained possession and acquired title to said bonds in its petition named, if it ever really did acquire said title, the said bonds were owned by other persons, not parties to this cause; that from the time of the execution of the said consolidated mortgage by the said Toledo, Wabash and Western Railway Company up to the time when the decree of foreclosure was rendered upon which said property was sold, as mentioned in plaintiff's petition, the several persons holding and owning
95 said two bonds described in plaintiff's petition did not set up or assert or claim to be entitled to any lien upon any of the property of the Toledo, Wabash and Western Railway Company by reason of the ownership of said bonds, but, on the contrary, said persons, up to July, 1874, continued to hold said bonds as subsisting obligations, and wholly neglected and failed to set up any right of lien whatever by virtue of the same; that during the said period the Toledo, Wabash and Western Railway Company executed

the mortgage which was foreclosed by said decree, and sold large amounts of bonds secured thereby, and that neither before nor at the time of the execution and recording of said mortgage, nor from thence until the foreclosure of the same did any person or persons holding any of said equipment bonds set up any claim or lien upon the property of the said last-mentioned railway company because of said ownership; and this defendant further avers that from the time of the rendering of the decree of foreclosure aforesaid, up to the time when plaintiff acquired possession of said bonds, the holders of the same did not in any way set up any claim to a lien upon said property, legal or equitable, by virtue of said ownership. That during said last-mentioned period the Wabash Railway Company, which had acquired the property formerly owned by the Toledo, Wabash and Western Railway Company, through and under said foreclosure sale, executed on all of said property the said Seney mortgage and also a subsequent mortgage, in which said Solon Humphreys and David A. Lindley were named as trustees. That said mortgages were executed to secure bonds and other obligations to a large amount, many of which are still outstanding and still unsatisfied. That said bonds and obligations were sold and negotiated, and are now owned by many persons who are not parties to this cause. That from the time of said foreclosure sale up to the time of the commencement of this suit, neither the plaintiff nor any former holder of the bonds placed in judgment as aforesaid set up any lien upon any part of said property, as security for said bonds, but,
96 on the contrary, it avers that when said last-mentioned mortgages were being executed, and the bonds and obligations secured thereby sold, and while this defendant was being formed by the consolidation of the said Toledo, Wabash and Western Railway Company with other companies, the holders of said bonds remained wholly quiescent and took no steps whatever to assert the lien which they now allege, although well knowing the execution of said mortgage and the sale of said bonds.

And this defendant further avers that the trustees named in said several mortgages hereinbefore mentioned and the several persons purchasing the bonds and obligations secured thereby, at the time when they acquired an interest under said mortgages, either as trustees or purchasers, had no notice of the said pretended lien now claimed by the plaintiff, but on the contrary, the said George I. Seney, trustee, and the said Humphreys and Lindley, when they became trustees as aforesaid, did so under the belief that if the holders of the bonds so placed in judgment ever claimed any lien said claim was not only unfounded but had been long before abandoned; and this defendant avers, upon information and belief, that the then holders of the bonds, which the plaintiff now claims to own, tacitly permitted the execution of the mortgages and sale of bonds secured thereby, raising no claim of lien, although aware of such proceedings. And this defendant now and again denies that

any such lien as plaintiff now claims ever existed in law or in equity, and avers that if any equities existed on the part of the holders of said bonds, such equities have long since lapsed, and such holders and the plaintiff and all others claiming through or under them are, by the facts aforesaid, estopped from asserting such lien.

This defendant moreover avers, upon information and belief, that large amounts of its capital stock have been repeatedly sold and transferred to persons who relied upon the claims of said bonds to a lien upon the property of this defendant as abandoned, and who did not reckon the amount of said bonds among the liabilities
97 of this defendant, many of such transfers being made within the knowledge of persons, who then owned some of the same series of bonds, which plaintiff now claims to own, and that such transfers were made under circumstances in the conduct of such persons as induced such purchasers to remain under the impression that no lien in favor of said bonds would be thereafter asserted.

Defendant further avers that if any such lien ever existed in law or equity, in favor of the holders of the equipment bonds now claimed by the plaintiff, the same was subordinate to the several mortgage liens hereinbefore mentioned, as no mortgage or other instrument in writing, executing such supposed lien for security of said equipment bonds was ever sealed, acknowledged or recorded as required by the laws of Ohio, to so operate as to execute such lien.

For a further answer this defendant says that the plaintiff ought not to have or maintain this said action because it shows that prior to the commencement of this action, to wit, on or about the 31st day of May, 1878, one Benjamin F. Ham and others began a suit in the United States Circuit Court for the District of Indiana as holders of said equipment bonds on behalf of themselves and all other bondholders similiarly situated who might desire to come into the said suit, thereby meaning all the holders of equipment bonds issued by said Toledo and Wabash Railway Company, and in said cause seeking to have said equipment bonds declared a lien upon all the property of the said Toledo and Wabash Railway Company, which passed into the hands of the consolidated companies, described in plaintiff's petition and to have the said lien enforced upon all of the property within the States of Ohio and Indiana being the same property described in plaintiff's petition and upon which the plaintiff seeks to assert a lien in this cause; that in said cause thus begun as aforesaid, the Wabash Railway Company, the Toledo, Wabash and Western Railway Company, the Wabash, Saint Louis and Pacific Railway Company, Isaac H. Knox and James R. Jessup, as trustees,
98 were made defendants and duly served with processes therein; that in said cause the said complainants set forth all the facts that are now set forth in plaintiff's petition in this cause and claimed thereon the right to subject the said property properly belonging to the Toledo and Wabash Railway Company to the lien of said equipment bonds held by them and also held by other parties and then outstanding; that the defendants above named joined issue with the

complainants in said cause, as will fully appear from a transcript of said record, which the defendant will produce upon the trial of this cause; that said cause was upon said issues fully tried in said Circuit Court of the United States, which thereupon held that all of said equipment bonds constituted an equitable lien upon said property of the Toledo and Wabash Railway Company within the States of Ohio and Indiana and ordering said propety to be sold for the satisfaction of the lien of said equipment bonds and provision to be made for the application of the proceeds to the payment of said bonds; that an appeal was thereupon taken by the defendants to the Supreme Court of the United States, which, upon consideration thereof, reversed said order and decree of the said Circuit Court, and said cause was thereupon retried by said Circuit Court and on said retrial a decree was entered by said Circuit Court holding that said described property was not subject to the lien of said equipment bonds; that in said cause said Court had jurisdiction of the subject matter and of the parties to said judgment of the Circuit Court of the United States entered on the 7th day of May, 1888, is a complete adjudication of all the questions and matters relating to the lien of said equipment bonds that are sought to be adjudicated in this cause and is a bar to the proceedings on behalf of the plaintiff in this cause.

For a further and additional defense this defendant says that on or about the 29th day of May, 1884, the Circuit Court of the United States for the Northern District of Ohio, Western Division, and for the District of Indiana, by orders duly entered thereon in
99 foreclosure proceedings brought on behalf of the trustees of mortgages given by said Wabash, Saint Louis and Pacific Railway Company, duly appointed Receivers, who took possession of all the property described in plaintiff's petition, and that said United States Circuit Courts through said Receivers have been and continued in possession and control of said property down to the present time; that subsequent to the appointment of said Receivers the trustees of mortgages, prior to the alleged lien of said equipment bonds, they began proceedings for foreclosure in said United States Circuit Courts and said United States Circuit Courts retain possession and jurisdiction of said property under said foreclosure proceedings and are proceeding to foreclose the prior mortgages described in plaintiff's petition within the States of Ohio and Indiana and through the officers of said Court, are in possession, custody and control, and that they have exclusive jurisdiction of said property and said plaintiff should be remitted to the proceedings in said United States Circuit Court and have his alleged claim adjudicated and determined therein.

By way of further answer to the petition of the plaintiff this defendant says that it denies that all the property comprising the line of railroad within the State of Ohio was property that was owned by the Toledo and Wabash Railway Company; on the contrary, it avers that a large amount of the property now in the possession of the Wabash, Saint Louis and Pacific Railway Company, or its successor, is property that has been purchased since the date of the consoli-

dation of the Toledo and Wabash Railway Company described in plaintiff's petition, wherefore it asks to be dismissed with its costs.

OSBORN & SMITH,
Attorneys for Defendant.

100 THE STATE OF OHIO, *County of Lucas, ss:*

John R. Osborn, being duly sworn, says that he is one of the attorneys for the Wabash, Saint Louis and Pacific Railway Company and is authorized to make this affidavit in its behalf, and that the statements of the foregoing answer are true, as he believes.

J. R. OSBORN.

Sworn to before me and subscribed in my presence this 8th day of June, A. D. 1888.

LOUIS G. RICHARDSON,
[SEAL.] *Notary Public in and for Lucas Co., O.*

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Cl'k.

Court of Common Pleas of Lucas County, Ohio.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILROAD CO., THE WABASH RAILWAY CO., THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO., JAMES R. JESSUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, Trustee; JOHN HUMPHREYS and DAVID A. LINDLEY, as Trustees, Defendants.

Supplemental and Amended Petition.

By leave of the Court, had and obtained, the plaintiff now comes, and, in addition to, and in correction of the matters and things contained in its original petition, and by way of amendment thereof, says:

101 That prior to the commencement of this action one James Compton, as plaintiff, began his certain civil action in this court against the same defendants above stated as defendants herein, save and except that in said action the said defendant Humphreys was correctly designated as Solon Humphreys, and said cause was pending in this Court at the time of the commencement of this action.

That the general purpose of said action was the recovery by plaintiff of a final judgment and decree establishing plaintiff's right to enforce as a lien about $150,000 par value of a series of bonds known as equipment bonds against the Toledo, Wabash and Western Railway property within the States of Ohio and Indiana, said series of bonds being the same in kind and of the same series as the bonds set forth and described by plaintiff in its action herein.

That afterwards final hearing was had in this Court in said cause, and from the final judgment and decree therein rendered by this Court an appeal was taken from this Court in said cause to the District Court of Lucas County, Ohio, and such proceedings were had in said cause in said District Court as that the same was duly reserved for decision in the Supreme Court of the State of Ohio, and the same was therein thereafter duly docketed pursuant to such reservation;

That in said Supreme Court said cause continued to be pending until the final judgment and decree was therein rendered by said Court on or about the — day of —— A. D. 1888, and the said cause in and by said final judgment and decree was remanded by said Supreme Court to this Court for execution on the footing of such final judgment and decree and for other purposes.

That in pursuance of said remanding order said cause has since been duly remanded to this Court and the same now is pending herein for execution of said final judgment and decree, and for other purposes.

That in and by said final judgment and decree it was, amongst other things, in substance found and adjudicated by said
102 Supreme Court that the said series of $600,000 of equipment bonds so called became and was, prior to the commencement of said action, a valid lien against the property of said line of railway within the States of Ohio and Indiana, and subject, however, to two certain mortgage liens of $1,000,000 and of $900,000, respectively, which are named and set forth in said Compton's petition, and also in the petition of plaintiff herein, and ordering that so much of said line of railway property as lies within the State of Ohio should be appraised, advertised and sold by the Sheriff of Lucas County at a rate not less than two-thirds the amount of the appraised value thereof.

That said final judgment and decree was by a proper remanding order duly certified and transmitted to this Court from said Supreme Court, which said final judgment and decree so remanded are now of record in this Court as provided by law.

That under and pursuant to the provisions of the same the said James Compton did on or about the — day of —— A. D. 1888 cause an order of sale to issue upon said final judgment and decree out of this Court to the Sheriff of Lucas County, Ohio, and thereupon said last-mentioned officer did call an inquest of three appraisers to make appraisement of the cash value of said railway property within the State of Ohio, subject to the said two mortgage liens aforesaid, which said inquest was duly made, and the appraisal thereby reached was duly reported to said Sheriff by said appraisers and by him filed in the office of the Clerk of this Court, wherein the same yet remains.

That thereupon and without further proceedings under said order of sale said Sheriff returned the same into this Court by the order of the said James Compton, and no further or supplemental order of sale has been issued therein.

That the amount of said appraisal is subject, as aforesaid, in the sum of —, and that the amount of the said equipment bonds held by said Compton, principle and interest, was found by said Supreme

Court to be in the sum of about $339,000, the same to bear
103 interest until paid from the — day of ——, A. D. 18—.

That plaintiff is informed and believes it to be true that said James Compton in his said suit, and under and by virtue of said final judgment and decree therein so remanded to and of record in this Court, is about further to proceed in the execution of said final judgment and decree with the sale of said railroad property and to appropriate the proceeds thereof to the payment of the costs of his said action and of his said final judgment and decree in full.

That by reason of the averments contained in the original petition of plaintiff herein it is entitled to have the decree of this Court declaring the amount of its said bonds a lien upon said railroad property concurrent and co-equal with the lien of said Compton thereon, and that plaintiff has a right in equity to share with said Compton ratably in the proceeds from the sale of said railway property.

Plaintiff further says that it withdraws its averment, admission and concession contained in its original petition, that the said mortgage upon said railway property in the aggregate sum of $900,000 is a valid mortgage and prior to the lien of plaintiff upon said railway property, and on the other hand it avers that by reason of its misinformation and incorrect understanding at the time of the filing of its original petition herein it falsely and incorrectly supposed and believed said mortgage to be valid and enforcible against said railway property, and to be prior to the lien of plaintiff and other equipment bondholders, but it now avers that it is informed and believes and charges the fact to be that said mortgage is invalid, that it is barred by lapse of time and is no longer a lien on said railway property, or on any part thereof, or in any sum whatsoever.

Whereupon plaintiff prays for relief as in its original petition, save and except that it here prays that its lien upon said railway property in the States of Ohio and Indiana may be declared prior to all liens thereon, save and except said mortgage lien of $1,000,000,
104 and especially that said mortgage for $900,000 be declared no longer a lien thereon.

And plaintiff also further prays that the said James Compton may be made a party defendant hereto, that in case said railway property shall be sold under and pursuant to final judgment and decree in favor of said Compton, rendered by said Supreme Court of Ohio, that the proceeds of such sale be held and retained in and by this Court, subject to distribution to this plaintiff on its said lien held by said bonds owned by it, concurrently and co-equally with said James Compton, and if it shall become necessary so to do, that an order be made consolidating this cause with said cause of James Compton against said Toledo, Wabash and Western Railroad Company and others, and if it shall become necessary plaintiff prays that the Court will make full inquiry and finding as to any and all liens upon railway property held by persons or parties not now formal parties in either this cause or in said cause brought by said Compton, and make full adjudication in respect thereto touching both said railway property and the proceeds to arise from the sale of the same, to the end that said railway property when it shall be sold shall pass free

and clear of all encumbrances to the purchaser thereof, with the view of making the same bring the largest possible price at such sale, and for other and full relief.

LEE & BROWN,
Attorneys for Plaintiff.

STATE OF OHIO, *Lucas County, ss:*

John C. Lee, being duly sworn, says that he believes the facts alleged in the foregoing amended petition are true, and that he makes this affidavit because the plaintiff is a corporation having its
105 principal office at Cleveland, Ohio, and affiant is one of the attorneys of plaintiff in this action.

JOHN C. LEE.

Sworn to before me and subscribed in my presence this 24th day of December, 1891.

W. H. A. READ,
Notary Public, Lucas Co., Ohio.

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Cl'k.

STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

No. 22624.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY ET AL.

Answer to Cross-Petition.

Now come William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke,
106 James M. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William G. Creamer, George B. Mead, George B. Mead and Walter M. Aitkinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers' Hospital, a corporation of the State of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveira,

and by leave of the Court here first had and obtained, appear in the above-entitled cause and file herein this their answer and cross-petition, and, by way of such answer, say that they admit all and singular the averments of the petition and the supplemental and amended petition filed in this cause, not hereinafter denied or modified, and except any statement thereof relating to the validity and amount of liens upon the railway property described in the said petition, and therein stated or admitted to be prior in date or superior to the lien of the equipment bonds issued by the Toledo and Wabash Railway Company, described in the said petition, and whereof the said Adelbert College is therein shown to be the holder of two bonds, and these defendants, as hereinafter stated, are the holders of a large number; and all averments of priority or superiority of lien of any mortgage to the lien of the said equipment bonds contained in said petition are denied.

And by way of cross-petition these cross-petitioners, not only in their own behalf, but for and on behalf of all holders of equipment bonds issued by the Toledo and Wabash Railway Company of the issue and class described in the said petition who may appear and unite in the prosecution of this cross-petition and contribute to the expense thereof, aver that they are holders and owners of equipment bonds issued by the said Toledo and Wabash Railroad Company in the year 1862, of the issue and class described in the said petition, the total issue of which amounted, at the par value thereof, to the
107 sum of six hundred thousand dollars ($600,000), with coupons thereon, payable semi-annually at the rate of seven (7) per cent., the principal whereof and of each of said bonds being payable on the first day of May, 1883, of one of which bonds, amounting at the par value thereof to the sum of five hundred dollars ($500), a true copy is contained in the said petition, and that their several holdings of said bonds are, exclusive of interest, as follows:

William F. Redmond, ten thousand dollars ($10,000).

John B. Manning, fourteen thousand dollars ($14,000).

David Kohn, William M. Kohn and Edward Popper, partners as Kohn, Popper & Co., eighteen thousand dollars ($18,000).

James M. Ham and Benjamin F. Ham, partners as Ham Bros., two thousand dollars ($2,000).

Israel M. Simon, five thousand dollars ($5,000).

Edward H. Litchfield, twenty-five thousand dollars ($25,000).

Irving D. Ferrey, seven thousand dollars, ($7,000).

John S. A. Wittke, twenty-seven thousand five hundred dollars ($27,500).

James M. Ham, one thousand five hundred dollars ($1,500).

Henry W. Smith, one thousand dollars ($1,000).

Charles S. Webb, five thousand dollars ($5,000).

Jane A. Sullivan, three thousand dollars ($3,000).

Ella R. Johnson, five thousand dollars ($5,000).

Charles E. Thorne, one thousand dollars ($1,000).

James Moir, five thousand dollars ($5,000).

Gustavus Rollins and Edward A. Rollins, partners as Rollins & Co., four thousand five hundred dollars ($4,500).

Eugene E. Bishop, one thousand dollars ($1,000).
Frederick Hubbard, eight thousand dollars ($8,000).
William G. Creamer, ten thousand dollars ($10,000).
George B. Mead, five thousand five hundred dollars ($5,500).
George B. Mead and Walter M. Aikinson, executors, and
108 Eliza Mead, executrix, of H. R. Mead, deceased, five thousand five hundred dollars ($5,500).
John W. Alling, one thousand dollars ($1,000).
E. Kellogg Beach, two thousand five hundred dollars ($2,500).
Clarence Mortit, one thousand dollars ($1,000).
James Walker, one thousand dollars ($1,000).
Vassar Bros. Hospital, two thousand dollars ($2,000).
Josephine L. Cadmus, ten thousand dollars ($10,000).
Preston Wing, four thousand dollars ($4,000).
Mary L. Oliveira, four thousand dollars ($4,000).

To each and all of which bonds there are attached all the coupons thereof, beginning with the coupon which matured on the first day of May, 1875, and thereafter maturing and accrued semi-annually until the maturity of said bonds, on May 1, 1883, being, in all, seventeen (17) semi-annual installments of interest of three and one-half (3½) per cent. each, and they aver that all said bonds and the coupons thereof described, as aforesaid, are severally due to them, as aforesaid, with interest thereon from the date of the maturity of the said bonds, at the rate of seven per cent. per annum, and with interest on the coupons aforesaid, from the date of the several maturities of the said coupons at the rate of six per cent. per annum until the present time, and will continue to bear interest, as aforesaid, until judgment shall have been rendered thereon, as hereinafter prayed for, and as to the principal of said bonds held by them, as aforesaid, being, in all, the sum of one hundred and ninety thousand dollars, said judgment will bear interest at the rate of seven per centum per annum until paid.

And these cross-petitioners further state that not only the equipment bonds enumerated and described in the petition of the plaintiff as owned by it, and in this answer and cross-petition as owned by them, were issued by the said Toledo and Wabash Railway Company, but also the residue of the whole issue provided for, as described in the said petition, by the resolution of the directors of the said
company, to the total amount of six hundred thousand
109 dollars ($600,000), with coupons thereon, as provided for and contemplated in said resolution, and as described in said petition, and that said bonds were negotiable in form, and were in all respects as shown by the specimen thereof in the said petition copied, each of said bonds being payable to the bearer thereof, and that said bonds were sold by said company to divers and sundry parties, purchasers thereof, in good faith and before maturity, for a total sum realized by said Toledo and Wabash Railway Company, of five hundred and thirteen thousand and forty-six and 13/100 dollars ($513,046.13), which said company appropriated to its own use.

And these cross-petitioners further state that, besides the bonds

held by them as aforesaid, and the two bonds described in the petition held by the plaintiff, one James Compton, a resident of the District of Columbia, claims to be the holder and owner of one hundred and fifty (150) of said bonds, upon which he has recovered judgment for his own benefit, and not for the benefit of any other bondholder, for a sale of so much of the said railway as is within the State of Ohio, with its accretions and additions, and that there are a large number of other bonds of the same class and issue now outstanding, in the hands of divers and sundry persons, partnerships and corporations unknown to these cross-petitioners, in whose behalf, if they should appear and join in this cross-petition, as well as on their own behalf, these cross-petitioners file this cross-petition.

And these cross-petitioners further state that in the year 1862, at the date of the issue of the said equipment bonds, the Toledo and Wabash Railway Company, which executed, issued and sold the same, was a consolidated railroad corporation of Ohio and Indiana, owning within the State of Ohio a railroad beginning in the City of Toledo and running through the counties of Lucas, Fulton, Henry, Defiance and Paulding to the State line of Indiana, at the western boundary line of the Township of Harrison, in the County of Paulding, and running thence in the State of Indiana westward to the boundary line of the State of Illinois.

And these cross-petitioners further state that the said Toledo and Wabash Railway Company continued to operate its said railroad until the year 1865, at which time the said Toledo and Wabash Railway Company aforesaid, the Great Western Railway Company of 1859, the Quincy and Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company, the three last named companies being corporations organized under the laws of the State of Illinois, and together owning and operating a line of railroad extending westward from the western terminus at the western boundary line of the State of Ohio, in Harrison Township, Paulding County, Ohio, of the railroad owned and operated by the Toledo and Wabash Railway Company aforesaid, duly entered into an agreement for the consolidation of the said companies, and for the ownership of their respective lines of railways by a consolidated company under the name of the Toledo, Wabash and Western Railway Company; which agreement of consolidation was duly adopted, executed and ratified by the directors and stockholders of the said consolidating companies, and was filed in the office of the Secretary of State of Ohio, on the 6th day of July, 1865, and then and thereafter was carried into full effect and execution, whereby the said Toledo, Wabash and Western Railway Company became and thereafter was a consolidated corporation of the States of Ohio, Indiana and Illinois, owning and operating a line of railroad beginning at the City of Toledo, in the State of Ohio, and extending thence westward through the counties of Lucas, Fulton, Henry, Defiance and Paulding, to the boundary line of the State of Indiana, on the west boundary of the township of Harrison, in said county of Paulding, and thence westward through the States of Indiana and Illinois.

And these cross-petitioners further aver that the said agreement of consolidation contains a provision for the consolidation of the roads, property and capital stock of the said consolidating
111 companies into one company, to be named and known as the Toledo, Wabash and Western Railway Company, upon a certain basis and conditions, which were duly adopted and ratified by the directors and stockholders of the said companies so consolidating, among which were the following, viz.: that the capital of the consolidated company should be ten million dollars, as follows, to wit: first mortgage bonds three million four hundred thousand dollars ($3,400,000); second mortgage bonds, two million five hundred thousand dollars ($2,500,000); controvertible equipment bonds, six hundred thousand dollars ($600,000); convertible preferred stock, one million dollars ($1,000,000); common stock, two million five hundred thousand dollars ($2,500,000), which convertible equipment bonds were the same equipment bonds whereof the plaintiff, the said James Compton and these cross-petitioners are holders of part of the issue thereof as aforesaid. And it was further, by said consolidation agreements, especially provided that all the rights, franchises, property, debts and choses in action of the said constituent companies should vest in the consolidated company and the said agreement contained the following clause:

"It is further agreed that the bonds and other debts hereinbefore specified in the manner and extent specified and not otherwise provided for in this agreement shall, as the principal and interest thereon, as the same respectively fall due, be protected by the said consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidated companies may be evidenced."

And these cross-petitioners respectfully represent and state and charge the fact to be, that the provision aforesaid was in fact intended to and does in law operate to bind the said consolidated company and all its property and franchises by written articles of consolidation, duly executed and, so as aforesaid, agreed upon and ratified by the directors and stockholders of the said constituent companies constituting the consolidated company, to protect the
112 said equipment bonds whereof these cross-petitioners, the plaintiff and the said James Compton, are holders as aforesaid, by a preferable and first lien prior to all subsequent liens, incumbrances or mortgages created by said consolidated company, and all judgments against it, upon and binding all the railroad, equipment, rights, franchises, property, debts and choses in action of the constituent companies so as aforesaid vested in and transferred to the consolidated company and being in the nature of a mortgage thereof.

And these cross-petitioners further state that the said Toledo, Wabash and Western Railway Company, so by the said consolidation agreement constituted, from and after the date of the said consolidation, held possession of the railroad properties and equipment aforesaid of the said constituent companies and all of the franchises,

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rights, property, debts and choses in action of the said constituent companies so consolidated, and operated said line of railroad of the said constituent companies as a single railway system; that thereafter, on the first day of February, 1867, the said Toledo, Wabash and Western Railway Company resolved to make and issue and did make and issue its bonds to the extent of fifteen million dollars ($15,000,000), and secured the same by a mortgage on its entire line to Isaac H. Knox, of the State of Missouri, and the defendant James R. Jesup, of the State of Connecticut, as trustees, which mortgage and the bonds secured thereby are known as the consolidated mortgage and bonds of the said Toledo, Wabash and Western Railway Company, by which mortgage it was proposed by the said consolidated company to provide for the security of the said equipment bonds aforesaid; but these cross-petitioners aver that the same had already been fully provided by the said prior lien contained in the said consolidation agreement, and they aver that the lien and encumbrance of the said equipment bonds attaching to them by virtue and force of the said consolidation agreement is prior in time and superior in right to the said mortgage to the said
113 Knox and Jesup, trustees. That since the execution of said consolidated mortgage said Isaac H. Knox has departed this life, leaving surviving him as trustee said James R. Jesup.

And these cross-petitioners further state that afterwards, in the year 1873, a certain mortgage of its line of railway from Toledo westward, known as the gold mortgage of the Toledo, Wabash and Western Railway Company, was executed by it to secure the payment of five million dollars ($5,000,000) of bonds, payable in gold coin, issued and disposed of by it, and that in the year 1875 proceedings were commenced in this Court and in the proper Indiana and Illinois courts to foreclose said mortgage, in which proceedings decrees were duly rendered for sale, and the said mortgaged premises were sold, and the line of railway so mortgaged, being the entire line of railway of the Toledo, Wabash and Western Railway Company, with all its equipment, rights and franchises, was, after due confirmation of said sale by this Court, conveyed to John W. Ellis and others, as a purchasing committee of the bondholders.

And these cross-petitioners further state that in the decree of foreclosure made by this Court under which the said property within the State of Ohio was so, as aforesaid, sold and conveyed, was contained the following provision and condition, subject to which the said sale was made and confirmed and the said conveyance was made, viz.:

"And that the sale of said road, property, equipment and franchises be made subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds called equipment bonds referred to in the petition, as to which all questions arising are left open."

And these cross-petitioners say that said equipment bonds last hereinbefore referred to and described in said provision of the said foreclosure decree are the same equipment bonds of part of which the plaintiff, these cross-petitioners and James Compton are holders.

And these cross-petitioners further state that the said Ellis
114 and others, who, as a purchasing committee, purchased the said property, rights and franchises at the said foreclosure sale, in due accordance with law, recognized the said premises and duly constituted a railway corporation to whom the said rights, franchises and premises and line of railway and equipment were conveyed, subject to the claim of the holders of said equipment bonds as aforesaid, which company took the name of and was known as the Wabash Railway Company, which was done by the said purchasing committee by the organization of corporations under the laws of the State of Indiana, Ohio and Illinois, for said purpose, and the consolidation of said corporations into a single consolidated corporation by the said name of the Wabash Railway Company, under articles of consolidation which were duly filed in the office of the Secretary of State of the State of Ohio, on the tenth day of January, 1877, and that on the 12th day of January, 1877, the said conveyance was made and delivered to the said last-named company by the said purchasing committee, and thereby the Wabash Railway Company became vested with title to the said lines of railway, equipment, rights and franchises, subject, however, to the prior lien and incumbrance aforesaid of the said equipment bondholders and the said Wabash Railway Company took possession of said railway and other property, and operated and used the same until the 25th day of October, 1879, when it was itself duly consolidated and united with the St. Louis, Kansas City and Northern Railway Company, a corporation organized under the laws of the State of Missouri, and owning a continuous line of railroad from the western terminus of the railroad of the said Wabash Railway Company to Kansas City in the State of Missouri, with certain extensions and branch lines.

And these cross-petitioners further aver that the agreement providing for the said last-named consolidation was duly executed and went into effect and provided for the ownership of said property, rights and franchises, by the consolidated company therein
115 named and known by the name of the Wabash, St. Louis and Pacific Railway Company.

And these cross-petitioners further state that by said consolidation the said Wabash, St. Louis and Pacific Railway Company succeeded to and became the owner of all the rights, franchises, premises, property and railroad line, including equipment, of the Wabash Railway Company, and of the Toledo, Wabash and Western Railway Company, and of the Toledo and Wabash Railway Company, subject, however, to the prior incumbrance aforesaid in favor of said equipment bonds and the holders thereof, including the plaintiff the said James Compton, and these cross-petitioners.

And these cross-petitioners further state that in January, 1877, before the said foreclosure sale and the creation of the consolidated company known as the Wabash, St. Louis and Pacific Railway Company, and the conveyance of said railroad line, property and franchises to it, as hereinbefore stated, the Wabash Railway Company did, in January, 1877, execute and deliver a mortgage of all its property and franchises to George I. Seney, of the State of New

York, trustee, and afterwards, in May, 1879, another mortgage of all its said property and franchises to Solon Humphreys, of the State of New Jersey, and Daniel A. Lindley, of the State of New York, trustees.

And these cross-petitioners further state that the said mortgages were, and each of them is, junior and subject to the rights of the holders of said equipment bonds and to the lien and encumbrance on said premises of the said equipment bonds and the interest thereon, of which said equipment bonds and the interest thereon the plaintiff, the said James Compton, and these cross-petitioners are the holders of part, but that the said Wabash, St. Louis and Pacific Railway Company took title under said foreclosure sale and the agreement of consolidation last hereinbefore aforesaid and the conveyances aforesaid, also subject to the said mortgages to the said Seney, Humphreys and Lindley, trustees.

And these cross-petitioners further state that the said the Wabash, St. Louis and Pacific Railway Company has refused payment
116 of the said equipment bonds or of any part thereof or of any interest therein, and has wholly failed and neglected to protect the same or to provide for the payment thereof, or of any part thereof, or of any part of the interest thereof, although retaining all and singular the property, and exercising the franchises and legal rights of the said Toledo and Wabash Railway Company, which made, issued and sold them, said property lying within the States of Ohio and Indiana.

And these cross-petitioners further state that on or about the first day of June, 1880, the said Wabash, St. Louis and Pacific Railway Company, to secure an issue of its bonds intended to be issued and disposed of, amounting in the aggregate to fifty million dollars ($50,000,000), made and executed to the Central Trust Company of New York, a corporation of the State of New York, and James Cheney, of the State of Indiana, as trustees, a mortgage or deed of trust bearing date on said day, known as its general mortgage, and thereby conveyed to said trustees, subject to all the prior liens thereon, all and singular the lines of railroad of the mortgagor company wheresoever situated, together with the equipment, appurtenances and franchises thereunto belonging, and thereafter sold and delivered or otherwise disposed of said bonds to various persons and corporations to the amount of seventeen million dollars ($17,000,000).

And these cross-petitioners further state that the lien of said mortgage is subsequent and junior to the lien and encumbrance of the equipment bonds aforesaid, including the said bonds owned by the plaintiff, the said James Compton, and these cross-petitioners.

And these cross-petitioners further aver that thereafter, and on or about the 28th day of May, 1884, the said Wabash, St. Louis and Pacific Railway Company filed its bill in equity in the Circuit Court of the United States for the Eastern District of Missouri, against the said Central Trust Company of New York, James Cheney and
117 others, alleging its insolvency and praying for appointment of Receivers and the sale of its railway property for the payment

of its mortgage debts, excepting the debt due upon the said equipment bonds which were not referred to in said bill in equity, and none of the holders of which were made parties defendant thereto, and suits of similar nature were at or about the same time instituted by the same complainant against the same defendants in the Circuit Courts of the United States for the Northern District of Ohio, Western Division, and for the Northern and Southern Districts of Illinois and the District of Indiana, and in other Courts, and afterwards suits were brought in State Courts in the said several States, by the Central Trust Company of New York and James Cheney, for the foreclosure of the said general mortgage, each of which suits was duly removed from the said State Courts into the Circuit Court of the United States for the proper district, and with the action so removed into the Circuit Court of the United States for the Eastern District of Missouri, was by the order of said Court consolidated, the suit so as aforesaid instituted therein by the Wabash, St. Louis and Pacific Railroad Company, and thereafter such proceedings were had in said consolidated suit that decrees and supplemental decrees of foreclosure and sale were rendered therein, and also in the said suits so as aforesaid pending in the said several Circuit Courts of the United States, except the Circuit Courts of the United States for the District of Illinois, and thereafter and on or about the 26th day of April, 1886, under and in pursuance of said decrees and supplemental decrees of foreclosure, the said property and franchises in and by said general mortgage conveyed, being all the railways, franchises and rights, including equipment, of the said Wabash, St. Louis and Pacific Railway Company, were sold at public vendue to James F. Joy, of the State of Michigan, Ossian D. Ashley and Thomas H. Hubbard, of the City of New York, and Edgar T. Welles, of the State of Connecticut, who had been constituted and were a purchasing committee under a certain plan of reorganization of the Wabash, St. Louis and Pacific Railway Company entered
118 into on the 15th day of July, 1885, by divers and sundry bondholders of the Wabash, St. Louis and Pacific Railroad Company, as such committee, and on or about the 15th day of June, 1886, a decree was made and entered in the said Circuit Court of the United States for the Eastern District of Missouri, confirming said sale and directing its Master in Chancery to execute and deliver to said purchasers a proper deed of conveyance of said railway and other property, rights and franchises, subject in all things to the rights and equities of the holders of bonds secured by mortgages, prior in date to the said general mortgage of June 1, 1880, on any part of said property; and thereafter application was made by said purchasing committee, claiming to have performed said decree, to the said Circuit Court of the United States, for the Eastern District of Missouri, for a release and delivery to them of possession of said railroad and other property last aforesaid, whereupon, on the 31st day of December, 1886, it was, by said Court, duly ordered that said delivery be made as so prayed for upon compliance by said purchasing committee with certain conditions, and that until such conditions should

be complied with, said property should remain in the hands and under the operation and management of certain Receivers by said Court before that time appointed.

And the said purchasing committee aver and claim that they have, in all respects, complied with the said order, and with all other orders and decrees of said Court, and with the terms of said sale, and that they are therefore entitled to the possession, custody and control of said property and franchises covered by and embraced in said general mortgage, subject, however, to all encumbrances upon any part of said property prior in date to the date of said general mortgage hereinbefore stated.

And these cross-petitioners further state that the Farmers' Loan and Trust Company is a corporation duly created under and by virtue of the laws of the State of New York, and that the said Farmers' Loan and Trust Company claims and alleges that
119 the Toledo and Wabash Railway Company was a consolidated Company, formed by consolidation with other companies, whereof the Toledo and Illinois Railway Company was one, which consolidation was made and executed and carried into full effect after the 8th day of September, 1853, and that on said last named day the said Toledo and Illinois Railway Company conveyed to the said Farmers' Loan and Trust Company, by way of mortgage, its line of railroad, being the said line of railway hereinbefore described, extending from the City of Toledo, Ohio, to the west line of Harrison Township, in the County of Paulding, in the said State, to secure certain mortgage bonds of the said Toledo and Illinois Railroad Company to the amount in all of nine hundred thousand dollars, at their par value, with certain interest thereon, and the said Farmers' Loan and Trust Company aver and claim that the said mortgage bonds were sold and disposed of by the said Toledo and Illinois Railroad Company, and are outstanding in the hands of divers *bona fide* holders thereof, and that there is due thereon a large amount of principal and interest, which averments and claims these cross-petitioners deny and dispute, for the reason that these cross-petitioners are not informed and do not know or believe the fact to be as alleged by said Farmers' Loan and Trust Company, and do not admit, but therefore deny, that said mortgage was duly executed or duly delivered, or that it secures the said amount or any amount, or that any sum of money is due or payable upon said bonds, but make the Farmers' Loan and Trust Company party hereto, and pray that it may be compelled to set up and fully discribe and disclose by answer to this cross-petition the full nature and extent of their said claim, and that evidence may be taken and that this Court shall upon final hearing ascertain the amount of said mortgage and provide for the security thereof, if there be any such mortgage, and of the bonds secured thereby, if there be any such bonds, in favor of the holders thereof, if there be any such holders, and of the said Farmers' Loan and Trust Company, and if it appear that said mortgage has been paid or its enforcement is barred by lapse of
120 time, as these cross-petitioners are informed and believe, and therefore aver to be the fact, then that this Court shall in final

judgment adjudge and decree that the mortgage aforesaid is not a prior and superior claim and encumbrance upon the premises aforesaid, to the lien of the said equipment bonds, so, as aforesaid, held by these cross-petitioners, by the said James Compton and by the plaintiff.

And these cross-petitioners further say that the said James F. Joy, of the State of Michigan, claims and alleges the fact to be that the said Toledo and Wabash Railway Company, on or about the 15th day of October, 1858, and prior to the issue of said equipment bonds, held as aforesaid by these cross-petitioners, by the said James Compton and the plaintiff, duly issued its mortgage bonds amounting at their par value to the sum of one million dollars ($1,000,000), and secured the same by mortgage of the said premises and railway property, equipment, rights and franchises last described, to Edwin D. Morgan, trustee, and said Edwin D. Morgan having departed this life, that the said James F. Joy has, under and in accordance with the said provisions of the said mortgage, been duly appointed and qualified as his successor in said trust, and that said bonds were sold and disposed of by the said Toledo and Wabash Railway Company, and are outstanding in the hands of divers *bona fide* holders thereof, and that there is due thereon a large amount of principal and interest, which averments and charges these cross-petitioners deny, for the reason that they are not informed and do not know the fact to be, as alleged by the said James F. Joy, and therefore do not admit but deny that the said mortgage was duly executed or duly delivered, or that it secures the said amount, or any amount, or that any sum of money is due or payable upon said bonds, or that James F. Joy has been duly appointed successor to the said Edwin D. Morgan, whose death they admit, but they make the said James F. Joy party defendant hereto, not only in his capacity as a member of the purchasing committee of the Wabash, St. Louis and Pacific Rail-
121 way Company as aforesaid, but also as the claimant and alleged trustee and pretended successor of said Morgan under said alleged mortgage, and pray that he may set up the nature and extent of the same, and that evidence may be taken and herein had, and that in the final judgment in this cause it may be adjudged that the said mortgage is not binding as an encumbrance upon the said property, and is not a lien or encumbrance thereon prior to the lien and encumbrance of the said equipment bonds.

And these cross-petitioners further state that although the said James Compton has recovered judgment for the sale of that part of the said Toledo and Wabash Railway within the State of Ohio as aforesaid, and of the franchises which were of the said Toledo and Wabash Railway Company and its equipment, with all the additions and accretions thereto, nevertheless that said James Compton's lien thereon and the right of any purchaser thereof under the said judgment is not and will not be either superior nor inferior to that of these cross-petitioners, or of the plaintiff, but is a lien and encumbrance of equal dignity and priority, the benefits of which must be shared in proportion to the amounts of said bonds by

them respectively held; that the said lien in favor of the said James Compton and of the plaintiff in this suit, and of these cross-petitioners, were created at the same time, by the same agreement of consolidation, and the same series or issue of equipment bonds, and are in all respects equal, and none of them is superior to any other, and that these cross-petitioners and the plaintiff desiring to prosecute their said rights and enforce their said claims in co-operation with the said James Compton and as sharers of an equal lien created at the same time in favor of them all, including said Compton, by the said agreement of consolidation and issue of equipment bonds, appeared in this court in the action of the said James Compton against the said Wabash, St. Louis and Pacific Railway Company and others, and moved this Court for leave to be
122 made defendants therein, and proved to the said Court their said several rights as hereinbefore and in the petition in this cause alleged, but the said Court, deeming the action of the said James Compton not to be representative in character, but only brought to assert his individual rights in the premises, overruled the said motions, and at various dates refused leave to the plaintiff, and afterwards to these cross-petitioners, to appear in the said action or to be made parties thereto, or to file answers and cross-petitions or to set up their said rights therein, and the said James Compton has successfully resisted all and every attempt of the plaintiff and of these cross-petitioners, and of each of them, although diligently made and pursued, to be made parties in said suit, and is not consenting thereto, but still resists the same.

Wherefore, and in order that complete justice may be done between all said parties, these defendants, by leave of the Court here first had and obtained, filed this cross-petition, and make defendants thereto the following persons and corporations, to wit:

The Adelbert College of the Western Reserve University, a corporation created by the laws of the State of Ohio; the Toledo, Wabash and Western Railway Company, a corporation existing in the States of Ohio, Indiana and Illinois; the Wabash Railway Company, a corporation existing in the States of Ohio, Indiana and Illinois; the Wabash, St. Louis and Pacific Railway Company, a corporation of the States of Ohio, Indiana, Illinois and Missouri; James R. Jesup, of the State of Connecticut, as surviving trustee; George I. Seney, of the State of New York, as trustee; Solon Humphreys, of the State of New Jersey, and Daniel A. Lindley, of the State of New York, as trustees; the Farmers' Loan and Trust Company, a corporation of the State of New York, as trustee; the Central Trust Company of New York, a corporation of the State of New York, and James Cheney, of the State of Indiana, as trustees; Thomas M. Hubbard and Ossian D. Ashley, of the State of New York, and Edgar T. Welles, of the State of Connecticut, and James F. Joy,
123 of the State of Michigan, as purchasing committee and trustees; the said James F. Joy, in his alleged capacity as trustee; and James Compton, of the District of Colum-

bia; that the said defendants, when served with process or otherwise duly notified by publication in accordance with law, may answer or demur to this cross-petition and may set up and assert by such pleading all and singular their rights, claims and interests in, or incumbrances upon, the said railway franchises and rights which were of the Toledo and Wabash Railway Company and are or lately were of the Wabash, St. Louis and Pacific Railway Company, extending from Toledo, Ohio, through the counties of Lucas, Fulton, Henry, Defiance and Paulding, to the State line of Indiana, at the western boundary line of the Township of Harrison, in the said State, and thence westward to the western boundary line of the State of Indiana, with all the accretions and additions thereto and the equipment thereof; that all liens and encumbrances thereon may be marshaled and their priority ascertained and adjudged; that it may be found and held that the lien of the said equipment bonds so as issued in the year 1862 to the total amount of six hundred thousand dollars ($600,000), at their par value with all the interest thereon accrued and matured, and that hereafter to mature at the rates aforesaid until and after judgment and until payment thereof, and the lien and encumbrances in favor of the holders of the same by virtue of the ownership thereof, including those of the plaintiff, these cross-petitioners and the said James Compton, are the first and prior lien and encumbrance upon all the said railway premises, franchises and property, and are superior in right to each and every claim of each and every defendant hereto; that a Receiver may be appointed to take possession thereof and operate and manage the same; if and after the said Receivers now in possession thereof may have surrendered, or otherwise been divested of possession, that the said premises, franchises and property in Ohio and Indiana be sold at judicial sale by the Sheriff of said county, or a Master Commissioner be appointed therefor
124 by this Court, as an entirety, by a title free and clear from all encumbrances whatsoever; that this cause may be referred to a Master Commissioner for the marshaling of liens, and to state and report each and every lien on any part of said premises junior and subordinate to the lien and encumbrance protecting the said equipment bonds as aforesaid; that the said Master Commissioner be directed to advertise or otherwise give suitable notice to all holders of equipment bonds of the issue aforesaid other than the plaintiff, the said James Compton and these cross-petitioners, and to all holders of claims protected and secured in priority of lien and encumbrance by the said agreement of consolidation first hereinabove described, to present the same to the said Master Commissioner and make due proof thereof; that the said equipment bonds and all other claims protected in said priority of lien and encumbrance by said agreement of consolidation executed in the year 1865, as aforesaid, be first paid out of the proceeds of such sale, and that just distribution be made of the residue of such proceeds, if any, according to the rights of the parties as they may appear

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and be established before said Master Commissioner, and this Court, and for all other and further relief to which in equity and good conscience these petitioners or any other party to this cause may upon final hearing prove to be entitled.

GEO. HOADLEY,
JOHN C. F. GARDINER, AND
LEE & BROWN,
Attorneys for William F. Redmond and Others, Defendants and Cross-Petitioners aforesaid.

125 STATE OF OHIO, *Lucas County:*

Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY AND OTHERS, Defendants.

STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, says that he is one of the cross-petitioners named in the foregoing answer and cross-petition, and that he believes the statements of the said answer and cross-petition to be true.

And affiant further states that the following named defendants to said answer and cross-petition are non-residents of the State of Ohio, and that service of summons cannot be made within said State upon any one of them, and that this case is one of those mentioned in Section 5048 of the Revised Statutes of Ohio, and that the said defendants reside out of the State of Ohio, at places of residence hereinafter stated as follows, viz: James R. Jesup, at Westport, in the State of Connecticut; Solon Humphreys, at Bergen Point, in the State of New Jersey; James Cheney, at Fort Wayne, in the State of Indiana; Edgar T. Welles, at Hartford, in the State of Connecticut; James F. Joy, at Detroit, in the State of Michigan; James Compton, at Washington, in the District of Columbia; George I. Seney, at Brooklyn, in the State of New
126 York; Daniel A. Lindley, The Farmers' Loan and Trust Company, the Central Trust Company of New York, Thomas H. Hubbard, and Ossian D. Ashley, each at New York City, in the State of New York.

And this affiant upon oath further states that this action is brought under the 5022d section of the Revised Statutes of Ohio, for the sale of real property, viz: of the railway which was in the years 1862 and 1865 owned by the Toledo and Wabash Railway Company, extending from Toledo, in the county of Lucas, through the counties of Lucas, Fulton, Henry, Defiance and Paulding, to the west boundary line of Harrison Township, in the county

of Paulding, in the State of Ohio, the same being the west boundary line of the State of Ohio, and the east boundary line of the State of Indiana, and thence westward, through the State of Indiana, to the western boundary thereof, under the lien and incumbrance created and declared in the said years, by the execution, sale and delivery of bonds, called equipment bonds, of the said Toledo and Wabash Railway Company, to the amount in all of six hundred thousand dollars ($600,000), part of which are held and owned by this affiant and his co-defendants who file the said answer and cross-petition, viz: Said bonds of said railway company of the par value of one hundred and ninety thousand dollars, each bond bearing interest at the annual rate of seven per cent., evidenced by coupons or interest warrants, payable semi-annually on the first days of May and November of each year until the maturity of the principal of said bonds, which was on the first day of May, in the year 1883, of which coupons or interest warrants there are now due or owing to said cross-petitioners and held by them all of said coupons or interest warrants, beginning with the coupon which matured May 1, 1895; also by articles of consolidation duly entered into in the year 1865, between the said Toledo and Wabash Railway Company, the Great Western Railway Company of 1859, the Quincy and Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company, the three last-named
127 being corporations organized under the laws of the State of Illinois, whereby said consolidated company agreed to protect said bonds, and established and created a first and preferable lien upon all its said railway, equipment, rights and franchises, and all additions and accretions thereto, for the security of the same, and the interest thereon.

And further affiant saith not.

WILLIAM F. REDMOND.

Subscribed in my presence, and sworn to before me this 2d day of January, 1889.

A. J. McCORMACK,

[SEAL.] *Notary Public, City and County of New York.*

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Clk.

STATE OF OHIO, *Lucas County:*

Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY AND OTHERS, Defendants.

Answer and Cross-Petition of Charles G. Peters.

Answer of Charles G. Peters to the petition and supplemental and amended petition of the plaintiff and to the cross-petition of William F. Redmond and others heretofore filed in this case.

Now comes Charles G. Peters and by leave of the Court first had and obtained appears in the above-entitled cause and files herein this his answer and cross-petition, and by way of such answer says that he admits all and singular the averments of the petition and supplemental and amended petition filed in this cause not hereinafter denied or modified, except any statement thereof relating to the validity and amount of liens on the railway property described in the said petition and therein stated or admitted to be prior in date or superior to the lien of the equipment bonds issued by the Toledo and Wabash Railway Company, described in the said petition, and supplemental and amended petition; and whereof the said Adelbert College is therein shown to be the holder of two bonds, and this defendant, as hereinafter stated, is the holder of twenty bonds and all averments of priority or superiority of lien of any mortgage or other encumbrance to the lien of said equipment bonds described in said petition and in this answer are denied, and he admits all the averments and statements in the answer and cross-petition of the said William F. Redmond and others.

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And by way of cross-petition this defendant says that he is the owner and holder of equipment bonds made by the Toledo and Wabash Railway Company of the issue and class described in the said petition, supplemental and amended petition and cross-petition to the amount at the par value thereof of twenty thousand dollars, and to each of which there are attached all the coupons thereof at the annual rate of interest of seven per cent. per annum, payable semi-annually and evidenced by semi-annual coupons beginning with coupon which matures on the first day of May, 1875, and thereafter accruing and maturing semi-annually until the maturity of said bonds on May 1, 1883, being in all seventeen semi-annual installments of interest of three and one-half per cent. each; and he avers that all of said bonds to the amount aforesaid of twenty thousand dollars at par value and the coupons thereon, described as aforesaid, are severally due to him with interest thereon from the date of the maturity of the said bonds at the rate of seven per cent. per annum, and with interest on the coupons aforesaid, from the date of the several maturities thereof, at the rate of six

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per cent. per annum, until the present time, and that they will continue to bear interest as aforesaid until judgment, as hereinafter prayed for, and that upon the principal of said bonds he is entitled to judgment, at the rate of seven per cent. per annum until paid, and that upon the interest and accumulated interest, as aforesaid, he is entitled to judgment to bear interest at the rate of six per cent. per annum until paid.

And further by way of cross-petition, he avails himself of the invitation of the said cross-petition of said William F. Redmond and others to appear and unite in the prosecution of their petition and to contribute to the expenses thereof, and prays that he may be held and treated as associated cross-petitioner with the said William F. Redmond and others cross-petitioners, and he adopts each and every averment of the cross-petition filed by the said William F. Redmond and others as his own, and asks that said averments and each of them may be treated as part of this his cross-petition, without the repetition thereof, but with the same full force and effect as if they and each of them were fully inserted herein, repeated and again stated at length, and he prays the same relief prayed for by the said William F. Redmond and his associate cross-petitioners, and that the relief which may be granted to them in this cause may be extended so as to embrace him to the extent of his said bonds and coupons, and for such other and further relief as in equity and good conscience he may be entitled to.

GEO. HOADLY,
J. C. F. GARDNER,
Attorney- for Charles C. Peters,
Defendant and Cross-Petitioner.

130 STATE OF NEW YORK, *City and County of New York, ss:*

Charles G. Peters, being duly sworn, says that he is the defendant and cross-petitioner named in the foregoing answer and cross-petition, and that he believes the statement in said answer and cross-petition to be true.

CHARLES G. PETERS.

Subscribed in my presence and sworn to before me this — day of April, 1889.

PERCY L. CLOCK,
Notary Public (31), *N. Y. Co.*

[SEAL.]

[Endorsed:] Filed in C. C., Jan. 14, '95, L. E. Clark, Cl'k.

STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY AND OTHERS, Defendants.

Now come William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon,
131 Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, James A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co., Eugene E. Bishop, Frederick Hubbard, William G. Creamer, George B. Mead, George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix, of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of the State of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira and Charles G. Peters, heretofore made defendants to this cause, and who have filed their answers and cross-petitions herein, and by way of amended answer and cross-petition reaffirm each and every averment of their original answer and cross-petition, and ask that the same may be taken as a part hereof, by this reference, without being set forth and repeated at large.

And, by way of further cross-petition, these petitioners, not only in their own behalf, but for and on behalf of all holders of equipment bonds issued by the Toledo and Wabash Railway Company of the issue and class described in the said petition, who may appear and unite in the prosecution of this cross-petition and contribute to the expenses thereof, say that since the filing of the original answer and cross-petition by William F. Redmond and his associated cross-petitioners in this cause, the railway property and franchises in said answer and cross-petition described have been sold under the authority of the Circuit Courts of the United States for the Northern District of Ohio and the District of Indiana, in a cause to which neither the plaintiff nor any of these cross-petitioners were parties to the same purchasing committee described in the said original answer and cross-petition of William F. Redmond and others, and the said sale having been confirmed by decrees of said Courts, the said property was duly conveyed, by Masters or Commissioners in Chancery appointed by said Courts, under the authority of said
132 Courts, to the said Purchasing Committee, and by them to a corporation duly organized under the laws of the States of Ohio and Indiana, under the title of the Wabash Railroad Company, which company has taken and is now in possession of the said rail-

road property, premises, equipment and franchises described in the said original answers and cross-petitions of these cross-petitioners, beginning in the City of Toledo and running through the Counties of Lucas, Fulton, Henry, Defiance and Paulding, in the State of Ohio, to the State line of Indiana at the western boundary line of the Township of Harrison, in the County of Paulding, and running thence in the State of Indiana westward to the boundary line of the State of Illinois.

And these cross-petitioners further say that, by proceedings had and taken in the said cause wherein said decrees were rendered, and in pursuance to an execution of the said decrees, all the said mortgage bonds in the said original answer and cross-petition described and secured respectively by the mortgages in the said cross-petition described, namely, the mortgage made by the Toledo and Wabash Railway Company to the Farmers' Loan and Trust Company, of New York, and the mortgage made by the same Toledo and Wabash Railway Company to Edwin D. Morgan, trustee, and of which mortgage James F. Joy afterwards became trustee, have been paid and the said mortgages fully satisfied, and the same are no longer a lien or incumbrance upon any part of said property.

And these cross-petitioners further aver that the lien of the said equipment bonds held by the plaintiff, by the said Compton and by themselves, and the lien of the other equipment bonds of the same issue, in behalf of the holders of which, as well as of these cross-petitioners, this answer and cross-petition is filed, is prior and superior to any mortgage, lien or incumbrance upon said property, and especially is a lien prior and superior to the title of the said Wabash Railroad Company now in possession of said railway property, premises, equipment and franchises as aforesaid.

133 Wherefore, these cross-petitioners pray as against the Wabash Railroad Company and all other defendants heretofore made hereto, as their said original answers and cross-petitions they have heretofore prayed, and without repeating said prayer but reaffirming it, and asking that it may be taken as part of this their amended cross-petition, they also pray that the lien of the equipment bonds owned by them, described in their original answers and cross-petitions, may be declared to be the first and best lien upon the said railway property, premises, equipment and franchises, superior to all other liens and titles whatsoever, and that in making sale of the said premises, property and franchises, as prayed in the original answers and cross-petitions, all right, title and interest acquired by the Wabash Railroad Company may be also sold for the purpose of producing the amount of money necessary to pay and discharge the said equipment bonds held by the plaintiff, by the said Compton and by these cross-petitioners; and for such other and further relief as in equity and good conscience these cross-petitioners may, upon final hearing of this cause, prove to be entitled to.

GEO. HOADLY,
JOHN C. F. GARDNER,
Attorneys for Cross-Petitioners.

STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, says that he is one of the cross-petitioners above named; that he has heard read
134 the foregoing amended answer and cross-petition, and that he believes the statements thereof to be true; and further says not.

WILLIAM F. REDMOND.

Subscribed in my presence and sworn to before me this 8th day of October, 1889.

[SEAL.] A. J. McCORMACK,
Notary Public (10), *N. Y. County.*

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, clk.

STATE OF OHIO, *Lucas County:*

Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. AND OTHERS,
Defendants.

Answer and Cross-Petition of Henry F. James.

Answer of Henry F. James to the petition and supplemental and amended petition of the plaintiff and to the cross-petition of William P. Redmond and others heretofore filed in this cause.

Now comes Henry F. James, and, by leave of the Court first had and obtained, appears in the above-entitled cause and files herein this his answer and cross-petition, and by way of such answer says that he admits all and singular the averments of the petition and supplemental and amended petition filed in this cause not herein-
135 after denied or modified, except any statement thereof relating to the validity and amount of liens on the railway property described in the said petition and therein stated or admitted to be prior in date or superior to the lien of the equipment bonds issued by the Toledo and Wabash Railway Company described in the said petition and supplemental and amended petition, and whereof the said Adelbert College is therein shown to be the holder of two bonds, and this defendant, as hereinafter stated, is the holder of ten bonds and all averments of priority or superiority of lien of any mortgage or other incumbrance to the lien of said equipment bonds described in said petition and in this answer are denied, and he admits all the averments and state-

ments in the answers and cross-petitions of the said William F. Redmond, Charles G. Peters and others.

And by way of cross-petition this defendant says that he is the owner and holder of equipment bonds made by the Toledo and Wabash Railway Company of the issue and class described in the said petition, supplemental and amended petition and cross-petition to the amount of the par value thereof of eight thousand dollars, and to each of which there are attached all the coupons thereof at the annual rate of interest of seven per cent. per annum, payable semi-annually and evidenced by semi-annual coupons, beginning with coupon which matures the first day of May, 1875, and thereafter accruing and maturing semi-annually until the maturity of said bonds on May 1, 1883, being in all seventeen semi-annual installments of interest of three and one-half per cent. each; and he avers that all of said bonds to the amount aforesaid of eight thousand dollars at par value, and the coupons thereon, described as aforesaid, are severally due to him with interest thereon from the date of the maturity of the said bonds at the rate of seven per cent. per annum, and with interest on the coupons aforesaid from the date of the several maturities thereof at the rate of six per cent. per annum until the present time, and that they will continue to bear interest as aforesaid until judgment as hereinafter
136 prayed for, and that upon the principal of said bonds he is entitled to judgment at the rate of seven per cent. per annum until paid, and that upon the interest and accumulated interest as aforesaid he is entitled to judgment to bear interest at the rate of six per cent. per annum, until paid.

And, further, by way of cross-petition, avails himself of the invitation of the said cross-petition of said William F. Redmond and others to appear and unite in the prosecution of their petition and to contribute to the expense thereof, and prays that he may be held and treated as associated cross-petitioner with the said William F. Redmond and others, and Charles G. Peters, cross-petitioners, and he adopts each and every averment of the cross-petition filed by the said William F. Redmond and others and Charles G. Peters, as his own, and asks that said averments, and each of them, may be treated as part of this cross-petition without the repetition thereof, but with the same full force and effect as if they, and each of them, were fully inserted herein, repeated and again stated at length; and he prays the same relief prayed for by the said William F. Redmond and his associates, cross-petitioners, and Charles G. Peters, and that the relief which may be granted to them in this cause may be extended so as to embrace him to the extent of his said bonds and coupons, and for such other and further relief as in equity and good conscience he may be entitled to.

GEORGE HOADLY AND
JOHN C. F. GARDNER,
Attorneys for Henry F. James,
Defendant and Cross-Petitioner.

CITY AND COUNTY OF NEW YORK, *ss:*

Edward C. James, being duly sworn, says that he is the attorney for the defendant and cross-petitioner, Henry F. James, named in the foregoing answer and cross-petition, and that he believes the statements in said answer and cross-petition to be true.

137 That the reason why said answer and cross-petition is not verified by the said Henry F. James is that said Henry F. James is absent from the State of Ohio and from the County of New York; that this deponent is the agent and attorney of said Henry F. James, is in possession of the bonds mentioned in said answer and cross-petition, and is familiar with the matters stated therein.

EDWARD C. JAMES.

Sworn to before me this 28th day of April, 1890.

[SEAL.] JOHN G. DAVIS,
Notary Public, N. Y. Co.

[Endorsed:] Filed in C. C., Jan. 14, '95. L. E. Clark, clk.

In the Court of Common Pleas in and for Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILROAD CO. ET AL.,
Defendants.

Motion for Leave to File Answer and Cross-petition by Ambrose D. Henry et al., and also by Wm. H. Pierce.

Ambrose D. Henry, Howard H. Henry and Frank L. Henry, executors of the last will and testament of Maria C. Henry, deceased, and Wm. H. Pierce, now come and move the Court to grant them leave to file answer and cross-petition respectively in the above-entitled cause for the reason that they and each of them

138 are the owners and holders of certain of the equipment bonds referred to in petition of plaintiff.

GEORGE HOADLY,
JNO. C. F. GARDNER, AND
R. R. KINKADE,
Attorneys for Motion.

[Endorsed:] Filed in C. C. Jan 14-95. L. E. Clark, Clk.

STATE OF OHIO, *Lucas county:*

Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. AND OTHERS,
Defendants.

Answer and Cross-petition of Ambrose D. Henry and Others.

Answer of Ambrose D. Henry, Howard H. Henry and Frank L. Henry, executors of the last will and testament of Maria C. Henry, deceased, to the petition and supplemental and amended petition of the plaintiff and to the cross-petitions of Wm. F. Redmond and others heretofore filed in this Court.

Now comes Ambrose D. Henry, Howard H. Henry and Frank L. Henry, executors of the last will and testament of Maria C. Henry, deceased, and by leave of the Court first had and obtained appear in the above-entitled cause and file herein this their answer and cross-petition, and by way of such answer say that they admit all
and singular the averments of the petition and supplemental
139 and amended petition filed in this case not hereinafter denied or modified, except any statement thereof relating to the validity and amount of liens on the railway property described in the said petition and therein stated or admitted to be prior in date or superior to the lien of the equipment bonds issued by the Toledo and Wabash Railway Company described in the said petition and whereof the said Adelbert College is therein shown to be the holder of two bonds, and these defendants as hereinafter stated are the holders of twenty-five bonds, and all averments of priority or superiority of lien of any mortgage or other incumbrance to the lien of said equipment bonds described in said petition and in this answer are denied, and they admit all the averments and statements in the answers and cross-petitions of the said Wm. F. Redmond, Charles G. Peters and others.

And by way of cross-petition these defendants say:

That heretofore and on the 17th day of April, 1891, Maria C. Henry died leaving a will by which these cross-petitioners were appointed the executors thereof. That on the 11th day of May, 1891, said will was duly proved and admitted to probate in the office of the Surrogate of the County of New York in the State of New York, and letters testamentary thereupon were on the 12th dao of May, 1891, duly issued and granted to these cross-petitioners as executors, by the Surrogate of said county, and these cross-petitioners thereupon duly qualified as such executors and entered upon the discharge of the duties of their said office.

That among the assets of the estate of said Maria C. Henry, which

came into the hands of these cross-petitioners as executors as aforesaid, and which are now held by them as such executors were equipment bonds of the Toledo and Wabash Railway Company of the issue and class described in the said petition, supplemental and amended petition and cross-petitions to the amount at the par value thereof of twenty-five thousand dollars and to each of which there are attached all the coupons thereof at the annual rate of interest
140 of seven per cent. per annum payable semi-annually and evidenced by semi-annual coupons beginning with coupons which matures on the first day of May, 1875, and thereafter accruing and maturing semi-annually until the maturity of said bonds on May 1st, 1883, being in all seventeen semi-annual installments of interest of three and one-half per cent. each, and they aver that all of said bonds to the amount aforesaid of twenty-five thousand dollars, at par value, and the coupons thereon, described as aforesaid, are severally due to them with interest thereon from the date of the maturity of the said bonds at the rate of seven per cent. per annum until the present time, and with interest on the coupons aforesaid from the date of the several maturities thereof at the rate of six per cent. per annum until the preent time, and that they will continue to bear interest, as aforesaid, until judgment as hereinafter prayed for, and that upon the principal of said bonds they are entitled to judgment at the rate of seven per cent. per annum until paid, and that upon the interest and accumulated interest, as aforesaid, they are entitled to judgment to bear interest at the rate of six per cent. per annum until paid.

And, further, by way of cross-petition, these cross-petitioners avail themselves of the invitation of the said cross-petition of said Wm. F. Redmond and others, to appear and unite in the prosecution of their petition and to contribute to the expense thereof, and pray that they may be held and treated as associated cross-petitioners with the said Wm. F. Redmond, Charles G. Peters and other cross-petitioners, and they adopt each and every averment of the cross-petition filed by the said Wm. F. Redmond, Charles G. Peters and others, as their own, and ask that said averments, and each of them, may be treated as part of this their cross-petition without the repetition thereof, but with the same full force and effect as if they and each of them were fully inserted herein, repeated and again stated at length, and they pray the same relief prayed for by the said Wm. F. Redmond, and his associates cross-petitioners, and Charles G. Peters and
141 others, and that the relief which may be granted to them in this cause may be extended so as to embrace these cross-petitioners to the extent of the said bonds and coupons held by them as aforesaid, and for such other and further relief as in equity and good conscience they may be entitled to.

GEO. HOADLEY,
JOHN C. F. GARDNER AND
R. R. KINKADE,
Attorneys for Ambrose D. Henry and Others,
Defendants and Cross-Petitioners.

STATE OF NEW YORK, *City and County of New York, ss:*

Ambrose D. Henry, being duly sworn, says that he is one of the cross-petitioners named in the foregoing answer and cross-petition, and that he believes the statements of the said answer and cross-petition to be true.

AMBROSE D. HENRY.

Subscribed in my presence and sworn to before me this 16th day of October, 1891.

MICHAEL W. NOLAN,
Notary Public, Kings Co.

[SEAL.]

Cert. filed in N. Y. Co.

[Endorsed:] Filed in C. C., Jan., 14/95. L. E. Clark, Clerk.

142 STATE OF OHIO, *Lucas County:*

Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. and Others,
Defendants.

Answer and Cross-petition of Wilson H. Pierce.

Answer of Wilson H. Pierce to the petition and supplement- and amended petition of the plaintiff and to the cross-petition of William P. Redmond and others heretofore filed in this cause.

Now comes Wilson H. Pierce, and, by leave of the Court first had and obtained, appears in the above-entitled cause and files herein this his answer and cross-petition, and by way of such answer says that he admits all and singular the averments of the petition and supplemental and amended petition filed in this cause not hereinafter denied or modified, except any statement thereof relating to the validity and amount of liens on the railway property decribed in the said petition and therein stated or admitted to be prior in date or superior to the lien of the equipment bonds issued by the Toledo and Wabash Railway Company described in the said petition and supplemental and amended petition, whereof the said Adelbert College is therein shown to be the holder of two bonds, and this defendant, as hereinafter stated, is the holder of three bonds, and all averments of priority or superiority of lien of any mortgage or other incumbrance to the lien of said equipment bonds described in said petition and in this answer are denied, and he admits all the averments and statements in the answers and cross-petitions of
143 the said William F. Redmond, Charles G. Peters and others.

And by way of cross-petition this defendant says that he is

the owner and holder of equipment bonds made by the Toledo and Wabash Railway Company of the issue and class described in the said petition, supplemental and amended petition and cross-petition, to the amount at the par value thereof, of fifteen hundred dollars, and to each of which there are attached all the coupons thereof at the annual rate of interest of seven per cent. per annum, payable semi-annually and evidenced by semi-annual coupons beginning with coupon which matures of the first day of May, 1875, thereafter accruing and maturing semi-annually until the maturity of said bonds on May 1, 1883, being in all seventeen semi-annual installments of interest of three and one-half per cent. each, and he avers that all of said bonds to the amount aforesaid of fifteen hundred dollars at par value and the coupons thereon, described as aforesaid, are severally due to him with interest thereon from the date of the maturity of the said bonds at the rate of seven per cent. per annum, and with interest on the aforesaid from the date of the several maturities thereof at the rate of six per cent. per annum until the present time, and that they will continue to bear interest as aforesaid until judgment as hereinafter prayed for, and that upon the principal of said bonds he is entitled to judgment at the rate of seven per cent. per annum until paid, and that upon the interest and accumulated interest as aforesaid he is entitled to judgment to bear interest at the rate of six per cent. per annum until paid.

And further, by way of cross-petition, avails himself of the invitation of the said cross-petition of said William F. Redmond and others to appear and unite in the prosecution of their petition, and to contribute to the expense thereof, and prays that he may be held and treated as associated cross-petitioner with the said William F. Redmond and others, and Charles G. Peters, cross-petitioners; and he adopts each and every averment of the cross-petition filed
144 by the said William F. Redmond and others, and Charles G. Peters as his own, and asks that said averments and each of them may be treated as part of this his cross-petition without the repetition thereof, but with the same full force and effect as if they and each of them were fully inserted herein, repeated and again stated at length, and he prays the same relief prayed for by the said William F. Redmond and his associates cross-petitioners, and Charles G. Peters, and that the relief which may be granted to them in this cause may be extended so as to embrace him to the extent of his said bonds and coupons, and for such other and further relief as in equity and good conscience he may be entitled to.

GEO. HOADLY,
JOHN C. F. GARDNER AND
R. R. KINKADE,
Attorneys for Wilson H. Pierce, Defendant and Cross-Petitioner.

CITY AND COUNTY OF NEW YORK, *ss*:

John C. F. Gardner, being duly sworn, says that he is the attorney for the defendant and cross-petitioner Wilson H. Pierce

named in the foregoing answer and cross-petition, and that he believes the statements in said answer and cross-petition to be true.

That the reason why said answer and cross-petition is not verified by the said Wilson H. Pierce is that said Wilson H. Pierce is absent from the State of Ohio and from the County of New York; that this deponent is the agent and attorney of said Wilson H. Pierce, and is familiar with the matter stated therein.

JOHN C. F. GARDNER.

Sworn to before me this 20th day of October, 1891.

APPLETON L. CLARK,
Notary Public, New York County, N. Y.

[Endorsed:] Filed in C. C., Jan. 14/95. L. E. Clark, Cl'k.

145 STATE OF OHIO, *Lucas County:*

Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

Answer of Louis G. Hampton to the petition and supplemental and amended petition of the plaintiff and to the cross-petition of William F. Redmond and others heretofore filed in this cause.

Now comes Louis G. Hampton, and, by leave of this Court first had and obtained, appears in the above-entitled cause and files herein this his answer and cross-petition, and by way of such answer says that he admits all of the averments of the petition and supplemental and amended petition filed in this cause not hereinafter denied or modified, except any statement thereof relating to the validity and amount of liens on the railway property described in said petition and therein stated or admitted to be prior in date or superior to the lien of the equipment bonds issued by the Toledo and Wabash Railway Company, described in the said petition and supplemental and amended petition, and whereof the said Adelbert College is therein shown to be the holder of two bonds, and this defendant, as hereinafter stated, is the holder of two bonds, and all averments of priority or superiority of lien of any mortgage or other encumbrance to the lien of said equipment bonds described in said petition and in this answer are denied, and he admits all the
146 averments and statements in the answers and cross-petitions of the said William F. Redmond and others; and by way of cross-petition this defendant says that he is the owner and holder of two equipment bonds made by the Toledo and Wabash Railway Company of the issue and class described in said petition, supplemental and amended petition and cross-petition to the amount at

the par value thereof of two thousand dollars, and to each of which there are attached all the coupons thereof at the annual rate of interest of seven per centum per annum, payable semi-annually and evinced by semi-annual coupons, beginning with the coupon which matures on the first day of May, 1875, and thereafter accruing and maturing semi-annually until the maturity of said bonds, on May 1, 1883, being in all seventeen semi-annual installments of interest of three and one-half per cent. each, and he avers that all of said bonds to the amount of aforesaid two thousand dollars at par value and the coupons thereof described as aforesaid are severally due to him, with interest thereon from the date of maturity of the said bonds at the rate of seven per cent. per annum, and with interest on the coupons aforesaid from the date of the several maturities thereof at the rate of six per cent. per annum until the present time, and that they will continue to bear interest as aforesaid until judgment as hereinafter prayed for, and that upon the principal of said bonds he is entitled to judgment at the rate of seven per cent. per annum until paid, and that upon the interest and accumulated interest as aforesaid he is entitled to judgment to bear interest at the rate of six per cent. per annum until paid.

And further, by way of cross-petition he avails himself of the invitation of the said cross-petition of said William F. Redmond and others to appear and unite in the prosecution of their petition and to contribute to the expenses thereof, and prays that he may be held and treated as associated cross-petitioner with the said William F. Redmond and others, cross-petitioners, and he adopts each and every averment of the cross-petitions filed by the said William F.
147 Redmond and others as his own, and asks that said averments, and each of them, may be treated as part of this, his cross-petition, without the repetition thereof, but with the same full force and effect as if they and each of them were fully inserted herein, repeated and again stated at length, and he prays the same relief prayed for by the said William F. Redmond and his associate cross-petitioners, and that the relief which may be granted to them in this cause may be extended so as to embrace him to the extent of his said bonds and coupons, and for such other and further relief as in equity and good conscience he may be entitled to.

GEO. HOADLY,
JOHN C. F. GARDNER,
Attorneys for Louis G. Hampton, Defendant and Cross-Petitioner.

STATE OF NEW YORK, *City and County of New York, ss:*

Louis G. Hampton, being duly sworn, says that he is the defendant and cross-petitioner named in the foregoing answer and cross-petition, and he believes the statements in said answer and cross-petition to be true.

L. G. HAMPTON.

Subscribed in my presence and sworn to before me this 21st day of February, 1893.

GEORGE W. VULTEE,
Notary Public (54), *City and Co. of N. Y.*

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, cl'k.

148 STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

On Cross-Petition of William F. Redmond and Others.

To the Clerk of the Court of Common Pleas, Lucas County, Ohio:

You will please issue a summons upon the cross-petition of William F. Redmond and others (for all full names of cross-petitioners see cross-petition on file in your office), directed to the Sheriff of Hamilton County, Ohio, commanding him to summon the Toledo, Wabash and Western Railway Company as a defendant to said cross-petition as required by law.

Toledo, April 17, 1889.

GEO. HOADLY,
JOHN C. F. GARDNER,
Attorneys for Cross-Petitioners.

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Cl'k.

149 THE STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of Lucas County:

You are commanded to notify The Wabash, St. Louis and Pacific Railway Company, The Toledo, Wabash and Western Railway Company and The Wabash Railway Company, that they have been sued by William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferry, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop. Fredrick Hubbard, William G. Croamer, George B. Mead; George B. Mead and Walter M. Aikinson, executors, and

Eliza Mead, executrix, of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of the State of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveria, on cross-petition in the case of The Adelbert College of the Western Reserve University against The Wabash, St. Louis and Pacific Railway Company *et al.* in the Court of Common Pleas of Lucas County, and that, unless they answer by the second day of February, A. D. 1889, the cross-petition of the said above-named defendants against them filed in the Clerk's Office of said court, such cross-petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the fourteenth day of January, A. D. 1889.

Witness, J. P. Bronson, Clerk of said Court, and the seal thereof, at Toledo, this fifth day of January, A. D. 1889.

[SEAL.]

J. P. BRONSON, *Clerk*,
By A. HADNETT,
Deputy Clerk.

150 [Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Cl'k.

THE STATE OF OHIO, *Lucas County, ss:*

Received this writ on the 5th day of January, 1889, and the same is hereby returned without service.

JOHN S. HARBECK, JR., *Sheriff*,
By E. HARBECK, *Deputy*.

Sheriff's Fees.

Service	$0 60
Cop-	0 96
Return	1 56

THE STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of Hamilton County:

You are commanded to notify The Toledo, Wabash and Western Railway Company that it has been sued by William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners udder the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners
151 under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William G. Creamer, George B. Mead, George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a

corporation of the State of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveira, on cross-petition of the case of the Adelbert College of the Western Reserve University against the Wabash, St. Louis and Pacific Railway Company and others in the Court of Common Pleas of Lucas County, and that unless it answer by the 18th day of May, A. D. 1889, the cross-petition of the said above-named defendants against it, filed in the Clerk's Office of said Court, such cross-petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 29th day of April, A. D. 1889.

Witness, J. P. Bronson, Clerk of said Court, and the seal thereof, at Toledo, this 17th day of April, A. D. 1889.

[SEAL.]

J. P. BRONSON, *Clerk,*
By A. HODNETT,
Deputy Clerk.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Clk.

THE STATE OF OHIO, *Hamilton County, ss:*

Received this writ April 19th, 1889, and pursuant to its command I summoned on the 22d day of April, 1889, the within named defendant The Toledo, Wabash and Western Railway Company, a corporation, by delivering a true copy of this writ, with
152 all the endorsements thereon, personally to Jacob D. Cox, last acting president of said company.

Sheriff's Fees.

Service and Return	40
Copy	40
Mileage	20
Docket & Postage	12
	$1.12

Paid by A. W. Coldsmith, Atty.

LEO SCHOTT, *Sheriff,*
By GEORGE W. DRAPER, *Deputy.*

THE STATE OF OHIO, *Lucas County, ss:*

To George W. Vultee, of New York City:

You are commanded to notify The Wabash Railway Company that it has been sued by William P. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb,

Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William G. Creamer, George B. Mead, George B. Mead and Walter M. Aikenson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation
153 of the State of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveira, on cross-petition in the case of The Adelbert College of the Western Reserve University against The Wabash, St. Louis and Pacific Railway Company and others in the Court of Common Pleas of Lucas County, and that, unless it answer by the 1st day of June, A. D. 1889, the cross-petition of the said above-named defendants against it, filed in the Clerk's Office of said Court, such cross-petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 13th day of May, A. D. 1889.

Witness J. P. Bronson, Clerk of said Court, and the seal thereof, at Toledo this 29th day of April, A. D. 1889.

[SEAL.]

J. P. BRONSON, *Clerk,*
By N. HADNETT,
Deputy Clerk.

[Endorsed:] Filed in C. C., Jan. 14, '95. L. E. Clark, Clk.

THE STATE OF OHIO, *Lucas County, ss:*

Received this writ May 2d, 1889, and pursuant to its command I summoned on the seventh day of May, 1889, the within-named defendant The Wabash Railway Company by delivering a true copy of the within summons, together with all endorsements thereon to Cyrus W. Field, the last known president of said The Wabash Railway Company, in person.

GEORGE W. VULTEE.

Sworn to before me and subscribed in my presence this 7th day of May, A. D. 1889.

[SEAL.]

MARK J. KATZ,
Notary Public (73), *of New York Co.*

154 THE STATE OF OHIO, *Lucas County, ss:*

To Thomas W. Wheeler, of Toledo, Ohio:

You are commanded to notify The Wabash, St. Louis and Pacific Railway Company that it has been sued by William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simons, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W.

Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co., Eugene Bishop, Frederick Hubbard, William G. Creamer, George B. Mead, George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John A. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of the State of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveira, on cross-petition in the case of The Adelbert College of the Western Reserve University against the Wabash, St. Louis and Pacific Railway Company and others in the Court of Common Pleas of Lucas County, and that unless it answer by the 1st day of June, A. D. 1889, the cross-petition of said above-named defendants against it filed in the Clerk's office of said Court, such cross-petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 13th day of May, A. D. 1889.

Witness, J. P. Bronson, Clerk of said Court, and the seal thereof, at Toledo, this 29th day of April, A. D. 1889.

[SEAL.]

J. P. BRONSON, *Clerk,*
By N. HADNETT,
Deputy Clerk.

155 [Endorsed:] Filed in C. C., Jan. 14, '95. L. E. Clark, Clk.

THE STATE OF OHIO, *Lucas County:*

Received this writ May 1st, 1889, and pursuant to its command, I summoned on the second day of May, 1889, the within-named defendant The Wabash, St. Louis and Pacific Railway Company, by delivering on the second day of May, A. D. 1889, to James F. Joy, at Detroit, Michigan, and the last president of said The Wabash, St. Louis and Pacific Railway Company a full, true and certified copy of the within summons, together with all endorsements thereon.

T. W. WHEELER.

Sworn to before me and subscribed in my presence this 3d day of May, A. D. 1889.

JAMES M. BROWN,
Notary Public, Lucas County, Ohio.

Sheriff's Fees.

Service	30
Copy	24
Mileage	10 08
Return	15
	$10 77

Paid by R. F. Redmond *et al.*

156 Court of Common Pleas of Lucas County, Ohio.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

Affidavit.

STATE OF OHIO, *Lucas County, ss:*

John C. Lee, being duly sworn, says that he is one of the attorneys of plaintiff in this action; that service of summons cannot be made within this State on the defendant James Compton, who is a resident of Washington City, in the District of Columbia, and that the cause is one of those mentioned in Section 5048 of the Revised Statutes of Ohio.

JOHN C. LEE.

Sworn to before me and subscribed in my presence this 21st day of January, A. D. 1889.

T. W. WHEELER,
Notary Public.

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Clk.

157 Court of Common Pleas of Lucas County, Ohio.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILROAD CO., THE WABASH RAILWAY CO., THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO., JAMES R. JESSUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, Trustee; JOHN HUMPHREYS and DAVID A. LINDLEY, as Trustees, Defendants.

Supplemental and Amended Petition.

Copy of Supplemental and Amended Petition.

(Printed *ante*, p. 100.)

STATE OF OHIO, *Lucas County, ss:*

I, John P. Bronson, Clerk of the Court of Common Pleas of Lucas County, Ohio, do hereby certify that the foregoing is a true, full copy of the supplementary and amended petition filed in said cause on the 22d day of December, A. D. 1888.

Witness my hand and seal of said court hereto affixed this —— of January, A. D. 1889.

[SEAL.]

J. P. BRONSON,
Clerk of Common Pleas Court of Lucas County.

158 DISTRICT OF COLUMBIA, *Washington City, ss:*

I, Joseph L. Atkins, being duly sworn, do depose and say that on the 28th day of January, A. D. 1889, I delivered personally to James Compton, of Washington City, D. C., a true and full copy of the foregoing petition, and further say not.

JOSEPH L. ATKINS.

Sworn to before me and subscribed in my presence this 29th day of January, A. D. 1889.

Witness my hand and official seal the day and year aforesaid.

[SEAL.] THOS. S. HOPKINS,
Notary Public, District of Columbia.

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Clk.

THE STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of Lucas County:

You are commanded to notify James Compton that he has been sued by the Adelbert College of Western Reserve University in the Court of Common Pleas of Lucas County, and that unless he answer by the 23d day of February, 1889, the original, supplemental and amended petitions of said plaintiff against him, filed in the Clerk's Office of the said Court, such original, supplemental and amended petitions will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 4th day of February, A. D. 1889.

159 Witness, J. P. Bronson, Clerk of said Court, and the seal thereof, at Toledo, this 22d day of January, A. D. 1889.

[SEAL.] J. P. BRONSON, *Clerk,*
By N. HADNETT,
Deputy Clerk.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Clk.

DISTRICT OF COLUMBIA, *Washington City, ss:*

I, Joseph L. Atkins, being duly sworn, do depose and say that on the 28th day of January, A. D. 1889, I delivered personally to the within-named James Compton a full and true copy of the within and foregoing summons, together with the endorsements thereon.

JOSEPH L. ATKINS.

Sworn to before me and subscribed in my presence this 29th day of January, A. D. 1889.

Witness my hand and official seal the day and year aforesaid.

[SEAL.] THOS. S. HOPKINS,
Notary Public, Dist. Col.

160 In the Court of Common Pleas, Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others.

Pending on Cross-petition of William F. Redmond and Others.

Now comes Charles G. Peters and moves the Court for leave to file an answer and cross-petition in the above-entitled cause, which leave is hereby granted and the said answer and cross-petition are filed accordingly.

Now come William F. Redmond and others, cross-petitioners, who have heretofore filed their answer and cross-petition and present the affidavit of William F. Redmond, from which it appears that the Toledo, Wabash and Western Railway Company, the Wabash Railway Company and the Wabash St. Louis and Pacific Railway Company are and each of them is a defendant to said cross-petition and a proper party to this cause and that each of them is a corporation organized under the laws of the State of Ohio and as such interested in real and personal property within the jurisdiction of this State, being the same described in the answer and cross-petition of said Redmond and his cocross-petitioners, namely, the railway and equipment of the railway company known as the Wabash, St. Louis and Pacific Railway Company, previously of the Wabash Railway Company and before that time of the Toledo, Wabash and Western Railway Company, extending from Toledo, in said Lucas County, through the counties of Lucas, Fulton, Henry, Defiance and Paulding to the State line of Indiana and thence through the State line of Indiana to the boundary line of the State of Illinois, and
161 that there is no present officer, agent or director of either of said corporations within the State of Ohio upon whom service of summons in this cause can be made except Jacob D. Cox, now residing in Cincinnati, Hamilton County, Ohio, who was the last president of the Toledo, Wabash and Western Railway Company and that Cyrus W. Field, of the City of New York, is the last president of the Wabash Railway Company, and that James F. Joy, of Detroit, in the State of Michigan, is the president of the Wabash, St. Louis and Pacific Railway Company and that no successor has been chosen or elected to the office of president of said companies to said Cox, Field and Joy respectively.

And it further appears that the summons has been issued to Hamilton County, Ohio, against the said Toledo, Wabash and Western Railway Company for service upon said company by delivery of same to Jacob D. Cox, its last president aforesaid.

And thereupon the Court granted leave to James F. Joy, Ossian D. Ashley, Edgar T. Welles and Thomas F. Hubbard the purchasing committee of the Wabash Railway and to James F. Joy leave to file supplemental answers *instanter*.

Wherefore, it is ordered and adjudged by the Court that the said Toledo, Wabash and Western Railway Company be made defendant to the said cross-petition of the said William F. Redmond and others by service of the summons aforesaid so as aforesaid issued to the Sheriff of Hamilton County and that George W. Vultee, of the City of New York, be authorized to make service of summons upon the Wabash Railway Company by delivering a copy thereof to Cyrus W. Field, the last known president of the said Wabash Railway Company, and that Thomas W. Wheeler, of the City of Toledo, Ohio, be authorized to make like service of summons upon the Wabash, St. Louis and Pacific Railway Company by delivery of a copy thereof to James F. Joy, the last known president of said Wabash, St. Louis and Pacific Railway Company.

[Endorsed:] Filed April 29, 1889.

162 Court of Common Pleas, Lucas County, Ohio.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILROAD COMPANY ET AL.,
Defendants.

Now comes James Compton, and appearing at this time solely for the purpose of this motion, moves the Court to set aside the service made upon him in this case for the following reasons:

First. Because this action is not one in which the service herein sought to be made is authorized by law.

Second. Because no sufficient affidavit, as required by law, was filed herein to justify service out of the County of Lucas.

Third. Because said service itself was irregular and insufficient under the laws of Ohio.

Fourth. Because no sufficient or correct copies of the pleadings were served upon him, and no correct or sufficient copy of the summons was served upon him.

Fifth. And for reasons other than those enumerated appearing in the record and papers on file herein, whereby it appears that said service was unauthorized, illegal and contrary to law.

DOYLE, SCOTT & LEWIS,
Attorneys for James Compton.

163 [Endorsed]: Filed in C. C., Jan. 14, '95. L. E. Clark, Cl'k.

THE STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of Lucas County:

You are commanded to notify The Wabash Railroad Company that it has been sued by The Adelbert College of Western Reserve University in the Court of Common Pleas of Lucas County, and

that unless it answers by the 16th day of November, 1889, the petition of the said plaintiff, the supplemental and amended petition, the second supplemental and amended petition against it, filed in the Clerk's Office of the said Court, such petition, the supplemental and amended petition, the second supplemental and amended petition, will be taken as true and judgment rendered accordingly.

You will make due return of this Summons on the 28th day of October, A. D. 1889.

Witness J. P. Bronson, Clerk of said Court, and the seal thereof, at Toledo, this 16th day of October, A. D. 1889.

[SEAL.] J. P. BRONSON, *Clerk*,
By N. HADNETT,
Deputy Clerk.

[Endorsed:] Filed in C. C., Jan. 14, '95. L. E. Clark, Cl'k.

THE STATE OF OHIO, *Lucas County, ss:*

Received this writ on the 16th day of October, 1889, and on the 24th day of October summoned the within-named, The Wabash Railroad Company, by delivering to J. M. Osborn, the local freight agent of said railroad company, a true and certified copy of
164 this writ and of the endorsements hereon, the president, vice-president, secretary, treasurer and all other chief officers not being found in this county.

Sheriff's Fees.

Service and Return	.30
Cop	.24
Mileage	.40
	.94

JOHN S. HARBECK, JR., *Sheriff.*
W. H. HARBECK, *Deputy.*

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others.

Now come William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir; Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William G.

Creamer, George B. Mead; George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased;
John W. Alling, E. Kellogg Beach, Clarence Morfit, James
165 Walker; Vassar Brothers Hospital, a corporation of the State of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveira, who have heretofore by leave of this Court filed their answer and cross-petition in this cause, and it appearing that they have made James R. Jesup, residing at Westport, in the State of Connecticut; Solon Humphreys, at Bergen Point, in the State of New Jersey; James Cheney, at Fort Wayne, in the State of Indiana; Edgar T. Welles, at Hartford, in the State of Connecticut; James F. Joy, at Detroit, in the State of Michigan; James Compton, at Washington, in the District of Columbia; George L. Seney, at Brooklyn, in the State of New York; Daniel A. Lindley, The Farmers' Loan and Trust Company, the Central Trust Company of New York, Thomas H. Hubbard and Ossian D. Ashley, each of New York City, in the State of New York, defendants to said answer and cross-petition, and that said defendants, except the Farmers' Loan and Trust Company and the Central Trust Company of New York, are, and each of them is, a non-resident of the State of Ohio, and that the said Farmers' Loan and Trust Company and the Central Trust Company of New York are, and each of them is, a foreign corporation organized and existing under the laws of the State of New York, and that the subject of this action and of the said answer and cross-petition is real and personal property in the Counties of Lucas, Fulton, Henry, Defiance and Paulding, in the State of Ohio, and that the relief demanded by the said answer and cross-petition consists in excluding the said defendants, and each one of them, from any interest in said real and personal property, and that the said answer and cross-petition and the original petition in this cause do, and each of them does, constitute an action brought under Section 5022 of the Revised Statutes of Ohio, namely, for the sale of real property situated in said counties, under a lien, encumbrance and charge thereon, and that William F. Redmond,
one of said cross-petitioners, on the fifth day of January,
166 1889, filed his affidavit in this cause that service of summons could not be made on any of said defendants within the State of Ohio, and that the said case so made by the filing of said answer and cross-petition is one of those mentioned in Section 5048 of the Revised Statutes of Ohio.

And it further appearing to the Court by the affidavit of Charles W. Selner that notice by publication, containing a summary statement of the object and prayer of said cross-petition, naming the Court wherein it is filed, and notifying the said defendants therein described as residing aforesaid, that they are, and each of them is required to appear and demur or answer to said cross-petition on or before the 16th day of March, 1889, has been made for six consecutive weeks in the "Weekly Herald and Times," a newspaper published in Lucas county, in the State of Ohio.

And it further appearing to the Court that immediately after the first publication of said notice the said cross-petitioners delivered

to the Clerk of this Court copies of the said publication with the proper postage, and the said Clerk mailed a copy of said publication to each of said defendants directed to his residence named therein as aforesaid,

It is now ordered that said service by publication be approved and confirmed, and that the said defendants be and each of them is required to answer or demur to said cross-petition within the said time named in said publication.

167 In the Court of Common Pleas, Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others.

Now come William F. Redmond and others, cross-petitioners, and present evidence of service of summons issued upon said cross-petition, made as follows, viz.: Upon the Wabash, St. Louis and Pacific Railway Company by Thomas W. Wheeler, of Toledo, Ohio, by delivery of a true copy of the said summons against the said Wabash, St. Louis and Pacific Railway Company to James F. Joy, the last-known president of said company, on the 2d day of May, 1889, and on the Wabash Railway Company, by delivery of a true copy of said summons, issued against the said Wabash Railway Company, by George W. Vultee, on the seventh day of May, 1889, to Cyrus W. Field, the last-known president of said Wabash Railway Company, both of which services are proved by affidavits of the said Thomas W. Wheeler and George W. Vultee respectively, and both of which writs of summons with said affidavits in proof of service are filed in this Court.

Whereupon, upon consideration thereof, it is ordered that the said service of said summons on said companies respectively be approved, and the said companies are respectively ruled to answer the said cross petition by the first day of June, 1889, according to the commands of said summons respectively.

[Endorsed:] Filed May 13/89.

168 Court of Common Pleas, Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,
Defendant.

Now come William F. Redmond and others, his associate cross-petitioners, who have heretofore filed their cross-petition in this cause against the Wabash, St. Louis and Pacific Railway Company, the Wabash Railway Company and the Toledo, Wabash and Western

Railway Company, and filed proof of publication for six consecutive weeks in "The Weekly Herald and Times," a newspaper printed and of general circulation in the said Lucas County, containing a summary statement of the object and prayer of their cross-petition, mentioning the Court wherein it is filed, and notifying the Wabash, St. Louis and Pacific Railway Company, the Wabash Railway Company and the Toledo, Wabash and Western Railway Company when they are required to answer said cross-petition, and it appearing to the Court that said companies are and each of them is a corporation incorporated under the laws of this State, which has failed to elect officers or to appoint an agent upon whom service of summons can be made, as provided by Section 5044 of the Revised Statutes of Ohio, and which has no place of doing business in this State, and that this is an action in which it is sought to appropriate the property of said companies or one of them to the payment of the debts of the Toledo, Wabash and Western Railway Company, it is now

169 Ordered that said publication be approved, and that the said defendant companies so notified and each of them answer or demur to the said cross-petition at the time named in said publication.

[Endorsed:] Filed June 10/89.

Court of Common Pleas of Lucas Co., Ohio.

No. 22624.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILROAD COMPANY ET AL., Defendants.

Journal Entry.

This day came the parties, and thereupon on the application of the plaintiff *of the plaintiff* leave is given to it to file a second supplemental and amended petition herein on or before the 27th day of October, A. D. 1889, and in which and whereby it may make new parties defendant herein, and cause the same to be brought in as such parties according to law.

And there also came the cross petitioners herein, William F. Redmond, John B. Manning, David Kohn, Wm. M. Kohn and Edward Popper, partners under the firm name Kohn, Popper & Co.; James D. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferry, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, James A. Sullivan, Ella R. Johnson, Chas. E.

170 Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop Frederiak Hubbard, William G. Creamer, George

B. Mead, George B. Mead and Walter M. Aikenson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Bros. Hospital, a corporation of the State of New York; Josephine E. Cadmus, Preston Wing Mary L. Oliviera and Chas. G. Peters heretofore made defendants in this cause, and who have filed their answers and cross-petitions herein upon their application therefore, are granted leave to file herein on or before the 27th day of October, A. D. 1889, their amended answer and cross-petition, and thereby may make new parties defendant, and may cause the same to be brought in as such parties according to law.

[Endorsed:] Filed Oct. 16/89.

Court of Common Pleas of Lucas County, Ohio.

No. 22624.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY, Plaintiff,

against

THE TOLEDO, WABASH AND WESTERN RAILROAD COMPANY ET AL., Defendants.

Second Supplemental and Amended Petition.

By leave of the Court had and obtained the plaintiff now comes and in addition to its original petition herein filed April 8th,
171 1883, and in addition to its supplemental and amended petition herein filed February 2d, 1889, and by way of supplement to, and amendment of, its said original and supplemental and amended petition says:

That it here adopts and reaffirms all of the allegations of said original and supplemental and amended petitions; and further says,

That since the filing of said original and supplemental and amended petition the railroad property and franchises in said original and supplemental and amended petition described have been sold under the authority of the Circuit Courts of the United States for the Northern District of Ohio, and for the District of Indiana, and in a cause in which neither the plaintiff nor any of the cross-petitioners herein were parties, to the purchasing committee which is described in the original answer and cross-petition of William F. Redmond and others herein heretofore filed, and the said sale having been confirmed by decrees of said Courts, the said railway property and franchises were duly conveyed by Masters or Commissioners in Chancery appointed by said Courts and under the authority of said Courts to said purchasing committee and by said committee to a railroad corporation duly organized under the laws of Ohio and Indiana under the title of the Wabash Railroad Company, which railroad company has taken, and is now in, possession of the said railroad property,

premises, equipment and franchises described in the said original and supplemental and amended petitions, beginning in the City of Toledo and running through the Counties of Lucas, Henry, Defiance and Paulding in the State of Ohio to the said line of Indiana at the western boundary line of the township of Harrison in said County of Paulding, and running thence in the State of Indiana westwardly to the boundary line of the State of Illinois;

That by said proceedings had and taken in said cause in which said decree was rendered, and in execution of the said decrees of the said mortgage bonds in the original petition herein described and secured respectively by the mortgages in the original answer

172 described, namely, the mortgage made by the Toledo and Wabash Railway Company to the Farmers' Loan and Trust Company of New York, and the mortgage made by the same railway company to Edwin D. Morgan, trustee, and of which mortgage James F. Joy afterwards became trustee, have been paid and the said mortgages fully satisfied, and the same are no longer a lien or encumbrance upon any part of said railway property and franchises;

That the lien of the said equipment bonds held by plaintiff by said Compton and by the said cross-petitioners Redmond and others herein is prior and superior to any mortgage lien or other encumbrance upon the said property, and especially is a lien prior and superior to the title of the said Wabash Railroad Co. now in possession of said railway property, premises, equipment and franchises as aforesaid.

Wherefore plaintiff prays as against the Wabash Railroad Company and all other defendants heretofore made parties hereto, as in its original and supplemental and amended petitions it has heretofore prayed, and without repeating said prayer, but reaffirming it and asking that it may be taken as part of this, its second supplemental and amended petition.

Plaintiff also further prays that the lien of the equipment bonds owned by it and described in its original answer may be declared to be the first and best lien upon said railway property, premises, equipment and franchises superior to all other liens and titles whatsoever, and that in making sale of said premises, property and franchises as prayed for in its original and supplemental and amended petitions all right, title and interest acquired by the Wabash Railroad Company, and also be sold for the purpose of producing the amount of money necessary to pay and discharge the said *said* equipment bonds held by plaintiff, by said Compton and by the cross-petitioners herein, and for such other and further relief as in equity and good conscience the plaintiff may upon final hearing prove itself to be entitled to.

LEE & BROWN,
Attorneys for Plaintiff.

173 STATE OF OHIO, *Lucas County, ss:*

John C. Lee, being duly sworn, says that he believes the facts alleged in the foregoing supplemental and amended petition are

true, and that he makes this affidavit because the plaintiff is a corporation, and affiant is the attorney of plaintiff in this action.

JOHN C. LEE.

Sworn to before me and subscribed in my presence this 16th day of October, A. D. 1889.

[SEAL.] RATHBUN FULLER,
Notary Public, Lucas County, Ohio.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, cl'k.

In the Court of Common Pleas, State of Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

Answer of Purchasing Committee.

LUCAS COUNTY, ss:

And now come the defendants Ossian D. Ashley, James F. Joy, Edgar T. Welles and Thomas H. Hubbard, made parties
174 hereto by the cross-petition of William F. Redmond and others, and by way of answer thereto say, that these defendants are constituted and acting as a purchasing committee on behalf — a very large majority of the holders of mortgage bonds outstanding upon the lines of railway formerly owned by the Wabash, St. Louis and Pacific Railway Company, including therein bonds secured by all the mortgages which are a lien upon the lines of railway formerly owned by the Toledo and Wabash Railway Company and named in the articles of consolidation, set forth in said cross-petition.

They say that they admit the averments of said cross-petition as to the execution by the Wabash, St. Louis and Pacific Railway Company of the general mortgage on or about the first day of June, 1880, to the Central Trust Company and James Cheney, and the issue and sale of bonds thereunder to the amount of $17,000,000; also the averments of said cross-petition as to the appointment of Receivers of the lines of railway and property of the Wabash, St. Louis and Pacific Railway Company, on or about the 28th day of May, 1884, and the subsequent action taken in said United States Circuit Courts in the cause in which said Receivers were appointed, and the foreclosure and sale of the property of the said Wabash, St. Louis and Pacific Railway Company, and the purchase of the same at said foreclosure sales by these defendants, acting as a purchasing committee as aforesaid, and that they claim to be entitled to the possession and control of the same, but they say further, that, notwithstanding, such claim on their part, the said United States Courts of the Southern District of Illinois, District of Indiana, and Northern District of

Ohio, Western Division, have, at times, since the said purchase by them, retained exclusive possession and control of all the said lines of railway east of the Mississippi River, and the property appurtenant thereto, through the Receivers appointed by said Courts in the said cause named in said cross-petition and in the following causes ancillary thereto and connected therewith, still pending in said Courts: First, a suit brought by one Thomas Atkins and
175 others in each of said Courts as bondholders under the consolidated mortgages of 1867 and 1879, and to which suit the trustees of all the prior mortgages upon said railways were made parties and in which all of said trustees appeared and filed answers or cross-bills. Second. In a suit brought by James R. Jesup and Isaac H. Knox, as trustees of the consolidated mortgage of 1867, and to which all the trustees of all the other mortgages upon said railways or divisions thereof are parties, as well as these defendants as a purchasing committee, as the holders of the equity of redemption by purchase of the same at said foreclosure sale.

In said last-named suit the trustees of all the mortgages upon all the divisions of said Wabash, St. Louis and Pacific Railway have appeared and filed cross-bills asking for the foreclosure of their respective mortgages, and, among others, The Farmers' Loan and Trust Company and James F. Joy, as trustees of the mortgages prior in lien to the alleged lien of the plaintiffs, and as cross-petitioners in this case, have thus appeared and answered and filed their cross-bills, asking foreclosure of their respective mortgages.

These defendants further say that, by orders of said United States Courts duly made and entered in said suits brought by Jesup and Knox, the said receivership has been duly extended to both of said suits, and said Receivers are now holding all the lines of railway and property of the Wabash, St. Louis and Pacific Railway Company; subject to the jurisdiction and orders of said Court, under suits brought to foreclosure mortgages prior in lien to the alleged lien sought to be enforced in action.

These defendants further say that, in the said suit brought by James R. Jesup and Isaac H. Knox, the said United States Courts are proceeding to foreclose all the mortgage liens upon said lines of railway, and to determine the amount and priority of said liens, and to adjust all rights and equities of all parties in and to said property,
and these defendants aver that they intend to sell and dispose
176 of all said lines of railway, and to apply the proceeds in satisfaction of said liens in the order in which they are entitled to receive the proceeds of said sales.

These defendants say that, in the said suit brought by James R. Jesup and Isaac H. Knox, they have duly appeared and filed answers, and that said Court has, therefore, duly acquired prior jurisdiction and control over said property and of these defendants, and has the exclusive right to determine the rights of the said cross-petitioners in and to the same, and that the said cross-petitioners should seek relief in said proceedings and in said courts.

These defendants further say that they have no knowledge, or information sufficient to form a belief, as to the allegation in said

cross-petition that the said parties therein named are the owners and holders of the said bonds, or that the said bonds were sold for value by the said Toledo and Wabash Railway *Railway* Company, and they, therefore, deny the same. They also deny the allegation as to the amount of said equipment bonds, and deny that said $600,000 of bonds were put upon the market and sold for value. They admit that an agreement of consolidation of the lines of railway named in said cross-petition was made, but they deny the construction put upon the same by the cross-petitioners, and ask leave to produce the said agreement upon the trial of this case.

For a second and further defense these defendants say that under and in pursuance of orders of the said United States Courts, duly made and entered, in the said causes pending therein, named in said cross-petition wherein the Central Trust Company of New York and James Cheney were the plaintiffs, and prior to the said foreclosure sale, they were duly issued by the said Receivers, certificates of indebtedness for debts incurred in the operation and maintenance of said railways, all of which were prior in lien upon said railways and properties to all other liens of any and every character whatsoever, and which amounted in the aggregate to over two millions of dollars.

177 And these defendants say that after the said foreclosure sale, and acting under the orders and decrees of said Courts, they paid the said sums of money represented by said certificates and other evidences of indebtedness, and thereby became the owners and holders of said certificates and evidences of indebtedness, and equitably entitled to assert the lien of the same as against said properties prior to any other mortgage or lien whatsoever.

For a third and further defense the defendants say that they here repeat all the allegations made in the first and second defenses herein, the same as if each were here specifically set forth as a part hereof, and these defendants say that all the said cross-petitioners and the plaintiff herein, with full knowledge of the foregoing facts and of the said foreclosure proceedings, allowed these defendants to go forward and purchase said properties, and advance large sums of money thereon without making any claim to any part thereof, and without asserting any lien thereon, or to any part of the same. These defendants further say that the said $17,000,000 of bonds were put upon the market and sold, and the several persons purchasing the said bonds, at the time when they acquired said bonds, did so without notice of the said pretended lien now claimed by the plaintiff and said cross-petitioners; and these defendants aver, upon information and belief, that the then holders of the bonds which the said cross-petitioners now claim to own, tacitly permitted the execution of the said mortgage and sale of the bonds secured thereby, and the subsequent foreclosure and sale of said property, and the foreclosure of the same by these defendants, and the expenditure of large sums of money by these defendants, as hereinbefore alleged and set forth, raising no claim of lien, although fully aware of such proceedings.

These defendants again deny the existence of any such lien as set forth in said cross-petition, and they aver that if any equities ever

existed on the part of the holders of said bonds, such equities have long since lapsed, and such holders and the cross-petitioners, and all others claiming through or under them are, by the facts aforesaid, estopped from asserting such lien.

178 For a fourth defense, these defendants say that the plaintiff and the cross-petitioners herein ought not to have maintained this said action, because it shows that prior to the commencement of this action, to wit, on or about the 31st day of May, 1878, one Benjamin Ham and others began a suit in the United States Circuit Court for the District of Indiana, as holders of said equipment bonds, on behalf of themselves and all other bondholders similarly situated, who might desire to come into the said suit, thereby meaning all the holders of equipment bonds issued by said Toledo and Wabash Railroad Company, and in said cause seeking to have said equipment bonds declared a lien upon all the property of the said Toledo and Wabash Railway Company, which passed into the hands of the consolidated companies described in plaintiff's petition and in the cross-petition herein, and to have the said lien enforced upon all of the property within the States of Ohio and Indiana, being the same property described in plaintiff's petition and in the cross-petition herein, and upon which the plaintiff and the cross-petitioners seek to assert a lien in this cause; that in said cause thus begun as aforesaid the Wabash Railway Company, the Toledo, Wabash and Western Railway Company, the Wabash, Saint Louis and Pacific Railway, Isaac H. Knox and James R. Jesup, as trustees, were made defendants, and duly served with process therein; that in said cause the said complainants set forth all the facts that are now set forth in plaintiff's petition, and in the cross-petition in this cause, as to the lien of said bonds, and claimed therein the right to subject the said property formerly belonging to the Toledo and Wabash Railway Company, being the lines of railway in Ohio, and Indiana, to the lien of said equipment bonds held by them and also held by other parties and then outstanding; that the defendants above named joined issue with the complainants in said cause, as will fully appear from a transcript of said record, which the defendant will produce upon the trial of this cause; that said cause was upon said issues fully tried in said Circuit Court of the United States, which

179 thereupon held that all of said equipment bonds constituted an equitable lien upon said property of the Toledo and Wabash Railway Company within the States of Ohio and Indiana and ordering said property to be sold for the satisfaction of the lien of said equipment bonds and provision to be made for the application of the proceeds to the payment of said bonds; that an appeal was thereupon taken by the defendants to the Supreme Court of the United States, which, upon consideration thereof, reversed said order and decree of the said Circuit Court, and said cause was thereupon retried by said Circuit Court, and on said retrial a decree was entered by said Circuit Court, holding that said described property was not subject to the lien of said equipment bonds; that in said cause said Court had jurisdiction of the subject matter and of the parties and said judgment of the Circuit Court of the United States, entered

on the — day of May, 1888, is a complete adjudication of all the questions and matters relating to the lien of said equipment bonds that are sought to be adjudicated in this cause and is a bar to the proceedings on behalf of the plaintiff in this cause.

Wherefore these defendants ask to be dismissed with their costs.

DILLON & SWAYNE,
Attorneys for Defendants O. D. Ashley, Thomas H. Hubbard, James F. Joy, Edgar T. Welles, Purchasing Committee.

STATE OF NEW YORK, *City and County of New York, ss:*

Rush Taggart, being duly sworn, says he is one of the attorneys for the defendants, and that he believes the allegations of the foregoing answer to be true, and that this verification is made
180 by him as attorney, because the defendants are nonresidents of the County of Lucas and now absent from said county.

RUSH TAGGART.

Sworn to before me this 12th day of March, 1889.

[SEAL.] WM. J. HARDING,
Notary Public, New York and Kings Counties.

[Endorsed:] Filed in C. C., Jan. 14, '95. L. C. Clark, clerk.

In the Court of Common Pleas.

STATE OF OHIO, *Lucas County, ss:*

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

Answer of James F. Joy.

And now comes James F. Joy, and by way of answer to the cross-petition of William F. Redmond and others, filed herein, says that he has no knowledge or information sufficient to form a belief as to the averments in said cross-petition; that the persons named therein are the owners and holders of equipment bonds and therefore deny all the averments in said cross-petition in that regard as to each of the parties named therein or that the parties named therein are holders for value and before the maturity of said bonds.

181 This defendant further says that he admits that the Toledo and Wabash Railway Company and other companies were duly consolidated on or about the 6th day of July, 1865, into a consolidated corporation of Ohio, Indiana and Illinois, but he denies that the agreement of consolidation bears the construction set

forth in said cross-petition and craves leave to produce the same upon the trial of this cause.

This defendant further alleges the fact to be that the Toledo and Wabash Railway Company, as a consolidated corporation of the States of Ohio and Indiana, was formed by the union of two constituent corporations, one a corporation of the State of Ohio and known as the Toledo and Wabash Railroad Company, duly incorporated on or about July 21, 1858, and owning a line of railway from Toledo, Ohio, to the west line of Paulding County, Ohio; the other a corporation of the State of Indiana, known as the Wabash and Western Railway Company, duly incorporated on or about September 27, 1858, and owning a line of railway extending across the State of Indiana, connecting at the east line with the Toledo and Wabash Railway, and at the west line with the Great Western Railway of 1859.

This defendant further says that said two companies became consolidated on or about the first day of November, 1858, the new company thus formed taking the name of The Toledo and Wabash Railway Company.

This defendant further says that the said Toledo and Wabash Railroad Company, prior to said consolidation, and on or about the 15th day of October, 1858, duly executed and delivered its mortgage or deed of trust to Edwin D. Morgan of the City and State of New York and thereby conveyed to said Morgan, all its said line of railway and all property appurtenant thereto and all its rights and franchises; that the said mortgage or deed of trust was given to secure an issue of bonds of said company to the amount of $1,000,000, bearing interest at the rate of seven per centum per annum, payable
182 semi-annually on the first days of May and November in each year thereafter, at the office of the said Edwin D. Morgan, or such other place in the City of New York as may be designated. Said bonds were made payable to said Morgan or to bearer, on the first day of November, 1878, at the same place as the interest coupons.

This defendant, further answering, says that the said Wabash and Western Railway Company, prior to the said consolidation and on or about the 15th day of October, 1858, did duly execute and deliver its mortgage or deed of trust to Edwin D. Morgan, of the City and State of New York, and thereby conveyed to said Morgan all its line of railway and all property appurtenant thereto, and all its rights and franchises; the said mortgage or deed of trust was given to secure an issue of bonds of said company to the amount of $1,500,000, bearing even date with the said mortgage, and made payable to the said Morgan or bearer, on the first day of November, 1878, at the office of Edwin D. Morgan, or such other place in the City of New York as may be designated; said bonds bearing interest at the rate of seven per centum per annum, payable semi-annually on the first days of May and November in each year, at the same place as said bonds were made payable.

Defendant further says that after the execution of said two mort-

gages by said companies the same were duly recorded in the States of Ohio and Indiana, respectively.

Defendant is advised and believes and therefore avers that all the bonds intended to be secured by each of said mortgages, respectively, were duly issued and sold for value and are still outstanding and unpaid, together with a large amount of interest now due thereon.

Defendant further says that in the year 1878, when both of the said issues of bonds matured the time of payment of the same was extended by agreement between the owners and holders of the same and the Wabash Railway Company until November 1st, 1893, at the same rate of interest provided for in the said bonds,
183 and that all interest payments falling due upon said bonds since November 1st, 1884, are now due and unpaid. Defendant also says that the interest coupons due on all of said bonds, May and November 1st, 1875, May and November 1st, 1876, and November 1st, 1877, are still outstanding and unpaid, together with interest thereon.

Defendant further says that Edwin D. Morgan, departed this life on the 14th day of February, 1883, and that on or about the 9th day of May, 1888, this defendant was duly appointed his successor in said trust by this Court, under the said Toledo and Wabash Railroad Company's mortgage; and on or about the 9th day of May, 1888, he was duly appointed the successor in said trust of said Morgan, deceased, by the Wabash and Western Railway Company's mortgage, by the Circuit Court of Tippecanoe County, Indiana; this defendant thereupon accepted said trusts and has since been acting as trustee under said mortgages or deeds of trust.

This defendant further says that the lien created by said mortgages respectively, is superior to all liens upon the property of the said Toledo and Wabash Railway Company, save and except a lien in favor of The Farmers' Loan and Trust Company for $900,000, and interest thereon as to the property in Ohio, and a lien in favor of said Farmers' Loan and Trust Company for $2,500,000 and interest thereon as to the property within the State of Indiana.

This defendant further says, that on and after the said purchasing committee acquired the interest of the Wabash, St. Louis and Pacific Railway Company, as in said cross-petition described and set forth, that the said Circuit Courts of the United States for Illinois, Indiana and Ohio, continued their Receivers in possession of all said railways, and the same continue in possession of said property down to the present time; that subsequent to the institution of the said suit set forth in said cross petition of the Central Trust Company against the Wabash St. Louis and Pacific Railway Company, *et al.*, one Thomas Atkins and others, bondholders under the con-
184 solidated mortgages of 1867 and 1879, filed their bill in the said Circuit Courts for the foreclosure of said mortgages, and made the trustees of all prior mortgages parties thereto. In said suits thus brought, Receivers of all the lines of railway of the said Wabash, St. Louis and Pacific Railway Company, were appointed and put into possession of said properties and have continued in possession ever since to the present time. Subsequently

to the institution of said suits, the trustees of all the first or divisional mortgages upon the various divisions named as entering into the consolidations in said cross-petitions, brought separate suits to foreclose their respective mortgages in said several Circuit Courts.

Subsequently to the institution of said several suits of foreclosure, and on or about October 22, 1888, all of said separate suits were duly consolidated into one consolidated cause under the title of James R. Jesup and Isaac H. Knox, against the Wabash, St. Louis and Pacific Railway Company *et al.*, consolidated cause; and in said cause upon the bills and cross bills filed therein, the said Circuit Courts extended the Receivership over all said properties, so that from and after said date the said Receivers hold said lines of railway under the first liens thereon, and the mortgages of which this defendant is trustee. In said consolidated cause this defendant has filed cross bills setting up the said mortgages hereinbefore set forth and described, and the said United States Courts are proceeding to the foreclosure and sale of said lines of railway and to determine the priority of all mortgages and liens thereon.

Wherefore, this defendant asks that this Court may fully ascertain the amount due upon the said mortgages, and interest thereon, and may declare the same liens upon the said lines of railway in Ohio and Indiana, respectively, and subject only to the said mortgages to the Farmers' Loan and Trust Company, and superior to any and all other liens whatsoever, and for such other and further relief as equity may require and the facts sustain.

DILLON & SWAYNE,
Attorneys for James F. Joy, Trustee.

185 STATE OF NEW YORK, *New York County, ss:*

Rush Taggart, being duly sworn, says he is one of the attorneys of James F. Joy, trustee, and that the said James F. Joy is a nonresident of the County of Lucas, and now is absent therefrom, so that on that account this verification is made by his attorney, and that he believes the allegations of the foregoing answer to be true.

RUSH TAGGART.

Sworn to before me this 12th day of March, 1889.

[SEAL.] WM. J. HARDING,
Notary Public, New York and Kings Counties.

In the Common Pleas Court of Lucas County, Ohio.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILWAY Co. and Others, Defendants.

Demurrer of Humphreys and Lindley, Trustees, to Cross-petition.

And now came Solm. Humphreys and Daniel A. Lindley, made parties herein in their capacity as trustees, and demur to the cross-

petition herein filed by William F. Redmond, John B. Manning and others and show for cause:

That said cross-petition does not set forth facts sufficient
186 to constitute a cause of action against these defendants.

OSBORN & SMITH,
Attorneys for Defendants.

HENRY CRAWFORD, Esq.,
Of Counsel.

[Endorsed:] Filed in C. C., Jan. 14/95. L. E. Clark, cl'k.

In the Court of Common Pleas, Lucas County, State of Ohio.

ADELBERT COLLEGE, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

Answer of the Farmers' Loan and Trust Company to the Cross-petition of William F. Redmond and Others.

The Farmers' Loan and Trust Company, for answer to the cross-petition of William F. Redmond and others, admits that it is a corporation created under the laws of the State of New York, and further admits that it makes the claim in said petition alleged as to The Toledo and Wabash Railway Company, and as to the execution by The Toledo and Illinois Railroad Company of the mortgage and bonds therein set forth, and defendant says that the facts in relation thereto are more fully stated as follows:

That at and prior to the 8th day of September, 1853, The
187 Toledo and Illinois Railroad Company was a corporation incorporated and organized under the laws of the State of Ohio, and, as such, was the owner of a line of railway extending from Toledo, Ohio, to the west line of Paulding County, in said State.

The said Toledo and Illinois Railroad Company, on or about the 8th day of September, 1853, made and executed its nine hundred (900) bonds for one thousand dollars each, bearing date of the first day of August, 1853, and payable to The Farmers' Loan and Trust Company or bearer, at its office in the City of New York on the first day of August, 1865, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first days of August and February in each year, until the principal sum should be paid, on presentation and surrender of the coupons and interest warrants thereto annexed, as they should severally become due, at the office of The Farmers' Loan and Trust Company, in the City of New York.

To secure the payment of the principal of said bonds and of the interest thereon, as the same should become due and payable, as evidenced by the coupons thereto attached, the said Toledo and Illinois Railroad Company duly made, executed and delivered to this defendant The Farmers' Loan and Trust Company, as trustee, a

mortgage or deed of trust bearing date of the eighth day of September, 1853, and thereby conveyed to this defendant, as trustee, its railroad from the City of Toledo to the west line of Paulding County, made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other material and machinery used thereon or procured therefor, including the furniture and equipments of the road and those to be furnished and paid for with the above described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights or privileges of said railroad company in, to or concerning the same.

That said mortgage or deed of trust was forthwith duly recorded in the office of the Recorders in each of the counties through
188 which the said railroad was situated or to be situated, and became a first and prior lien on all the railroad property, equipments and franchises therein mentioned and described.

That thereafter, and subsequent to said 8th day of September, 1853, the said Toledo and Illinois Railroad Company, mortgagor as aforesaid, duly issued all of the said bonds secured by said mortgage, and the same are now outstanding in the hands of divers persons and corporations, owners and holders thereof for value.

The Lake Erie, Wabash and St. Louis Railroad Company, on or about the 25th day of June, 1856, was a corporation duly incorporated and organized under the laws of the State of Indiana, and was the owner of the railway extending from the western boundary of the State of Ohio, at the western terminus of the Toledo and Illinois Railroad as aforesaid, across the State of Indiana to the southern boundary of Illinois. On or about the said 25th day of June, 1856, the said Toledo and Illinois Railroad Company and the said Lake Erie, Wabash and St. Louis Railroad Company duly consolidated under the name of the Toledo, Wabash and Western Railway Company; that thereafter, under decrees of foreclosure and sale rendered by the Circuit Court of the United States for the Northern District of Ohio and of the Circuit Court of the United States for the District of Indiana, in Ohio and Indiana, all the railroad property, rights and franchises of said consolidated corporation were, on the 8th day of October, 1858, duly sold, and that portion of said line lying and being within the State of Ohio, was at sale purchased by Azariah Boody, and by said purchaser that portion of the said property situate in the State of Ohio, and formerly owned by The Toledo and Illinois Railroad Company, was conveyed to the Toledo and Wabash Railroad Company, a corporation duly incorporated July 21st, 1858, under the laws of the State of Ohio, and that portion lying with- the said State of Indiana, was conveyed to the Wabash and Western Railway Company, a corporation duly incorporated September 27th, 1858, under the laws of the said last-named State, but the said sale the railroad and property of The Toledo,
189 Wabash and Western Railway Company was made subject to the mortgage of this defendant, hereinbefore set forth.

In the month of October, 1858, the Toledo and Wabash Railway Company and the Wabash and Western Railroad Company, afore-

said, were duly consolidated under and by virtue of the laws of the States of Ohio and Indiana, and thus formed The Toledo and Wabash Railroad Company, being the same company in said cross-petition alleged to have issued the equipment bonds therein set forth.

This defendant admits that the said Toledo and Wabash Railroad Company, The Great Western Railroad Company of 1859, The Quincy and Toledo Railroad Company and The Illinois and Southern Iowa Railroad Company, entered into the agreement for consolidation set forth in said cross-petition and admits that said agreement of consolidation was carried into effect, whereby was formed the said The Toledo, Wabash and Western Railway Company, a consolidated corporation of the States of Ohio, Indiana and Illinois, owning a line of railroad beginning at the City of Toledo, in the State of Ohio, and extending thence westward through the Counties of Lucas, Fulton, Henry, Defiance and Paulding to the boundary line of the State of Indiana, being the railroad or property covered by the aforesaid mortgage of this defendant, and thence westward through the States of Indiana and Illinois.

Defendant further alleges that the said agreement of consolidation enumerated among others the bonds and mortgage executed by The Toledo and Illinois Railroad Company, as hereinbefore set forth, and by said agreement the payment of the principal of said bonds and the interest to mature thereon, was expressly assumed and agreed to be paid by the said The Toledo, Wabash and Western Railway Company.

Afterwards, on or about said first day of August, 1865, an agreement was duly made between the several holders of said bonds made and issued said Toledo and Illinois Railroad Company and
190 The Toledo, Wabash and Western Railway Company, by which the time for the payment of the principal of said bonds was extended until August 1st, 1890, interest to be paid thereon at the rate and times in said bonds provided and additional coupons providing for the payment of semi-annual installments of interest of three hundred and fifty dollars each to accrue in accordance with the terms of said agreement on the first days of February and August in each year, during said twenty-five years were issued and annexed to said bonds by said Toledo, Wabash and Western Railroad Company.

Defendant admits the execution by the Toledo, Wabash and Western Railway Company, in 1873, of the mortgage in said cross-petition called the gold mortgage, upon the entire line of railway and property of said company last aforesaid.

Defendant further admits the allegations of said cross-petition as to the foreclosure of said mortgage, and the sale and conveyance of said mortgage property to John W. Ellis and others as purchasers.

Defendant further admits that said sale was subject to prior liens, and further says that said decree expressly found and adjudged the said mortgage to this defendant to be a first and best lien upon so much of the said line of railway as laid within the State of Ohio, extending from Toledo to the State line betwen Ohio and Indiana.

Defendant further admits that said John W. Ellis and others conveyed all of the said line of railway property, rights and franchises of the Toledo, Wabash and Western Railway Company, so purchased by them to said consolidated Wabash Railway Company, and thereby said Wabash Railway Company became vested with the title of said lines of railway, equipments, rights and franchises, but subject, however, to prior lien of this defendant, under and by reason of the mortgage hereinbefore set forth upon the property therein mentioned and described.

Defendant further admits the consolidation of the Wabash Railway Company with the St. Louis, Kansas City and Northern Railway Company, thereby forming the company known as The
191 Wabash, St. Louis and Pacific Railway Company, and that the said last-named company succeeded to and became the owner of all the rights, franchises, premises, property, railway line and equipment of the Wabash Railway Company and the Toledo, Wabash and Western Railway Company, but subject, however, to the prior lien of this defendant under and by reason of the mortgage hereinbefore set forth upon the property therein mentioned and described.

Defendant further says that The Toledo, Wabash and Western Railway Company, The Wabash Railway Company and The Wabash, St. Louis and Pacific Railway Company successively paid the new coupons issued by said The Toledo, Wabash and Western Railway Company and annexed to said bonds of The Toledo and Illinois Railroad Company at the time of their maturity, until February 1st, 1885, at which time the said The Wabash, St. Louis and Pacific Railway Company failed to pay the interest coupons which then became due and that default has been made in payment of the interest coupons annexed to said bonds, maturing since February 1st, 1885, although the payment of the same was duly demanded at the respective dates of the maturity thereof; that the coupons due February 1st, 1885, August 1st, 1885, February 1st, 1886, and August 1st, 1886, has since been paid by the Receivers appointed as hereinafter stated, leaving unpaid all subsequent coupons and the entire principal of said bonds.

This defendant admits that The Wabash, St. Louis and Pacific Railway Company, on or about May 28th, 1884, filed its bill in equity in the Circuit Court of the United States for the Eastern District of Missouri, and that similar suits were instituted by the same complainant in the said several Circuit Courts of the United States, in said cross-petition mentioned.

Defendant further says that in said suits an order was made directing Receivers therein named, to take possession of all the lines of railway, property, franchises and rights of said The
192 Wabash, St. Louis and Pacific Railway Company, and that in accordance with said order, the said Receivers did take such possession and said Receivers continued in possession of the said lines of railway and property in the States of Ohio, Indiana and Illinois, until a successor was appointed as hereinafter set forth.

Defendant says that subsequently, on or about December 16th, 1886, Thomas F. Atkins and other holders of bonds issued under and secured by the mortgages alleged in said cross-petition to have been executed by The Toledo, Wabash and Western Railway Company in 1867, and the mortgage alleged in said cross-petition to have been executed by The Wabash Railway Company in 1879, filed their bill in Circuit Courts of the United States for the Southern District of Illinois, the District of Indiana and the Northern District of Ohio, Western Division, to foreclose said last-mentioned mortgages.

That in said suit of Atkins and others, on or about December, 18th, 1886, an order was made by the said several Circuit Courts of the United States in which their said bill had been filed, appointing a Receiver of all the lines of railway and property of said The Wabash, St. Louis and Pacific Railway Company in the said States of Illinois, Indiana and Ohio, in the place and stead of the Receivers appointed as hereinbefore stated, and said Receiver thereupon entered into possession of said lines of railway and property, including the property mentioned and described in the mortgage from the said Toledo and Illinois Railway Company to this defendant and said Receiver and his successor, duly appointed thereafter, have continued in possession of said property ever since to the present time. That, John N. A. Griswold and others, bondholders under said mortgage alleged in said cross-petition to have been executed by The Toledo and Wabash Railroad Company on or about the 15th day of October, 1887, filed their cross-bill in foreclosure of said last-mentioned mortgage in said suits of Thomas F. Atkins, and by said cross-bill this defendant and the trustees of all prior mort-
193 gages upon said lines of railway of said Wabash, St. Louis and Pacific Railway Company in the States of Ohio, Indiana and Illinois were made parties defendant, and this defendant, on or about October 22d, 188-, filed its answer to said cross-bill, duly setting up the mortgage of The Toledo and Illinois Railroad Company to this defendant. Subsequently to the institution of said suits of Thomas F. Atkins and others, this defendant and all the trustees of the several first mortgages upon the different divisions of the lines of railway acquired by The Wabash, St. Louis and Pacific Railway Company as set forth in said cross-petition, brought separate suits in the said several Circuit Courts of the United States for the Southern District of Illinois, District of Indiana and the Northern District of Ohio, Western Division, to foreclose their respective mortgages, and that the bill of this defendant was filed in the Circuit Court of the United States of the Northern District of Ohio, Western Division, to foreclose the aforesaid mortgage of The Toledo and Illinois Railroad Company, and on or about October 22d, 1888, the said several suits of the said trustees of the prior mortgages aforesaid, were duly consolidated into one cause, under the title of James R. Jesup and Isaac H. Knox against The Wabash, St. Louis and Pacific Railway Company and others, consolidated cause, and in said consolidated cause upon the bills and cross-bills filed therein, the said Circuit Court extended the receivership over all said property and lines of railway of The Wabash, St. Louis and Pacific Railway Company,

so that from and after the said date the said Receivers held said lines of railway and property under mortgages constituting the first lien thereon, including the mortgage to this defendant as trustee, hereinbefore set forth; that in said consolidated cause, on or about the 30th day of March, 1889, the said Circuit Courts of Illinois, Indiana and Ohio, rendered a decree finding and adjudging the priority of liens upon the lines of railway and property of said The Wabash, St. Louis and Pacific Railway Company, and finding the lien of
194 this defendant to be first and best upon the portion of said railway in the State of Ohio, extending from Toledo to the State line of the State of Indiana and ordering a sale of all said lines of railway, including that upon which defendant was found to have the first lien as aforesaid to satisfy the amount due upon the bonds secured by the said several mortgages, in the order of the priority of their respective liens as found by said decree.

Wherefore this defendant prays that if the Court shall grant the prayer of said cross-petition and marshal the said liens and encumbrances on said railroad and property, and ascertain and adjudge their priority, that an account may be taken of the amount due or to become due by the way of principal and interest upon said bonds of The Toledo and Illinois Railroad Company aforesaid, and that the same may be declared a first and prior lien upon the said property and lines of railroad in the State of Ohio, mentioned and described in said mortgage from The Toledo and Illinois Railway Company and first paid out of the proceeds of any sale of the said property and lines of railway and this defendant further prays that it may have such other and further relief in the premises as he may be entitled to.

By SWAYNE, SWAYNE & HAYES,
Defendant's Attorney-.

STATE OF OHIO, *Lucas County, ss:*

Frank B. Swayne, being duly sworn, says that he is one of the attorneys for The Farmers' Loan and Trust Company, and that the facts stated in the foregoing answer are true as he verily believes.

FRANK B. SWAYNE.

Sworn to before me and subscribed in my presence this — day of April, A. D. 1889.

CHAS. E. SUMNER,
Notary Public in and for Lucas Co., O.

[Endorsed:] Filed in C. C., Jan. 14/95, L. E. Clark, Clk.

195 Court of Common Pleas, Lucas County, Ohio.

No. 22624.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILROAD COMPANY ET AL.,
Defendant.

Answer of James Compton.

The defendant for answer to plaintiff's petition says that he has no knowledge of the ownership by the plaintiff of any of the bonds in said petition described, and, therefore, denies that said plaintiff holds or owns any of said bonds.

The defendant admits that he has obtained a final decree in the Supreme Court of this State, and that the same is remanded to this Court for execution, and that the same is of record in the records of this Court as provided by law. That defendant caused to be issued an order of sale and said property to be appraised, but he denies any right in the plaintiff or any one else to any decree concurrent or co-equal with the plaintiff upon any part of said property; denies that plaintiff has any lien upon said premises, except the same be inferior and subsequent to the lien of this defendant. And this defendant refers to the record and proceedings in said cause of this defendant against the said The Wabash, St. Louis and Pacific Railway Company and others in which his said decree was rendered, and makes the same a part hereof the same as if the same was fully herein set out.

And this defendant for answer to the said petition, and amended and supplemental petition of plaintiff, and the cross-petition
196 of William F. Redmond and others herein filed on January 5th, 1889, says that he denies the ownership of said plaintiff and cross-petitioners, and each of them, of any of the bonds set forth in said petition and cross-petition, respectively, and that there are any other of said bonds outstanding in the hands of divers and sundry persons, partnerships and corporations whomsoever, or that there is anything due said plaintiff or said cross-petitioners, or either of them, upon any of the bonds or coupons in said petition or cross-petitions set forth.

And this defendant denies each and every allegation in said amended and supplemental petition and said cross-petition contained on the subject of the ownership or the validity of any of said bonds therein alleged to be owned by the plaintiff or said cross-petitioners or either of them.

This defendant admits that he is the owner of one hundred and fifty thousand dollars of said bonds, known as equipment bonds, and that he has recovered a judgment and decree thereon for his own benefit, and not for the benefit of any other bondholder, for a

sale of so much of the said railway as is within the State of *of* Ohio, with its accretions and additions.

But this defendant denies that his lien under his said decree and judgment, or the right of any purchaser of said property, or any of it thereunder, is not and will not be superior to that of the said cross-petitioners, or of the plaintiff, but is only a lien and incumbrance of equal dignity and propriety, the benefits of which must be shared in proportion to the amounts of said bonds by them respectively held.

This defendant admits that said cross-petitioners, or some of them, appeared in this Court in the action of this defendant against said Wabash, St. Louis and Pacific Railway Company and others, and moved the Court for leave to be made defendants therein; but defendant says that such action was not taken by any of them until after the final decree had been rendered in said cause by the Supreme Court of the State of Ohio in favor of said Compton,
197 finding the amount due him on his individual bonds, owned by him, and ordering the sale of the said property in Ohio on default for ten days, in the payment of said sum, and after the said Supreme Court had by its mandate to this Court commanded it to carry said decree into execution, reference being had to said record and decree hereby; that before such action had been taken by or for said cross-petitioners, or any of them, said action had been pending for over eight years, and had resulted, as aforesaid, in a final decree for the plaintiff.

He admits that the Court refused to allow said parties to intervene in said suit and overruled their said motions. He admits that he resisted said motions thus made after the said final decree of the Supreme Court and mandate to this Court, but avers that that was the only effort ever made by said cross-petitioners, or any of them, to prosecute their said claims, or to be made parties to said suit, and he denies that any of them ever diligently made or pursued any attempt to be made parties to said suit or any attempt until the one aforesaid after final decree, and after this defendant had spent over eight years in litigations of his said claims, and at a very large expenditure of labor, time and money.

On the contrary, this defendant avers that the litigation in reference to said bonds of this defendant was commenced, conducted and carried on to final judgment without the aid or assistance, or the offered aid or assistance, of any of said cross-petitioners, or any other holder of any of said equipment bonds; that none of said cross-petitioners, and no other holder of any of said equipment bonds, ever took any step or proceeding of any kind in the Courts of Ohio to enforce their said lien, although the fact of the commencement and pendency of said suit of this defendant was notorious and well known to said bondholders.

And defendant says that on the 16th day of May, 1878, one David J. Tyson commenced a suit in the Circuit Court of Fountain County, Indiana, against the said Wabash Railway Company and others, to enforce the lien of certain of said equipment bonds,
198 for the benefit of himself and such other equipment bondholders similarly situated as might desire to come into said

suit and contribute to the expense thereof; that said suit was removed to the United States Court for *for* the District of Indiana, and there came into the same and were made parties thereto the following, to wit: Benjamin F. Ham, Edward D. Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, G. M. Whittemore, Townsend Underhill, M. L. Underhill and Thomas N. Mays and none others. The said parties setting up therein their bonds, or the bonds claimed by them; that said suit was tried in said Circuit Court of the United States for the District of Indiana, and a decree for the said bondholders rendered therein. An appeal was taken therefrom to the Supreme Court of the United States, and in May, 1885, said case decided against the said bondholders, and the lien by them claimed; that said suit was decided some three years before the decision of the Supreme Court of the State of Ohio in favor of this defendant in his action aforesaid. Except the said Benjamin F. Ham, who is the same person of that name who is a cross-petitioner herein, and upon the same bonds, none of said cross-petitioners ever took any steps whatever to enforce their said bonds, to commence any action thereon, or to aid in any manner or form, or contribute anything to the expense of said litigation by this defendant, although the pendency and effect of the decisions in both of said cases was well known to said cross-petitioners, and was public, and by the exercise of any diligence on their part, or the part of any of them, the same could have been known, and the necessary actions or proceedings commenced to protect their said rights or liens, if any they have. But said parties and each of them have been guilty of laches and neglect in sleeping upon their rights in the premises and in not asserting the same.

That this defendant has been compelled, unaided and alone, to prosecute his said suit and to obtain and maintain his said decree for a period of over eight years, with an expenditure of time
199 and money and labor exceeding in value the sum of fifty thousand dollars, and none of said cross-petitioners or said plaintiff ever took any steps until after said defendant had succeeded in establishing his said lien, by the final decree aforesaid, and until after the mandate had been filed herein, and the property appraised under the decree aforesaid, to aid in said litigation, or to commenec any action in their own behalf, or take any action whatever in the premises, but are seeking now to reap the benefit of this defendant's efforts in his said suit, and to participate in the results of his said litigation, after the same has ended, and resulted in a decree in his favor, as aforesaid.

And this defendant, referring to the said decree of the Supreme Court of Ohio, and the mandate of said Court to this Court, filed in said action of this defendant, says that the said Supreme Court found due to this defendant, and ordered the same paid to this defendant within ten days from the entry thereof, the sum of three hundred and thirty-nine thousand eight hundred and twenty dollars and forty cents, and interest thereon from the first day of May, 1888, and, in default thereof, ordered the said property therein described sold to pay the same, and that said property be sold, subject only

to two certain mortgages therein described, and that said property be appraised and sold subject to said two mortgages, and to no other lien or claim, and that said decree is a final decree, and settles the rights of this defendant and all the other parties to said action. That no one else, whether the plaintiff or any of the cross-petitioners herein, or other person, has any interest in said decree of the plaintiff, or the amount found due him, or the proceeds of any sale made thereunder, to the extent of the judgment of this defendant, and interest, or any part thereof. That said decree would be impossible of execution if the claim of these cross-petitioners, or of said plaintiff to practice therein, was or could be allowed.

And any lien or claim of said plaintiff, or of said cross-
200 petitioners, and each of them, if any they have, is inferior and subject to the lien and claim of this defend*fendant* as determined by his said decree.

And the defendant avers that, after the commencement of his said suit in this Court, and after his pendens had been fully established as to all the parties thereto, being all the persons and corporations who were necessary parties thereto, to wit: June 1st, 1880, the said $50,000,000 mortgage was executed and the bonds placed upon the market and sold, so far as they were sold. That said mortgage was foreclosed as stated and said property purchased by said purchasing committee, and all the proceedings had and steps taken recited in said cross-bill, whereby new rights were created in said property and new parties became the owners thereof, all of whom took their said rights or interests, charged with notice of and subject to the rights and equities of this defendant, as by his said action they were alleged and finally adjudicated, but without any notice of any claim of said cross-petitioners, or any of them, and without any steps being taken by them, or any of them, to assert or enforce any lien or claim upon said property, although fully aware of all such proceedings and transactions. And any equity which said cross-petitioners, or any of them, may have had are now lapsed and barred, and said cross-petitioners and each of them estopped from asserting the same.

This defendant admits the execution by The Wabash, St. Louis and Pacific Railway Company of the $50,000,000 mortgage to the Central Trust Company and James Cheney, as alleged in said cross-petition, and the issue and sale of said $17,000,000 of bonds. Also the commencement of proceedings to foreclose the same, the appointment of Receivers, and the subsequent proceedings therein, including the sale of said property to the Purchasing Committee, Joy, Ashley, Hubbard and Welles, and the confirmation of said sale, and avers that there has been subsequently commenced in the said United States Circuit Court for the Western Division of the Northern District of Ohio, and the Circuit Court for the District of
201 Indiana and the Circuit Courts in Illinois, certain suits for the foreclosure of mortgages on said property, to wit, one suit by Thomas B. Atkins and others, as bondholders under the mortgages of 1867 to Jesup and Knox, trustees, and the mortgages of 1879 to Humphreys and Lindley, trustees; and also a suit by said

Jesup and Knox, as trustees, to foreclose said mortgage of 1867; also a suit by the Farmers' Loan and Trust Company, to foreclose said first mortgage on the Ohio property made by The Toledo and Illinois Railroad Company in 1853, which two last-named suits have been consolidated with and under the title of the said Jesup and Knox suit, and to which suit all the mortgagees of said property, or any part of it, are parties, and have answered or filed cross-bills therein, and in which suits Receivers of all of the property of said railway companies, including all the property described in said petition and cross-petition herein, were appointed and took actual control and possession of all of said property, and still retain such actual control and possession. That such suits were commenced in said United States Circuit Court long after the commencement of this defendant's said suit in which he has obtained in his said decree, but long before the filing of said cross-petition or the commencement of any proceeding or taking of any steps by said cross-petitioners, or any of them, to enforce their alleged liens, and said Receiver was appointed and had actual possession and control of said property and said United States Circuit Court was proceeding to adjudicate the rights of the parties and the liens on said property long before any such action or proceeding by said cross-petitioners; and to which suits in the said Federal Courts all of the mortgagees of prior date to the alleged lien of the plaintiff and cross-petitioners and all of the railroad companies were and are parties, and in which there has now been entered by said Circuit Courts of the United States a decree for the sale of all of said property.

That this defendant was brought into said suits in the United States Courts *in invitum* before any pleadings filed herein by
202 said cross-petitioners, or any of them, and before any application was made for leave to plead herein by said cross-petitioners, or any of them, and he has been compelled by said Court to appear therein and answer, setting up his said lien and rights in the premises and in the property aforesaid, and while the jurisdiction of said Federal Courts was acquired after the jurisdiction of this Court in the suit of this defendant aforesaid, the said Federal Court acquired jurisdiction and possession of all of said property before any action of any kind was commenced by said cross-petitioners, or any of them.

That the record in said suits in said United States Circuit Courts is so voluminous that it would be impracticable to file copies of the same herein, but defendant will produce or prove the same on the trial hereof.

And this defendant denies everything in said amended and supplemental petition of the plaintiff alleged or contained, not hereby specifically admitted or denied.

The — admits the corporate character of the various railroad companies, the consolidation of the same, the terms of the consolidation agreement of 1865. The execution of the various mortgages. The decree of foreclosure in this Court in 1875. The sale and reorganization of said railroad company, and the consolidations under the name of The Wabash, St. Louis and Pacific Railway Company, as

alleged in said petition and cross-petition. And deny every other allegation in said petition and cross-petition not herein specifically admitted or denied.

JOHN G. MILBURN AND
DOYLE, SCOTT & LEWIS,
Attorneys for James Compton.

THE STATE OF OHIO, *Lucas County, ss:*

John H. Doyle, being duly sworn, says he is one of the attorneys for the defendant James Compton herein; that said James
203 Compton is absent from and a nonresident of the State of Ohio, and that the facts stated and allegations contained in the above answer are true as he believes.

JOHN H. DOYLE.

Sworn to before me and subscribed in my presence this 15th day of April, 1889.

N. HADNETT,
Deputy Clerk, Lucas County, O.

[Endorsed:] Filed in C. C., Jan. 14/95. L. E. Clark, clk.

STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

No. 22624.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

And now come James F. Joy, Ossian D. Ashley, E. T. Welles and Thomas H. Hubbard, and by leave of Court first had, file this their supplemental answer in this cause, and say that since the filing of their answer in this cause, the United States Circuit Court for the Southern District of Illinois; for the District of Indiana and for the Northern District of Ohio, Western Division, have duly entered de-
crees in this cause wherein James R. Jessup and Isaac H.
204 Knox were complainants *vs.* the Wabash, St. Louis and Pacific Railway Company, *were* defendants, being the same cause stated *in* by *this* defendant- in their original answer in this cause;

That said decrees were decrees for foreclosure and sale under all the mortgages existing against said railway lines and property formerly belonging to the Wabash, St. Louis and Pacific Railway Company, and fixing and determining the amount and priority of the liens upon said property and providing for a sale of all said properties, franchises and interests to satisfy the said liens;

That in accordance therewith the Commissioners appointed by said Court have appointed the 15th day of May, 1889, as the day for the sale of the said properties, the same to take place at the United States Court House in the City of Chicago in the State of Illinois.

These defendants say that they attach a copy of said decree to this their answer, the said decree being the same as entered in each of said Courts.

DILLON & SWAYNE,
Attorneys for James F. Foy, Ossian D. Ashley, Edgar T. Welles and Thomas H. Hubbard, Purchasing Committee.

STATE OF NEW YORK, *New York County, ss:*

Ossian D. Ashley, being duly sworn, says that the foregoing supplemental answer is true as he verily believes.

O. D. ASHLEY.

Sworn to before me this 23d day of April A. D., 1889.

WM. J. HARDING,
[SEAL.] *Notary Public, New York and Kings Counties.*

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Clerk.

205 In the Circuit Court of the United States for the Southern District of Illinois, the Twenty-third Day of March, 1889.

Present—The Honorable Walter Q. Gresham, Circuit Judge.

In Chancery. Consolidated Clause.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, SOLON HUMPHREYS and THOMAS E. TUTT, as Receivers of the said Wabash, St. Louis and Pacific Railway Company; SOLON HUMPHREYS, THE FARMERS' LOAN AND TRUST COMPANY, ALEXANDER M. WHITE, HENRY H. WARDEN, JOHN T. TERRY, ALFRED T. WHITE, JAMES F. JOY, OSSIAN D. ASHLEY, THOMAS H. HUBBARD, EDGAR T. WELLES, THE CENTRAL TRUST COMPANY OF NEW YORK, as Substituted Trustee; THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, THE MISSOURI PACIFIC RAILWAY COMPANY, DANIEL A. LINDLEY, THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY, JAY GOULD, A. LAWRENCE HOPKINS, S. FISHER JOHNSON, EDWARD POPPER, J. HARSEN PURDY, EDWIN PARSONS, MAXIMILIAN HERSCHEL, THE MERCANTILE TRUST COMPANY, JOHN MCNULTA, as Receiver of the property formerly
206 of the Wabash, St. Louis and Pacific Railway Company lying east of the Mississippi River; JAMES COMPTON, THE METROPOLITAN NATIONAL BANK, DAVID G. LEGGETT, JOHN N. A. GRISWOLD, Defendants.

This cause having come on in due course to be heard upon the pleadings and proofs of the respective parties and on all the papers

and proceedings herein, and on the report of Bluford Wilson and A. J. Ricks, the Special Masters heretofore appointed herein, which report bears date and was filed on the first day of February, 1889, and on the exceptions filed thereto, and it appearing to the Court that all the parties hereto except the defendants Jay Gould and A. Lawrence Hopkins have been duly served with process, or have duly entered their appearance herein, or have been notified of the pendency of this cause by personal service without the district as heretofore ordered by the Court, more than thirty days since, and the same having been duly argued by counsel, and due deliberation having been had.

It is ordered and adjudged that the said exceptions be, and the same hereby are, overruled, and that the report of the said Special Masters be, and the same hereby is, in all things approved and confirmed.

And the Court being fully advised in the premises doth hereby find:

I.

1. That the Toledo and Illinois Railroad Company was a corporation duly incorporated under and by virtue of the laws of the State of Ohio on or about the twentieth day of April, 1853, for the purpose of constructing, owning and maintaining a railroad from the City of Toledo, in said State of Ohio, in a direction towards the Town of Fort Wayne, in the State of Indiana, to a point on the west
207 boundary line of said State of Ohio, in the township of Harrison, in the County of Paulding, in said State of Ohio.

2. That thereafter the said Toledo and Illinois Railroad Company made and executed its nine hundred bonds for one thousand dollars each, bearing date the first day of August, 1853, bearing date the first day of August, 1865, with interest at the rate of seven per centum per annum, payable semi-annually, on presentation and surrender of the coupons thereto attached as they should severally become due.

3. That to secure the payment of the principal of the said bonds of the interest thereon as the same should from time to time become due the said Toledo and Illinois Railroad Company duly made, executed and delivered to the Farmers' Loan and Trust Company, as trustee, a mortgage or deed of trust bearing date the eighth day of September, 1853, and thereby conveyed to the said trustee, upon the trusts therein stated, all the property of the said railroad company, that is to say, their road, made and to be made, including the right of way and the land occupied thereby, together with the superstructure and the tracks thereon, and all rails and other materials and machinery used thereon or proposed therefor, including the furniture and equipments of the road and those to be furnished or paid for with the above-described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights or privileges of said railroad company of, in, to or concerning the same.

4. That the said mortgage was thereafter only recorded in all the

counties through which the said railroad ran or in which it was situated, and became and is a first and prior lien on all the railroad property, equipments and franchises herein mentioned and described, and that all of the said bonds thereby secured were issued and are now outstanding in the hands of divers persons and
208 corporations, owners and holders thereof for value.

5. That the time for the payment of the principal of the said bonds was thereafter, at maturity, extended to the first day of August, 1890, at the same rate of interest.

6. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated to said Toledo and Illinois Railroad Company, failed to pay the interest maturing on said bonds on the first day of February, 1885, and that default has been made in the payment of the coupons on said bonds maturing since that date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due February 1, 1885, and August 1, 1885, and February 1, 1886, and August 1, 1886, have since been paid by the Receivers, appointed as hereinafter stated, leaving unpaid all subsequent coupons.

7. That there is now owing and unpaid for principal and interest upon said bonds, together with interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of one million and sixty-six thousand nine hundred and fifty dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree, and that such sum is independent of, and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and appointment to said mortgage or trust deed of scrip certificates and funded debt bonds.

8. That the holders of more than one-half of the bonds outstanding and secured by said mortgage by notice in writing have required the said trustee to proceed to enforce the security provided by said mortgage, and to foreclose upon the same, and to collect the principal and interest due upon said bonds.

209 II.

The Court doth further find:

1. That the Lake Erie, Wabash and St. Louis Railroad Company was a corporation duly organized and incorporated under and by virtue of the laws of the State of Indiana, on or about the twenty-fourth day of June, 1852, for the construction, owning and maintaining of a line of railroad, the eastern terminus thereof being a point on the east line of Allen or De Kalb County in said State of Indiana, thence running down the Valleys of Little and Wabash Rivers, and passing through the Counties of De Kalb, Allen, Whitley, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain, Warren and Vermillion, or as many of them as may be necessary, all in the State of Indiana, on the most eligible route and terminating at some point on the west line of the State of Indiana in the general direction of Danville, Illinois.

2. That thereafter the said Lake Erie, Wabash and St. Louis Railroad Company duly made and executed its twenty-five hundred bonds for one thousand dollars each, bearing date the first day of August, 1853, payable on the first day of August, 1865, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of February and August in each year, on presentation and surrender of the coupons thereto attached as they should respectively become due.

3. That thereafter the said Lake Erie, Wabash and St. Louis Railroad Company, in order to secure the payment of the principal of the said bonds and of the interest thereon, as the same should from time to time become due, duly made, executed and delivered to the said Farmers' Loan and Trust Company, as trustee, a mortgage or deed of trust bearing date on said first day of August, 1853, and thereby conveyed to the said trustee, upon the trusts therein
210 specified, its road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and the tracks thereon, and all the rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road and those to be purchased and paid for with the above described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all the franchises, rights and paivileges of the said railroad company of, in, to or concerning the same.

4. That the said mortgage was thereafter duly recorded in all the counties through which the said railroad ran or in which it was situated, and became and is a first and prior lien on all the railroad property, equipment and franchises therein mentioned and described, and that all of the said bonds thereby secured are now outstanding in the hands of divers persons and corporations, owners and holders thereof for value.

4. That the time for the payment of the principal of the said bonds was thereafter, at maturity thereof, extended to the first day of August, 1890, at the same rate of interest.

5. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated of the said Lake Erie, Wabash and St. Louis Railroad Company, failed to pay the interest maturing on said bonds on the first day of February, 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due February 1, 1885, and August 1, 1885, and February 1, 1886, and August 1, 1886, have since been paid by the Receivers appointed as hereinafter set forth, leaving due and unpaid all subsequent coupons.

211 6. That there is now owing and unpaid for principal and interest upon said bonds and interest upon the unpaid installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of two millions nine hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum from the said first

day of February, 1889, to the date of this decree, and that such sum is independent of, and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

7. That the holders of more than one-half of the bonds outstanding and secured by said mortgage, by notice in writing, have required the said trustee to proceed to enforce the security provided by said mortgage, and to foreclose the same, and to collect the principal and interest due upon said bonds.

III.

The Court doth further find and adjudge:

1. That thereafter, and on or about the twenty-fifth day of June, 1856, the said Toledo and Illinois Railroad Company consolidated under the laws of the said States of Ohio and Indiana with the said Lake Erie, Wabash and St. Louis Railroad Company, the consolidated corporation being known as the Toledo, Wabash and Western Railroad Company.

2. That thereafter, under decrees of the Circuit Court of the United States for the Northern District of Ohio, and of the Circuit Court of the United States for the District of Indiana, the property of the said consolidated corporation was sold, under foreclosure of certain junior mortgages, to Azariah Boody; that the said purchaser thereafter conveyed the said property, that portion thereof
212 situate within the State of Ohio, and formerly owned by the Toledo and Illinois Railroad Company, to the Toledo and Wabash Railroad Company, a corporation organized as hereinafter stated, and that portion thereof situate within the State of Indiana, and formerly owned by the Lake Erie, Wabash and St. Louis Railroad Company, to the Wabash and Western Railway Company, a corporation also organized as hereinafter stated.

IV.

The Court doth further find:

1. That the Toledo and Wabash Railroad Company was a corporation organized under and by virtue of the laws of the State of Ohio on or about the first day of July, 1858; and that to said corporation was conveyed the railway property, equipments and franchises formerly of the Toledo and Illinois Railroad Company situate in said State.

2. That thereafter and on or about the fifteenth day of October, 1858, the said Toledo and Wabash Railroad Company duly made and executed its bonds to the amount of one million dollars of the denomination of two hundred and fifty, five hundred and one thousand dollars each, bearing date on that day, payable on the first day of November, 1878, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year, on presentation and surrender of the coupons thereto attached as they should respectively become due.

3. That to secure the payment of the said bonds and of the interest

thereon as the same should from time to time mature and be due and payable, the said Toledo and Wabash Railroad Company duly made, executed and delivered to Edwin D. Morgan, as trustee, a mortgage or deed of trust bearing date on said fifteenth day of October, 1858, and thereby conveyed to the said trustee, upon
213 the trusts therein stated, its railroad made and to be made, the right of way and all lands occupied thereby, together with superstructures, depots, depots grounds, and all buildings erected or to be erected thereon, and the rails, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises and accessories of the said railroad company in the State of Ohio, and all the rolling stock, material, machinery, furniture and equipments of said road, being the same property described in the deed of Matthew Johnson, Marshal and Special master Commissioner to A. Boody, dated October 8th, one thousand eight hundred and fifty-eight, and which was conveyed by said Boody to said railroad company.

4. That the said mortgage was thereafter duly recorded in all the counties through which the said railroad ran or in which it was situated and became and is a lien on all the railroad property, equipment and franchises therein described, subject only to the prior lien of the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, as hereinbefore mentioned, and that all of the bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations holders thereof for value.

5. That the time for the payment of the principal of said bonds was thereafter at maturity extended to the first day of May, 1893, at the same rate of interest.

6. That the said Edwin D. Morgan, trustee under said mortgage or deed of trust, departed this life on or about the fourteenth day of February, 1883, and the defendant James F. Joy has been duly appointed his successor in the trusts thereby created.

7. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated of said Toledo and Wabash Railroad Company, failed to pay the interest maturing on said bonds on the first day of May, 1885, and that default has been
214 made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof.

8. That there is now owing and unpaid for principal and interest upon said bonds and interest upon said several installments of interest from the dates at which they respectively became due, to the first day of February, 1889, the sum of one million three hundred and thirty-one thousand one hundred dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree, and that such sum is independent of and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

V.

And the Court doth further find:

1. That the Wabash and Western Railway Company was a corporation duly organized and incorporated under and by virtue of the laws of the State of Indiana on or about the fifteenth day of July, 1858, and that to said corporation was conveyed the railway property, equipments and franchises formerly of the Lake Erie, Wabash and St. Louis Railroad Company in said State.

2. That thereafter and on or about the fifteenth day of October, 1858, the said Wabash and Western Railway Company duly made and executed its bonds to the amount of one million five hundred thousand dollars, of the denomination of one hundred, five hundred and one thousand dollars each, bearing date on said day, payable on the first day of November, 1878, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of May and November in each year on presentation and surrender of the coupons thereto attached, as they should respectively become due.

215 3. That to secure the payment of the said bonds and of the interest thereon, as the same should from time to time accrue and become due, the said Wabash and Western Railway Company duly made, executed and delivered to Edwin D. Morgan, as trustee, a mortgage or deed of trust, bearing even date with said bonds, and thereby conveyed to said trustee upon the trusts therein stated its railroad made and to be made, the right of way and all the land occupied thereby, together with all the superstructure, depots, depot grounds and buildings erected or to be erected thereon, and the rail tracks, side tracks, bridges, fences, viaducts, culverts and rights, privileges and franchises of the said railway company in the State of Indiana, all the rolling stock, materials, machinery, furniture and equipments of the said road, being the same property described in the deed of John L. Robinson, marshal and commissioner, to A. Boody, dated October fifth, eighteen hundred and fifty-eight, and conveyed by A. Boody to the said railway company.

4. That the said mortgage was thereafter duly recorded in all the counties through which the said railroad ran or in which it was situated, and became and is a lien on all the railroad property, equipment and franchises therein described, subject only to the prior lien of the said mortgage executed by the Lake Erie, Wabash and St. Louis Railway Company to the Farmers' Loan and Trust Company as hereinbefore recited, and that all of the bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations holders thereof for value.

5. That the time for the payment of the principal of the said bonds was thereafter, at maturity, extended to the first day of May, 1893, at the same rate of interest.

6. That the said Edwin D. Morgan, trustee under the said
216 mortgage or deed of trust, departed this life, as hereinbefore found, on or about the fourteenth day of February, 1883, and that since his death the defendant James F. Joy has been appointed his successor in the trusts thereby created.

7. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated to said Wabash and Western Railway Company failed to pay the interest maturing on said bonds on the first day of May, 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof.

8. That there is now owing and unpaid for principal and interest upon said bonds and interest upon the several installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of one million, nine hundred and ninety-six thousand, six hundred and fifty dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree, and that such sum is independent of, and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed, of scrip certificates and funded debt bonds.

VI.

And the Court doth further find:

1. That thereafter and on or about the third day of November, 1858, the said Toledo and Wabash Railroad Company duly consolidated under the laws of the said States of Ohio and Indiana with the said Wabash and Western Railway Company, the consolidated company being known as the Toledo and Wabash Railway Company.

217

VII.

And the Court doth further find:

1. That the Illinois and Southern Iowa Railroad Company was a corporation duly incorporated by Act of the Legislature of the State of Illinois on or about the twelfth day of February, 1857, with power and authority to survey, locate, relocate, establish, build, maintain, equip and operate a railroad from the City of Warsaw and from the easterly shore and main channel of the Mississippi River opposite the City of Keokuk at Hamilton in the County of Hancock, Illinois, by way of Carthage in said county to such point on the line of the Toledo and Quincy railroad at or near Clayton as might be found most expedient and practicable for a connection with the line of said Toledo and Quincy railroad.

2. That the said Illinois and Southern Iowa Railroad Company thereafter and on or about the first day of March, 1862, duly made and executed its bonds to the amount of three hundred thousand dollars, two hundred of said bonds being of the denomination of one thousand dollars each, and two hundred thereof being of the denomination of five hundred dollars each, payable on the first day of August, 1882, with interest thereon from and after the first day of March, 1862, at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each year on presentation and surrender of the coupons thereto attached as they should respectively become due.

3. That to secure the payment of the principal of said bonds together with the interest thereon as the same should accrue and become due and payable, the said Illinois and Southern Iowa Railroad Company duly made, executed and delivered to John N. A. Griswold, James R. Jessup and Lucien Tilton, as trustees, a
218 mortgage or deed of trust bearing even dated with said bonds, and thereby conveyed to said trustees upon the trusts therein stated all the lands, tenements, roadbed, right of way, depot and station grounds, and houses, turnouts, switches and easements, ties, bridges, iron, engines, tenders, cars, tools, machinery and materials, wood, fuel, furniture and property of every kind, name and nature whatsoever which the said railroad company then owned or might thereafter acquire or own have any interest in, for, on, or connected with its road, built or to be built, being and situate between the town of Carthage, in Hancock County, and the junction with the Quincy and Toledo Railroad at or near Clayton, in Adams County, Illinois, the same being a distance of about thirty miles. Also all contracts, leases and rights which said railroad company then had or might thereafter acquire with or against any other railroad or other corporation, and especially the lease then owned by said railroad company from the Mississippi and Wabash Railroad Company granting the joint use of all its road from Carthage to the Mississippi River, opposite Keokuk, Iowa, and to said Town of Warsaw, for the term of fifty years from May twenty-fifth, eighteen hundred and fifty-nine, which said lease is duly executed and of record in said County of Hancock and State of Illinois, and also any lease or contract then made or which might at any time thereafter be made by said railroad company with other parties respecting the ferry across the Mississippi River at Keokuk, and the right to use the same; also, all unpaid subscriptions to the capital stock, debts, books, vouchers, evidences of debt, tickets, hand bills and all other papers which might then or thereafter be due or belong to said railroad company, together with all the rights, privileges, immunities and franchises, and all its receipts, earnings and assets from every source and of every nature whatever.

4. That the said mortgage was thereafter duly recorded in all the counties in said State of Illinois through which the said railroad ran, or in which it was situated, and became and is a first and prior
219 lien on all the railway property, equipments and franchises therein mentioned and described, and that all the said bonds were issued and are now outstanding in the hands of divers persons and corporations, holders thereof for value.

5. That the time for the payment of the principal of the said bonds was thereafter, at maturity, extended to the first day of August, 1912, the rate of interest being reduced to six per centum per annum.

6. That the said Lucien Tilton, one of said trustees, thereafter died.

7. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation, as hereinafter stated, to the said Illinois and Southern Iowa Railroad Company failed to pay the interest maturing on said bonds on the first day of August, 1884, and that default

has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due August 1, 1884, and February 1, 1885, and August 1, 1885, and February 1, 1886, and August 1, 1886, have since been paid by the Receivers appointed as hereinafter stated, leaving unpaid all subsequent coupons.

8. That there is now owing and unpaid for principal and interest upon the said bonds and interest upon the several installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of three hundred and forty-seven thousand seven hundred dollars, together with interest on said sum, from the said first day of February, 1889, to the date of this decree, and that such sum is independent of, and in addition to, the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed
220 of scrip certificates and funded debt bonds.

9. That the holders of more than one-half of the bonds outstanding and secured by said mortgage, by notice in writing, have required the said trustees to proceed to enforce the security provided by said mortgage for the principal and interest due upon said bonds.

VIII.

And the Court doth further find:

1. That the Great Western Railroad Company of 1859, was a corporation duly incorporated by Act of the Legislature of the State of Illinois on or about the twenty-ninth day of January, 1859, with the rights, powers and franchises usually possessed by railroad corporations and all the privileges, powers, rights and franchises at any time theretofore possessed by the Great Western Railroad Company.

2. That thereafter and on or about the twenty-fifth day of May, 1863, the said Great Western Railroad Company of 1859, made and executed its twenty-five hundred bonds, bearing date on that day for one thousand dollars each, payable on the first day of August, 1888, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each year on presentation and surrender of the coupons thereto attached as they should severally become due.

3. That to secure the payment of the principal of the said bonds together with the interest thereon, as the same should accrue and become due and payable the said Great Western Railroad Company of 1859, duly made, executed and delivered to George Griswold, Alexander M. White and Henry H. Warden, as trustees, a
221 mortgage or deed of trust, bearing even date with the said bonds and thereby conveyed to the said trustees upon the trusts therein specified all the right of way and railroad of said railroad company extending in the State of Illinois from Naples and Meredosia as its western termini through Springfield and Decatur to the boundary line between the States of Illinois and Indiana, as then used, or as at any time thereafter the said *said* road might be used, together with all embankments, bridges, turnouts, side tracks,

structures, water tanks and fixtures, shops, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices, and all things real and personal then used or that thereafter might be used by the said railroad company in connection with the said railroad, and everything appurtenant thereto, and all the franchises, privileges and chartered, or other rights of the said The Great Western Railroad Company of 1859.

4. That the said mortgage was thereafter recorded in the various counties of the said State of Illinois, through which the said railroad ran, and in which it was situated, and became and is a first and prior lien, except as hereinafter stated, upon all the railway property, equipments and appurtenances therein mentioned and described, and that all of the bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations, holders thereof for value.

5. That the said bonds were executed and delivered to take up and pay and satisfy certain prior liens theretofore existing upon the property of said company, viz., two certain issues of bonds of the Great Western Railroad Company, the predecessor corporation of said The Great Western Railroad Company of 1859, amounting to one million dollars and one million three hundred and fifty thousand dollars respectively; that all of the said bonds last mentioned were so taken up and satisfied except four, for the sum of one thousand dol-
222 lars each, with interest at ten per centum per annum, payable semi-annually, which are still outstanding; that of said four bonds, one has been produced and proved before the Masters in this cause; that the same is secured by a mortgage to The Farmers' Loan and Trust Company as trustee, bearing date the fifteenth day of March, 1853, and which said mortgage to the extent of the principal and interest of the bonds secured thereby outstanding as aforesaid, and not exceeding the sum of four thousand dollars and interest, is a lien on the railway property, equipments and franchises of the said the Great Western Railroad Company of 1859, prior to the lien thereon of the said mortgage to the said Griswold, White and Warden.

6. That the said George Griswold, one of the said trustees, thereafter departed this life.

7. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated, of said the Great Western Railroad Company of 1859, failed to pay the interest maturing on said bonds on the first day of August, 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of maturity thereof; that the coupons due August 1, 1884, and February 1, 1885, and August 1, 1885, and February 1, 1886, and August 1, 1886, have since been paid by the Receivers, appointed as hereinafter set forth, leaving unpaid all subsequent coupons.

8. That there is now due, owing and unpaid upon the said bond produced before the Masters, executed by the Great Western Railroad Company to the Farmers' Loan and Trust Company, as trustee,

for principal and interest, the sum of two thousand nine hundred and seventy-five dollars and sixty-two cents, together with interest thereon from the first day of February, 1889, to the date of this decree.

9. That there is now due and owing and unpaid for
223 principal and interest upon said bonds of the Great Western Railroad Company of 1859 and interest upon the several installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of two millions nine hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree, and that such sums are so due independent of and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

10. That the holders of more than one-half of the bonds outstanding and secured by said mortgage, by notice in writing, have required the said trustees to proceed to enforce the security provided by said mortgage and to foreclose the same and to collect the principal and interest due upon said bonds.

IX.

And the Court doth further find:

1. That thereafter and on or about the eleventh day of May, 1865, the said the Great Western Railroad Company of 1859 duly made and executed its twenty-five hundred other bonds, each for the sum of one thousand dollars, bearing date on said day, payable on the first day of May, one thousand eight hundred and ninety-three, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of May and November in each year, on presentation and surrender of the coupons thereto attached as they should severally become due.

2. That to secure the payment of the principal of the said bonds, together with the interest thereon, as the same should mature and become due, the said The Great Western Railroad Company
224 of 1859 duly made, executed and delivered to Solon Humphreys and James R. Jesup, as trustees, a mortgage or deed of trust, bearing date the said eleventh day of May, 1865, and thereby conveyed to the said trustees, upon the trusts therein stated, all the right of way and railroad of the said railroad company extending in the State of Illinois from Naples and Meredosia as its western termini, through Springfield and Decatur to the boundary line between the States of Illinois and Indiana, as then used, or as at any time thereafter the said road might be used, together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices, and all things, real and personal, then owned or used, or that thereafter might be owned or used, by the said railroad company in connection with the said railroad, and everything appurtenant

thereto, and all the franchises, powers, privileges and chartered or other rights of the said Great Western Railroad Company of 1859.

3. That the said mortgage was thereafter duly recorded in the various counties of the said State of Illinois through which the said railroad ran or in which it was situated, and became and is a lien upon the railway property, equipments and franchises therein mentioned and described, subject only to the prior lien of said mortgage executed by the Great Western Railroad Company to the extent of the principal and interest of the four bonds secured thereby outstanding, as hereinabove set forth, and to the prior lien of the said mortgage executed by the said The Great Western Railroad Company of 1859 to the said Griswold, White and Warden, as trustees.

4. That the said Solon Humphreys thereafter duly resigned and discharged himself of the trusts created by the said mortgage.

5. That the Wabash, St. Louis and Pacific Railway Com-
225 pany, the successor corporation, as hereinafter stated, of the said The Great Western Railroad Company of 1859, failed to pay the interest maturing on the said bonds on the first day of May, 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof.

6. That there is now owing and unpaid for principal and interest upon said bonds and interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of three million three hundred and twenty-seven thousand seven hundred and fifty dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree, and that such sum is independent of, and in addition to, the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

7. That the holders of more than a majority in value of the bonds outstanding and secured by said mortgage, by notice in writing, have declared the principal of said bonds to be due and payable, and have required the said trustee to proceed in accordance with the terms of said mortgage, to foreclose the same.

X.

And the Court doth further find:

1. That the Quincy and Toledo Railroad Company was a corporation duly incorporated under and by virtue of an act of the Legislature of the State of Illinois on or about the thirty-first day of January, 1857, and authorized and empowered to locate, construct and finally complete and put in operation a railroad from the east end of the depot ground of the Northern Cross Railroad Company,
226 at Camp Point, in the County of Adams, to the east side of the Illinois River, at or near Naples or Meredosia, and so as to connect the same with the track of the Great Western Railroad of Illinois.

2. That thereafter and on or about the twenty-ninth day of May,

1865, the said Quincy and Toledo Railroad Company made and executed its five hundred bonds, each for the sum of one thousand dollars, bearing date on that day, payable on the first day of November, 1890, with interest thereon at the rate of seven per centum per annum, payable semi-annually on the first days of May and November of each year on presentation and surrender of the coupons thereto attached, as they should severally become due.

3. That to secure the payment of the principal of said bonds and of the interest thereon, as the same should mature and become due and payable, the said Quincy and Toledo Railroad Company made, executed and delivered to John T. Terry, as trustee, a mortgage or deed of trust, bearing date on said twenty-ninth day of May, 1865, and thereby conveyed to said trustee, upon the trusts therein specified, all the right of way and railroad of the said railroad company, extending in the State of Illinois from Clayton to the west side of the Illinois River, opposite Meredosia, as then used or as at any time thereafter the said road might be used; together with all embankments, bridges, turnouts, sidetracks, structures, water tanks and fixtures, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all things real and personal now owned or used or that thereafter might be owned or used by the said railroad company in connection with the said railroad and everything appurtenant thereto, excepting that part of the road west of said Clayton, and all the franchises, powers, privileges and chartered or other rights of the said Quincy and Toledo Railroad Company.

227 4. That the said mortgage or deed of trust was thereafter duly recorded in the various counties through which the said railroad ran, or in which it was situate, and became and is a first and prior lien upon all the railway property, equipments and franchises therein mentioned and described, and that all of said bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations, holders thereof for value.

5. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter set forth to said Quincy and Toledo Railroad Company, failed to pay the interest maturing on said bonds on the first day of November, 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due November 1, 1884, and May 1, 1885, and November 1, 1885, and May 1, 1886, and November 1, 1886, have since been paid by the Receivers appointed as hereinafter set forth, leaving unpaid all subsequent coupons.

6. That there is now owing and unpaid for principal and interest upon said bonds and interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of five hundred and eighty-two thousand nine hundred and fifty dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree, and that such sum is independent of and in

addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

7. That the holders of more than one-half of the said bonds outstanding and secured by said mortgage by notice in writing have required the said trustee to proceed to enforce the security
228 provided by said mortgage and to foreclose the same and collect the principal and interest due upon said bonds.

XI.

And the Court doth further find:

1. That thereafter, and on or about the said twenty-ninth day of May, 1865, under and by virtue of the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, the said Toledo and Wabash Railway Company, the said The Great Western Railroad Company of 1859, the said Quincy and Toledo Railroad Company, and the said Illinois and Southern Iowa Railroad Company, consolidated together as one corporation under the name of the Toledo, Wabash and Western Railway Company.

XII.

And the Court doth further find:

1. That thereafter and on or about the first day of February, 1867, the said Toledo, Wabash and Western Railway Company made and executed under its corporate seal, and attested by the signatures of its president and secretary, fourteen thousand two hundred of its bonds bearing date on that day, fourteen thousand thereof, numbered from one to fourteen thousand inclusive, being for one thousand dollars each, and two hundred thereof, numbered from fourteen thousand and one to fourteen thousand two hundred, both inclusive, being for five thousand dollars each, payable on the first day of February, 1907, with interest thereon at the rate of seven per centum per annum, payable quarterly on the first days of May, August, November and February of each year on presentation and surrender of the coupons thereto attached, as they should severally become due.

2. That to secure the payment of the principal of the said
229 bonds and of the interest thereon as the same should accrue and become due, the said Toledo, Wabash and Western Railway Company duly made, executed and delivered to the complainant James R. Jesup, and to Isaac H. Knox, as trustees, a mortgage or deed of trust, bearing date on that day, and known as the consolidated mortgage of the said company, and thereby conveyed to the said trustees, upon the trusts therein stated, all the right of way and railroad of the said railroad company extending from Toledo, in the State of Ohio, to and through the State of Indiana, and thence in the State of Illinois to Meredosia, with branch of said road to Naples, and from said Meredosia to Camp Point in said State of Illinois, and also with branch of said road from Clayton in said State to the east bank of the Mississippi River at Hamilton, in said State as then made, or as thereafter might be made, and as then used, or

thereafter might be used, together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turn tables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all other things, real and personal, then owned or used or that might thereafter be owned or used by the said railroad company in connection with the said railroad, and everything appertaining and appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said railroad company, together with all the property, real and personal, of said railroad company then acquired, or to be thereafter acquired, at Quincy, in said State of Illinois, as also a certain contract made between the said railroad company and the Chicago, Burlington and Quincy Railroad Company, dated October 26, 1866, with all the rights and privileges secured by the said contracts to said railroad company, and all other contracts.

3. That the said consolidated mortgage was thereafter duly recorded in all the counties through which the said railroad ran, or in which it was situated, and became and is a lien on all the
230 railway property, equipments and franchises therein mentioned and described, being a first and prior lien upon that portion of said railroad extending from Clayton to Camp Point, and upon that portion of said railroad extending from Carthage to Elvaston, and being a second lien upon that portion of said railroad extending from the west bank of the Illinois river opposite Meredosia to Clayton, in the State of Illinois, subject to the prior lien of the mortgage executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, and upon that portion of the said railroad running from Clayton to Carthage in the said State of Illinois, subject to the prior lien of *of* the mortgage executed by the Illinois and Southern Iowa Railroad Company to Lucien Tilton, John N. A. Griswold and James R. Jesup as trustees; and being a third lien upon the remaining portions of the said railroad, subject to the prior lien of the mortgage executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White and Henry H. Warden as trustees, and of the mortgage executed by said last named company to Solon Humphreys and James R. Jesup as trustees, and of the mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company to The Farmers' Loan and Trust Company as trustee, and of the mortgage executed by the Wabash and Western Railway Company to Edwin D. Morgan as trustee, and of the mortgage executed by the Toledo and Illinois Railroad Company to the said Farmers' Loan and Trust Company as trustees, and of the mortgage executed by the Toledo and Wabash Railroad Company to the said Edwin D. Morgan as trustee.

4. That the said consolidated mortgage, among other things, contained provisions for a sinking fund for the payment and extinguishment of all the bonds secured by said mortgage, by the payment to commissioners of fifty thousand dollars per year, in installments of twenty-five thousand dollars every six months until and including the maturity of said bonds.

231 That the said mortgage and said bonds also contain covenants that in case of default in any of the quarter yearly installments of interest on any of said bonds, or in the said semi-annual payments to the sinking fund, and the continuance of such defaults, or either of them, for the period of six months, the principal of all the said bonds secured by said consolidated mortgage should forthwith become immediately due at the option of the holder or holders of a majority in interest of the said bonds then outstanding to be expressed by them in writing to the trustees of said mortgage.

5. That the said bonds secured by said consolidated mortgage were thereafter duly issued and delivered to the amount of two millions seven hundred thousand dollars; that of said amount ninety thousand dollars have been retired by means of the said sinking fund, and that there are now outstanding said bonds secured by said consolidated mortgage to the amount of two millions six hundred and ten thousand dollars in the hands of divers persons and corporations holders thereof for value.

6. That the said Isaac H. Knox, one of the said trustees, departed this life on or about the twenty-first day of December, 1888, and the complainant Edward H. Dixon has been duly elected in accordance with the terms of said consolidated mortgage to fill the vacancy thereby created.

7. That the Wabash, St. Louis and Pacific Railway Company, the successors corporation as hereinafter set forth of said The Toledo, Wabash and Western Railway Company, failed to pay the interest maturing on said bonds on the first day of August, 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due August 1, 1884, and November 1, 1884, were
232 paid by the Receivers appointed as hereinafter set forth, leaving unpaid all subsequent coupons.

8. That after the default in payment of the interest on the bonds secured by the said consolidated mortgage had continued for more than the space of six months, the holders of more than the majority of the bonds outstanding and secured by said mortgage, by notice in writing, notified the trustees of said consolidated mortgage that as such holders they elected to consider the principal of said bonds due and payable in consequence of such default, and required the said trustees to proceed with the foreclosure of said consolidated mortgage.

9. That there is now due, owing and unpaid for principal and interest upon the said bonds and interest upon the several unpaid installments of interest to the first day of February, 1889, the sum of three millions four hundred and seventy-nine thousand six hundred and fifty-two dollars, together with interest on said sum from said first day of February, 1889, to the date of this decree, and that such sum is so due, independent of and in addition to the amount hereinafter declared to be due by reason of the issue of and appor-

tionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

XIII.

And the Court doth further find:

1. That the Decatur and East St. Louis Railroad Company was a corporation duly incorporated under an act of the Legislature of the State of Illinois on or about the twenty-sixth day of February, 1867, with full power and authority to locate, construct, finish and maintain a railroad with one or more tracks commencing at some suitable point at or near the Town of Decatur, in Macon County in Illinois, and running from thence to East St. Louis
233 through the Towns of Taylorville in Christian County, Litchfield in Montgomery County, Stanton in Macoupin County, and Edwardsville in Madison County, upon the most eligible route and with the usual powers of railway corporations.

2. That the said Decatur and East St. Louis Railroad Company thereafter duly made and executed its twenty-seven hundred bonds for one thousand dollars each, bearing date the first day of August, 1869, payable on the first day of August, 1889, with interest at the rate of seven per centum per annum, payable semi-an-ually on the first days of February and August of each year on presentation and surrender of the coupons thereto attached as they should severally become due.

3. That in order to secure the payment of the said bonds and the interest thereon as the same should accrue and become due and payable the said Decatur and East St. Louis Railroad Company duly made executed and delivered to Isaac H. Knox as trustee a mortgage or deed of trust bearing date the third day of June, 1869, and thereby conveyed to the said trustee upon the trusts therein stated the said Decatur and *and* East St. Louis Railroad Company's railroad, track, land, depot grounds, depots, buildings, structures, equipments, rolling stock and property of every description owned, constructed and used or in future to be owned, constructed and used on the line of their said road from Decatur to East St. Louis, both inclusive, together with the road bed, tracks, said tracks, branches, lands, gravel pits, stations, shops, cars, engines, tools and machinery of every description and including all rights, credits, franchises and property real and personal and mixed acquired or to be acquired by said railroad company.

4. That the said mortgage was thereafter duly recorded in all the counties in said State of Illinois through which the said railroad ran or in which it was situated, and became and is a first
234 and prior lien upon all the railway property, equipments and franchises therein mentioned and described; and that all of the said bonds secured thereby were duly issued and delivered and are now outstanding in the hands of divers persons and corporations holders thereof for value.

5. That the said Isaac H. Knox, the trustee named in said mortgage, having departed this life on or about the twenty-first day of December, 1888, as hereinbefore found, the defendant the Central

Trust Company of New York has been duly substituted as trustee in his place and stead.

6. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation to said Decatur and East St. Louis Railroad Company, as hereinafter stated, failed to pay the interest maturing on said bonds on the first day of August, 1884, and that default has been made in the payment of the coupons on the said bonds maturing since said date although payment thereof has been duly demanded at the respective dates of maturity thereof; that the coupons maturing August 1, 1884, and February 1, 1885, and August 1st, 1885, and February 1, 1886, and August 1, 1886, have since been paid by the Receivers, appointed as hereinafter stated, leaving unpaid all subsequent coupons.

7. That there is now owing and unpaid for principal and interest upon the said bonds and interest upon the several unpaid installments of interest from the dates t- which they respectively became due to the first days of February, 1889, the sum of three millions two hundred thousand eight hundred and fifty dollars, together with interest on said sum from the said first day of May, 1889, and that -uch -um is independent of s and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of script certificates and funded debt bonds.

235 8. That the holders of more than one-half of the said bonds outstanding and secured by said mortgage by notice in writing have required the trustee to seek to obtain possession of the railroad and property covered thereby, and to foreclose said mortgage and to sell the said mortgaged premises for the benefit of the holders of said bonds.

XIV.

And the Court doth further find:

1. That on or about the third day of June, 1869, the said The Toledo, Wabash and Western Railway Company and the said Decatur and East St. Louis Railroad Company consolidated together under the laws of the State of Illinois under the name of The Toledo, Wabash and Western Railway Company.

2. That thereafter by virtue of a decree of foreclosure and sale made in an action pending in the Court of Common Pleas of Lucas County, Ohio, on the twenty-first day of December, 1875, and by virtue of decrees of foreclosure and sale made in actions pending in the Circuit Court of Cass County, Indiana, and in the Circuit Court of Vermilion County, Illionis, at the February Term, 1876, of said Courts, respectively, for the foreclosure of a certain mortgage theretofore executed by the said The Toledo, Wabash and Western Railway Company, and known as the "Gold Bond" mortgage, all and singular the railway of said The Toledo, Wabash and Western Railway Company lying in the States of Ohio, Indiana and Illinois, was sold and conveyed to John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post.

3. That thereafter said purchasers caused to be organized under the laws of the State of Ohio, a corporation called the Wabash Railway of Ohio, and also caused to be organized under the laws of the State of Indiana a corporation called the Wabash
236 Railway Company of Indiana, and also caused to be organized under the laws of the State of Illinois a corporation called the Wabash Railway Company of Illinois; that thereafter the said three corporations consolidated under the laws of the said several States of Ohio, Indiana and Illinois under the name of The Wabash Railway Company, and that thereafter the said John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, by deed bearing date the twelfth day of January, 1877, duly conveyed to the said The Wabash Railway Company, all their right, title and interest of, in and to all and singular the continuous railway extending from its eastern terminus at Toledo, in the State of Ohio, through the States of Indiana and Illinois to East St. Louis and also to East Hannibal, Quincy and Hamilton, on the Mississippi River, in the State of Illinois, and therefore known as the Toledo, Wabash and Western Railroad or Railway.

XV.

And the Court doth further find:

1. That thereafter the said Wabash Railway Company became a purchaser of a certain line of railroad theretofore known as the Hannibal and Naples Railroad, extending from Naples in Scott County, in the State of Illinois, to the Mississippi River at East Hannibal, in said State.

2. That thereafter the said Wabash Railway Company, in payment of the purchase price of the said railroad, duly made and executed its five hundred bonds bearing date the sixteenth day of May, 1879, for one thousand dollars each, payable on the first day of June, 1909, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of December and June in each year, on presentation and surrender of the coupons thereto attached as they should respectively become due.

237 3. That in order to secure the payment of the principal of the said bonds, and of the interest thereon as the same should from time to time mature and become due and payable, the said Wabash Railway Company duly made, executed and delivered to Alfred T. White, as trustee, a mortgage or deed of trust bearing date the said sixteenth day of May, 1879, and thereby conveyed to the said trustee, upon the trusts therein stated, the Hannibal and Naples Railroad, from Naples in Scott County, Illinois, to the Mississippi River at East Hannibal, as then laid out and constructed, with all sidings, appurtenances and belongings, the same as conveyed by Alexander M. White to said Wabash Railway Company by deed dated ——, 1878.

4. That the said mortgage was thereafter duly recorded in the various counties in the said State of Illinois through which the said railroad ran or in which it was situated, and became and is a first

and prior lien upon the railroad property, equipments and franchises therein mentioned and described.

5. That all the bonds secured by said mortgage were duly issued and are now outstanding in the hands of divers persons, owners and holders thereof for value.

6. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated to said Wabash Railway Company failed to pay the interest on said bonds maturing on the first day of June, 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due June 1, 1884, and December 1, 1884, and June 1, 1885, and December 1, 1885, and June 1, 1886, have since been paid by the Receivers, appointed as hereinafter set forth, leaving unpaid all subsequent coupons.

238 7. That there is now owing and unpaid for principal and interest upon the said bonds and interest upon the several unpaid instalments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of five hundred and ninety-nine thousand four hundred and fifty-eight dollars and thirty-three cents, together with interest on said sum from said first day of February, 1889, to the date of this decree.

8. That the holders of more than a majority in value of the outstanding bonds secured by said mortgage, by notice in writing, have required the said trustee to foreclose said mortgage for non-payment of the interest coupons attached to said bonds.

XVI.

And the Court doth further find:

1. That the said Wabash Railway Company thereafter duly made and executed its two thousand bonds for one thousand dollars each, bearing date the seventh day of May, 1879, payable on the 1st day of April, 1909, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October in each year on presentation and surrender of the coupons thereto attached as they should severally become due.

2. That, in order to secure the payment of the principal of the said bonds, together with the interest thereon, as the same should mature and become due and payable, the said Wabash Railway Company duly made, executed and delivered to Solon Humphreys and Daniel A. Lindlay, as trustees, a mortgage or deed of trust, bearing date on the said seventeenth day of May, 1879, and thereby conveyed to the said trustees, upon the trusts therein specified, all the railroad, roadbed and right of way of the said railway company, extending from the City of Toledo, in the State of Ohio, through the State

239 of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi

River at Hannibal, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State, together with all the embankments, bridges, turnouts, sidetracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables, engine machinery, cars, tools, rolling stock, lots, lands, buildings and offices, and other things, real and personal, then owned or used, or that might thereafter be owned or used, by the said railroad company in connection with the said railroad, and every appurtenant thereto, and all the powers, privileges, franchises and chartered or other rights of the said Wabash Railway Company, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and all reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all contracts, leases and rights then existing or that might thereafter be acquired by said railroad company with other corporations, companies or individuals, and all the estate, right, title, interest and demand, as well at law as in equity, of the said railway company in and to the same, and every part thereof, with the said appurtenances.

3. That the said mortgage or deed of trust was thereafter duly recorded in the various counties through which the said line of railroad ran or in which it was situated, and became and is a lien upon the railway property, equipments and franchises mentioned and described therein, but subsequent and subject to the respective liens of the various mortgages theretofore executed by the said railway company and its predecessor corporations and hereinbefore particularly set forth.

240 4. That all the bonds secured by the said mortgage or deed of trust were issued and are now outstanding in the hands of divers persons and corporations holders thereof for value.

5. That the Wabash, St. Louis and Pacific Railway Company, the successor corporation to the said Wabash Railway Company, failed to pay the interest maturing on said bonds on the first day of October, 1884, and that default has been made in the payment of the coupons maturing on said bonds since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupon maturing October 1, 1884, has since been paid by the Receivers appointed as hereinafter set forth, leaving unpaid all subsequent coupons.

6. That there is now due, owing and unpaid for principal and interest on the said bonds and interest on the several unpaid instalments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of two millions six hundred and seventy-six thousand six hundred and sixty-six dollars and sixty-six cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

XVI. (*a.*)

Reference is hereby made to the report of the masters filed herein for a detailed statement of the amounts outstanding and unpaid for interest and for principal on each of said mortgages respectively.

XVII.

And the Court doth further find:

1. That the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, as trustee, is the first and best lien upon all the line of railway,
241 premises and property therein mentioned and described.

2. That the said mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company, as trustee, is the first and best lien upon all the line of railway, premises and property therein mentioned and described.

3. That the mortgage executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan as trustee is a lien upon all the line of railway, premises and property therein mentioned and described, subject to the prior lien of the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company.

4. That the mortgage executed by the Wabash and Western Railway Company is a lien upon the line of railway, premises and property therein mentioned and described, subject to the prior lien of the said mortgage executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company.

5. That the mortgage executed by the Illinois and Southern Iowa Railroad Company to Lucien Tilton, John N. A. Griswold and James R. Jesup, as trustees, is the first and best lien upon all the line of railway, premises and property therein mentioned and described.

6. That the mortgage executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White and Henry H. Warden, as trustees, is the first and best lien upon the line of railway, premises and property therein mentioned and described, subject only to the lien of a mortgage executed by the Great Western Railroad Company to the Farmers' Loan and Trust Company, as trustee, to the extent of four thousand dollars and interest.

242 7. That the mortgage executed by the said Great Western Railroad Company of 1859 to Solon Humphreys and James R. Jesup, as trustees, is a lien upon the line of railway, premises and property therein mentioned and described, subject to the prior lien of the mortgage executed by said company to said Griswold, White and Warden, and to the lien of said mortgage executed by the Great Western Railroad Company to the Farmers' Loan and Trust Company to the extent of said four thousand dollars and interest.

8. That the mortgage executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, is the first and best lien upon the line of railway, premises and property therein mentioned and described.

9. That the mortgage executed by the Toledo, Wabash and Western Railway Company to James R. Jesup and Isaac H. Knox, as trustees, is the first and best lien upon that portion of the said railways extending from Carthage to Elvaston, and upon that portion of the said railways extending from Clayton to Camp Point, and is a

second lien upon that portion of said railway extending from the west bank of the Illinois River, opposite Meredosia, to Clayton in the State of Illinois, subject to the prior lien of the said mortgage executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, and upon that portion of the said railway extending from Clayton to Carthage in the State of Illinois, subject to the lien of the said mortgage executed by the Illinois and Southern Iowa Railroad Company to Lucien Tilton, John N. A. Griswold and James R. Jesup, as trustees, and is a third lien upon that portion of the said railway extending from Naples and Meredosia to the boundary line between the States of Illinois and Indiana, subject to the prior liens thereon of the said mortgages executed by the Great Western Railway Company of 1859 to George Griswold, Alexander M. White and Henry H. Warden, as trustees, and to Solon Humphreys and James R. Jesup, as trustees, and to the lien of said
243 mortgage executed by the Great Western Railroad Company to the Farmers' Loan and Trust Company to the extent of four thousand dollars and interest, and on that portion of said railway extending across the State of Indiana, subject to the prior lien of the mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company, as trustee, and of the mortgage executed by the Wabash and Western Railway Company to Edwin D. Morgan, as trustee, and upon that portion of said railway extending from the State line between Indiana and Ohio to Toledo, subject to the prior lien of the mortgage executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, as trustee, and of the mortgage executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan, as trustee.

10. That the mortgage executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox, as trustee, is the first and best lien upon the line of railway, premises and property therein mentioned and described.

11. That the mortgage executed by the Wabash Railway Company to Alfred T. White, as trustee, is the first and best lien upon the line of railway, premises and property therein mentioned and described.

12. That the mortgage executed by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, as trustees, is a lien upon the lines of railway, premises and property therein mentioned and described subject to the prior liens of all the several mortgages hereinbefore in this finding set forth.

XVIII.

And the Court doth further find:

That the parcels of real estate embraced in terminal properties and attached to the various divisions of the said railway are to be
244 regarded as accessions to said divisions respectively, and are subject to the lien of the divisional and the respective general mortgages in the order of their respective priorities.

XIX.

And the Court doth further find:

That prior to the consolidation in 1879 the several predecessor companies of the Wabash Railway Company had owned and used upon their several lines of railway respectively certain amounts of rolling stock and equipment, which were subject to the liens of the various divisional mortgages hereinbefore set forth, and to the lien of the consolidated mortgage and the mortgage of 1879.

That since said time the Wabash, St. Louis and Pacific Railway Company have purchased and acquired for service thereon large additional amounts of equipment, and that the several Receivers, Humphreys and Tutt and Cooley and McNulta, have also made additions thereto, and that such various additions have in accordance with the terms of said divisional mortgages become subject to the liens thereof; and also to the lien of the consolidated mortgage and the mortgage of 1879.

That the said rolling stock and equipment has been used indiscriminately upon the entire system of railway without any apportionment thereof to any particular division of road, and has been so used, commingled and renewed that the lien of the said several mortgages cannot be declared therein except as a whole.

The Court, however, for the purposes of this decree and of the sale hereunder hereinafter provided for, and not otherwise, hereby finds that the division from Toledo to the Indiana State line shall be entitled to seventy-five nine-hundredths thereof; the division from the State line of Ohio west to the State line of Illinois, to one hundred and sixty-six nine-hundredths thereof; the division from the State line between Indiana and Illinois to Naples and Meredosia
245 to one hundred and eighty nine-hundredths thereof; the division from Clayton to the west side of the Illinois River opposite Meredosia to thirty-four nine-hundredths thereof; the division from Clayton to Carthage to twenty-nine nine-hundredths thereof; the division from Naples to the Mississippi River, opposite East Hamilton, to fifty-nine hundredths thereof; the division from Decatur to East St. Louis to one hundred and eight nine-hundredths thereof; the line from Clayton to Camp Point to six nine-hundredths thereof; the line from Carthage to Elvaston to six nine-hundredths thereof; and the line of road known as the Chicago Division (which is not otherwise included in this decree) to two hundred and forty-six nine-hundredths thereof.

XX.

And the Court doth further find:

1. That thereafter and on or about the fourteenth day of August, 1879, the said The Wabash Railway Company consolidated with the St. Louis, Kansas City and Northern Railway Company, a corporation of the State of Missouri, and owning and operating a line of railway extending from St. Louis, Missouri, to Kansas City, in said State, with various branches, the consolidated corporation being known as the Wabash, St. Louis and Pacific Railway Company.

2. That thereafter and on or about the first day of June, 1880, the said The Wabash, St. Louis and Pacific Railway Company, in order to secure a proposed issue of its bonds aggregating fifty millions of dollars, payable on the first day of June, 1920, with interest at six per cent. per annum, payable semi-annually, made and executed to the defendants The Central Trust Company of New York and James Cheney a mortgage or deed of trust bearing date on said day, and thereby conveyed to said trustees, upon the trusts therein stated and subject to the prior liens thereon, all and singular the
246 lines of railway of said mortgagor wherever situate, together with the equipment, appurtenances and franchises thereunto belonging.

3. That thereafter the bonds secured by said mortgage or deed of trust were issued and delivered to the amount of about seventeen millions of dollars.

4. That thereafter and on or about the twenty-eighth day of May, 1884, the said Wabash, St. Louis and Pacific Railway Company filed in the Circuit Court of the United States for the Eastern District of Missouri its bill in equity against the said The Central Trust Company of New York, James Cheney and others, and, alleging its insolvency, prayed for the appointment of Receivers of its property.

5. That by an order of said Court entered on said day Solon Humphreys and Thomas E. Tutt were appointed Receivers with power to take possession of all the lands, railroad and property, rights and choses in action of said Wabash, St. Louis and Pacific Railway Company within the jurisdiction of the Court.

6. That in an action of similar character instituted in this Court by said Wabash, St. Louis and Pacific Railway Company against said defendants a similar order was made by this Court, the said order of the said Circuit Court of the United States for the Eastern District of Missouri being made the order of this Court.

7. That the said Solon Humphreys and Thomas E. Tutt entered upon and took possession of the property of the said Wabash, St. Louis and Pacific Railway Company and used and operated the same.

8. That thereafter The Central Trust Company of New York and James Cheney instituted actions in the Courts of the various States in which any part of the railway property of the said Wabash,
247 St. Louis and Pacific Railway Company was situated, against said company and others for a foreclosure of said general mortgage executed to them by said railway company; that each of said actions was removed from the State Court in which the same was pending to the Circuit Court of the United States for the corresponding district, and that with the action so removed to the Circuit Court of the United States for the Eastern District of Missouri, was consolidated said action instituted in said Court by said Wabash, St. Louis and Pacific Railway Company.

9. That on or about the sixth day of January, 1886, a decree was entered in the said consolidated action foreclosing the said general mortgage of the Wabash, St. Louis and Pacific Railway Company, and ordering the railways and property in said decree described to

be sold, subject to the liens of the mortgages executed prior to the said general mortgage by said Wabash, St. Louis and Pacific Railway Company, or any of its predecessor corporations.

10. That thereafter, and on or about the twenty-sixth day of April, 1886, under and in pursuance of said decree the property therein directed to be sold was so sold to the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, acting as a purchasing committee; that by decree of the Circuit Court of the United States for the Eastern District of Missouri, entered on or about the fifteenth day of June, 1886, the said sale was ratified and confirmed, and that the Master by whom the said property was sold has executed a deed of said railways and property to said purchasers, including the railways and property mentioned and described in the mortgages hereinbefore in this decree recited, subject in all things to the lien of said mortgages.

11. That by an order of the Circuit Court of the United States for the Southern District of Illinois, bearing date and entered
248 on or about the sixteenth day of December, 1886, Solon Humphreys and Thomas E. Tutt were removed as Receivers of the said Wabash, St. Louis and Pacific Railway Company, within the jurisdiction of said Court, and Thomas M. Cooley was appointed Receiver in their place and stead of said property, being appointed Receiver of all the property described and set forth in the amended and supplemental complaint in this action.

12. That thereafter, and on or about the first day of April, 1887, the said Thomas M. Cooley resigned as such Receiver, and by order of said Court bearing date and entered on said day, John McNulta was duly appointed successor to said Cooley as such Receiver.

XXI.

And the Court doth further find:

1. That, at the time of the filing in this court of the original and amended and supplemental bills in this cause, and of the various cross-bills herein, the said mortgaged railways, property and premises were in the possession of this Court through its Receiver appointed by its order.

XXII.

And the Court doth further find:

1. That on or about January 24th, 1877, the said Wabash Railway Company, in order to provide for the payment of interest theretofore accrued and then still due and unpaid, and shortly thereafter to become due, upon the several issues of bonds hereinafter stated, proposed to the holders of the coupons representing such interest to fund the same under an agreement by which the said holders should deposit the same in trust and receive in lieu thereof scrip certificates, exchangeable at the option of the holders for bonds of the said Wabash Company, to be known as funded debt bonds.

249 2. That the said proposition was thereafter accepted by holders of the said coupons, who thereafter deposited the same

in trust with the defendant the Metropolitan National Bank, receiving in lieu thereof a scrip certificate reciting the deposit, the number and amount of the coupons, the numbers of the bonds to which they belonged, and entitling the holder thereof to interest thereon at the rate of seven per cent per annum, payable yearly, and also entitling such holders to exchange such certificates at their option for bonds of the Wabash Railway Company, to be known as funded debt bonds.

That thereafter certain of the holders of said scrip certificates exchanged the same for said funded debt bonds, payable on the first day of February, 1907, with interest at the rate of seven per centum per annum, payable semi-annually.

3. That the said scrip certificates and the said funded debt bonds provided that in case of default in payment of the interest thereon the holders thereof should be entitled to demand and receive possession of the original coupons deposited therefor, and that the agreement between the said Wabash Railway Company and the holders of said coupons also provided that the deposit of said coupons and the acceptance of said funded debt bonds should in no way impair the lien on the respective portions of the roads by which the respective bonds and coupons were secured.

4. That the said funded debt bonds were apportioned by numbers to the several mortgage liens upon the several portions of the road primarily liable for the coupons in default, in proportion to the aggregate amount of such defaulted coupons.

5. That thereafter an agreement was entered into between the said Wabash Railway Company and certain holders of coupons belonging to bonds of the Toledo and Wabash Railroad Company, the
250 Wabash and Western Railway Company, the Great Western Railroad Company of 1859, the Toledo, Wabash and Western Railway Company, and the Decatur and East St. Louis Railroad Company, whereby said coupon holders received in exchange for such coupons, when deposited, a scrip certificate bearing interest graduated up to six per centum per annum, and received for said scrip certificates at their option funded debt bonds bearing interest at six per centum per annum.

6. That, prior thereto, certain holders of overdue coupons had exchanged the same for scrip certificates and funded debt bonds bearing interest at the rate of seven per centum per annum, and that, such holders having refused to exchange the same for said graduated scrip and funded debt bonds, said seven per cent. scrip and funded debt bonds are still outstanding and unpaid.

7. That the total amount of coupons deposited with the said Metropolitan National Bank was three millions and nine thousand eight hundred and fifty dollars and thirty-seven cents.

8. That the said coupons represented interest on said bonds falling due in 1875, 1876 and 1877, as follows, viz.: On the bonds of the Toledo and Illinois Railroad Company, four coupons amounting to one hundred and forty dollars, together with accrued interest amounting to twelve dollars and twenty-five cents, making in all one hundred and fifty-two dollars and twenty-five cents; on the bonds of the Lake Erie, Wabash and St. Louis Railroad Company, four coupons

amounting to one hundred and forty dollars, together with the sum of twelve dollars and twenty-five cents accrued interest thereon, making in all one hundred and fifty-two dollars and twenty-five cents; on the first mortgage bonds of the Great Western Railroad Company of 1859, four coupons amounting to one hundred and forty dollars,
251 together with the sum of twelve dollars and twenty-five cents accrued interest thereon, making in all the sum of one hundred and fifty-two dollars and twenty-five cents; on the bonds of the Illinois and Southern Iowa Railroad Company, four coupons amounting to one hundred and forty dollars, together with twelve dollars and twenty-five cents accrued interest thereon, making in all the sum of one hundred and fifty-two dollars and twenty-five cents; on the bonds of the Quincy and Toledo Railroad Company, five coupons amounting to one hundred and seventy-five dollars; on the bonds of the Decatur and East St. Louis Railroad Company, five coupons amounting to one hundred and seventy-five dollars; on the bonds of the Toledo and Wabash Railroad Company, five coupons amounting to one hundred and seventy-five dollars; on the bonds, of the Wabash and Western Railway Company, five coupons amounting to one hundred and seventy-five dollars; on the second mortgage bonds of the Great Western Railroad Company of 1859, five coupons amounting to one hundred and seventy-five dollars, and on the consolidated mortgage of the Toledo, Wabash and Western Railway Company, fourteen coupons amounting to the sum of two hundred and forty-five dollars.

9. That default was made in the payment of interest upon the outstanding scrip certificates on the first day of February, 1887, and on the first day of February, 1888, and in the payment of the coupons upon the funded debt bonds due on the first day of February, 1887, and on the first day of August, 1887, and on the first day of February, 1888, and on the first day of August, 1888.

10. That there is now owing and unpaid for principal and interest upon the scrip certificates based upon coupons from bonds of the Toledo and Illinois Railroad Company, together with interest on the defaulted interest payments at the rate of six per centum per annum to the first day of February, 1889, the sum of seventy-
252 six thousand seven hundred and twenty dollars and twenty-nine cents, together with interest on said last named sum from said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest on the funded debt bonds based upon coupons from bonds of the Toledo and Illinois Railroad Company together with interest on the overdue coupons from the respective dates of maturity thereof to the first day of February, 1889, the sum of eighty-five thousand three hundred and fifty-six dollars, together with interest on said last-mentioned sum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Com-

pany, as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

11. That there is now owing and unpaid for principal and interest on the scrip certificates based upon coupons from bonds of the Lake Erie, Wabash and St. Louis Railroad Company, and interest at six per centum per annum on the defaulted payments of interest from the dates of such respective defaults to the first day of February, 1889, the sum of two hundred and thirteen thousand four hundred and forty-one dollars and thirty-seven cents, together with interest on said last-mentioned sum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid on the funded debt bonds based upon coupons from bonds of the said Lake Erie, Wabash and St. Louis Railroad Company, for principal and interest, and interest at six per centum per annum upon the overdue coupons from the respective dates of the maturity thereof the sum of
253 two hundred and thirty-seven thousand one hundred dollars, together with interest on said last-mentioned sum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company as trustee added to the amount found to be secured by said mortgage, according to the tenor thereof, and payable out of the proceeds of any sale of said property *pro rata* therewith.

12. That there is now owing and unpaid for principal and interest upon the scrip certificates based upon coupons from bonds of the Illinois and Southern Iowa Railroad Company, and interest at six per centum per annum, on the defaulted interest payments from the dates of the said defaults, respectively, to the first day of February, 1889, the sum of one thousand two hundred and sixty-one dollars and twenty-one cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from bonds of the said Illinois and Southern Iowa Railroad Company, and interest upon the defaulted coupons from the respective dates of maturity thereof to the first day of February, 1889, at the rate of six per centum per annum, the sum of forty-nine thousand seven hundred and ninety-one dollars, together with interest on said sum from the first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the mortgage executed by the said Illinois and Southern Iowa Railroad Company to Lucien Tilton, James R. Jesup and John N. A. Griswold as trustees added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of the said property *pro rata* therewith.

254 13. That there is now due, owing and unpaid for principal and interest upon the scrip certificates based upon coupons from first mortgage bonds of the Great Western Railroad Company of 1859, and interest at six per centum per annum on the defaulted interest payments from the dates of the respective defaults to the first day of February, 1889, the sum of one hundred and thirty-five thousand five hundred and sixty-five dollars and forty-five cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now due, owing and unpaid for principal and interest upon the funded-debt bonds based upon coupons from said first mortgage bonds of the Great Western Railroad of 1859, and interest upon the defaulted coupons at the rate of seven per centum per annum from the dates of the maturity thereof, respectively, to the first day of February, 1889, the sum of three hundred and fourteen thousand seven hundred and fifty dollars and twenty-five cents, together with interest on said sum at seven per centum per annum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be due on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Great Western Railroad Company of 1859, to George Griswold, Alexander M. White and Henry H. Warden, as trustees, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

14. That there is now owing and unpaid for principal and interest upon scrip certificates based upon coupons from bonds of the Quincy and Toledo Railroad Company and interest at six per centum per annum on the defaulted interest payments from the dates of the respective defaults to the first day of February, 1889, the
255 sum of nineteen thousand two hundred and eighty-nine dollars and forty-two cents, together with interest on said sum from said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest upon the remaining outstanding scrip certificates based upon coupons from bonds of said Quincy and Toledo Railroad Company and interest at six per centum per annum upon the defaulted interest payments from the dates of such defaults respectively to the first day of February, 1889, the sum of thirty-four thousand nine hundred and fifty-one dollars and twenty-two cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid upon the funded debt bonds based upon coupons from said bonds of the Quincy and Toledo Railroad Company and interest at six per centum per annum on the overdue coupons from the dates of the respective maturities thereof to the first day of February, 1889, the sum of forty-seven thousand five hundred and nineteen dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and — on said scrip and

said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Quincy and Toledo Railroad Company to John T. Terry, as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

15. That there is now owing and unpaid for principal and interest upon scrip certificates based upon coupons from bonds of the Decatur and East St. Louis Railroad Company, and interest at six per centum per annum upon the defaulted interest payments from the dates of the respective defaults to the first day of February, 1889, the sum of fifty-two thousand eight hundred and nine dollars
256 and twenty-three cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest upon the remaining outstanding scrip certificates, based upon coupons from bonds of the said Decatur and East St. Louis Railroad Company, and interest at six per centum per annum upon the defaulted interest payments from the date of such defaults respectively to the first day of February, 1889, the sum of one hundred and forty-nine thousand four hundred and thirty-nine dollars and sixty cents, together with interest on said sum at six per centum per annum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from bonds of the Decatur and East St. Louis Railroad Company, and interest on the defaulted coupons belonging to said funded debt bonds from the dates of the maturity thereof, respectively, to the first day of February, 1889, at the rate of six per centum per annum, the sum of three hundred and forty thousand one hundred and sixty-six dollars and fifty cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

16. That there is now owing and unpaid for principal and interest upon the scrip certificates, based upon coupons from bonds of the Toledo and Wabash Railroad Company, and interest at the rate of six per centum per annum upon the defaulted interest pay-
257 ments from the dates of such defaults respectively, to the first day of February, 1889, the sum of ninety thousand one hundred and fifteen dollars and fifty-three cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest

upon the funded debt bonds based upon coupons from bonds of the said Toledo and Wabash Railroad Company, and interest on the defaulted coupons belonging to said funded debt bonds from the dates of the maturity thereof respectively to the first day of February, 1889, at six per centum per annum, the sum of one hundred and thirty-six thousand seven hundred and fifty-two dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the mortgage executed by the said Toledo and Wabash Railroad Company to Edwin D. Morgan, as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of the said property *pro rata* therewith.

17. That there is now owing and unpaid for principal and interest upon the scrip certificates based upon coupons from bonds of the Wabash and Western Railroad Company, and interest upon the defaulted interest payments at six per centum per annum from the dates of the respective defaults to the first day of February, 1889, the sum of one hundred and twenty-five thousand eight hundred and seventy-eight dollars and ten cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest upon the funded debt bonds, based upon coupons from bonds of the said Wabash and Western Railway Company, and interest upon the overdue coupons belonging to said funded debt bonds
258 from the dates of maturity thereof, respectively, to the first day of February, 1889, at the rate of six per centum per annum, the sum of two hundred and fourteen thousand two hundred and forty-four dollars and eighty cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and unpaid on said scrip and on said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Wabash and Western Railway Company to Edwin D. Morgan, as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

18. That there is now owing and unpaid for principal and interest upon a portion of the outstanding scrip certificates based upon coupons from the second mortgage bonds of the Great Western Railroad Company of 1859, and interest at six per centum per annum on the defaulted interest payments thereon from the dates of such defaults, respectively, to the first day of February, 1889, the sum of forty-one thousand seven hundred and twenty-five dollars and sixty-eight cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now owing and unpaid for principal and interest

upon the remaining outstanding portion of the scrip certificates based upon coupons from the second mortgage bonds of the Great Western Railway Company of 1859, and interest at six per centum per annum upon the defaulted interest payments thereon from the dates of such defaults, respectively, to the first day of February, 1889, the sum of one hundred and fifty-four thousand seven hundred and ninety-two dollars and fifty-one cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

259 That there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from the said second mortgage bonds of the Great Western Railway Company of 1859, and interest upon the overdue coupons belonging to said funded debt bonds from the dates of maturity thereof respectively, to the first day of February, 1889, at the rate of six per centum per annum, the sum of three hundred and seventy-three thousand one hundred and thirty-seven dollars and sixty cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That the amounts so found to be owing and unpaid on said scrip certificates and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Great Western Railway Company of 1859 to Solon Humphreys and James R. Jesup, as trustees, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

19. That there is now due, owing and unpaid for principal and interest upon a portion of the scrip certificates based upon coupons from the consolidated mortgage bonds of the Toledo Wabash and Western Railway Company, and interest upon the defaulted interest payments at the rate of six per centum per annum, from the dates of such defaults respectively to the first day of February, 1889, the sum of thirty-one thousand seven hundred and nineteen dollars and seven cents, together with interest upon said sum from the said first day of February, 1889, to the date of this decree.

That there is also now due, owing and unpaid for principal and interest upon the remaining portion of the outstanding scrip certificates, based upon coupons from the consolidated mortgage bonds of the said Toledo, Wabash and Western Railway Company, and interest upon the defaulted interest payments from the dates

260 of such defaults respectively to the said first day of February, 1889, at the rate of six per centum per annum, the sum of one hundred and thirty-one thousand three hundred and thirty-five dollars and seventy-two cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree.

That there is also now due, owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from the said consolidated mortgage bonds of the Toledo, Wabash and Western Railway Company, and interest on the overdue coupons belonging to said funded debt bonds from the respective dates of maturity thereof to the first day of February, 1889, at six per

centum per annum, the sum of six hundred and sixty-eight thousand seven hundred and eighty-two dollars and forty cents, together with interest on said sum from the said first day of February, 1889, to the date of this decree, that the amounts so found to be due on said scrip certificates and said funded debt bonds are a lien on the property mentioned and described in the said consolidated mortgage executed by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jesup as trustees, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

XXIII.

And the Court doth further find:

That the said funded debt bonds and scrip certificates so issued and apportioned to the several mortgage liens as aforesaid constitute an enlargement of the principal of the several respective mortgage liens to the amount in each case of the said funded debt bonds and scrip certificates so apportioned, and that the amounts of such funded debt bonds and scrip certificates are in each case an integral part of the mortgage lien to which they were so apportioned, and secured by such mortgage, the principal thereof equally *pro rata*
261 with the principal of said bonds and the interest equally *pro rata* with the interest of said bonds, and are entitled to be paid out of the proceeds of the sale of the property constituting the security of such mortgages respectively.

XXIV.

It is therefore considered, ordered, adjudged and decreed, that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court the sum of
$182,195.90. one hundred and ninety-two thousand one hundred and ninety-five dollars and ninety cents, together with interest on said sum from the first day of February, 1889, to the date of this decree at the rate of six per centum per annum; that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company as trustee the sum of one hundred and sixty-six thousand
$166,950. nine hundred and fifty dollars, together with interest on said sum from the said first day of February, 1889, to the date of this decree at the rate of six percentum per annum.

2. For the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Toledo and Illinois Railroad Company, as hereinbefore mentioned, the sum of
$11,889.90. eleven thousand eight hundred and eighty-nine dollars and ninety cents, together with interest thereon from the first day of February, 1889, to the date of this decree at the rate of six per centum per annum.

3. For the use and benefit of the holders of the funded
262 debt bonds and coupons based upon coupons from bonds of the said Toledo and Illinois Railroad Company, the sum of thirteen thousand three hundred and fifty-six dollars, together with interest thereon at six per centum per annum from the said first day of February, 1889, to the date of this decree. $13,356

4. That within said time they also pay or cause to be paid into court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said Toledo and Illinois Railroad Company's mortgage.

That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, as trustee, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described, be sold, as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders by Special Masters hereinafter appointed.

XXV.

It is further ordered, adjudged and decreed that within ten days after the entry of this decree the mortgagor corporation, or its successors, or its assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this Court the sum of five hundred and thirty-three thousand nine hundred and twenty-eight dollars and fifty-four cents, together with interest on said sum from the first day of February, 1889, to the date of this decree, at the rate of six per centum per annum; that is to say: $533,928.54

263 1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company, as trustee, the sum of four hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum at the rate of six per centum per annum, from the said first day of February, 1889, to the date of this decree. $463,750

2. For the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Lake Erie, Wabash and St. Louis Railroad Company, as hereinbefore mentioned the sum of thirty-three thousand and seventy-eight dollars and fifty-four cents, together with interest on said sum at the rate of six per centum per annum, from the first day of February, 1889, to the date of this decree. $33,078.54

3. For the use and benefit of the holders of the funded debt bonds

and coupons based upon coupons from said bonds of the Lake Erie, Wabash and St. Louis Railroad Company, the sum of
$37,100 thirty-seven thousand one hundred dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February, 1889, to the date of this decree.

4. That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage executed by said Lake Erie, Wabash and St. Louis Railroad Company.

That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in the said mortgage
264 executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company as trustee be forever barred and foreclosed, and that all and singular the railroad, property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction, without redemption to the highest bidder or bidders by the Special Masters hereinafter appointed.

XXVI.

It is further ordered, adjudged and decreed that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption in addition to the sum adjudged to be due upon the securities hereinbefore described, secured by the said mortgage of the Toledo and Illinois Railroad Company pay or cause to be paid into this Court the
$382,915.03 sum of three hundred and eighty-two thousand nine hundred and fifteen dollars and three cents, together with interest on said sum from the first day of February, 1889, to the date of this decree at the rate of six per centum per annum; that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Toledo and
$331,100 Wabash Railroad Company to Edwin D. Morgan, as trustee, the sum of three hundred and thirty-one thousand one hundred dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February, 1889, to the date of this decree.

2. For the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Toledo and
$20,063.03 Wabash Railroad Company, as hereinbefore mentioned, the sum of twenty thousand and sixty-three dollars and
265 three cents, together with interest on said sum at the rate of six per centum per annum, from the first day of February, 1889, to the date of this decree.

3. For the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from the bonds of the said Toledo and Wabash Railroad Company the sum of thirty-one
$31,752 thousand seven hundred and fifty-two dollars, together with interest on said sum at the rate of six per centum per annum, from the said first day of February, 1889, to the date of this decree.

4. That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage of said Toledo and Wabash Railroad Company.

That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause, of, in and to the property mentioned and described in said mortgage executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan as trustee, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage, and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction without redemption, to the highest bidder, or bidders by the Special Masters hereinafter appointed.

XXVII.

It is further ordered, adjudged and decreed that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition
266 to the sums adjudged to be due upon the securities hereinbefore described secured by the said mortgage of the Lake Erie, Wabash and St. Louis Railroad Company, pay or cause to be paid into this Court the sum of five hundred and seventy-
$574,419. five thousand four hundred and nineteen dollars and *and* ninety cents, together with interest on said sum from the first day of February, 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Wabash and Western Railway Company to Edwin D. Morgan as trustee the sum of four hundred and ninety-six thousand six hundred
$496,650. and fifty dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February, 1889, to the date of this decree.

2. For the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the said Wabash and Western Railway Company, the sum of twenty-eight thousand
$28,025.10. and twenty-five dollars and ten cents, together with interest on said sum at the rate of six per centum per

annum from the first day of February, 1889, to the date of this decree.

3. For the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from the bonds of the said Wabash and Western Railway Company the sum of forty-
$49,744.50. nine thousand seven hundred and forty-four dollars and fifty cents, together with interest on said sum at the rate of six per centum per annum from the said first day of February, 1889, to the date of this decree.

267 4. That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage of said Wabash and Western Railway Company.

That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in said mortgage executed by the Wabash and Western Railway Company to Edwin D. Morgan, as trustee, be forever barred and foreclosed, and that all and singular the railroad, property, equipment and franchises in said mortgage, and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders, by the special masters hereinafter appointed.

XXVIII.

It is further ordered, adjudged and decreed, that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be
paid into this Court the sum of fifty-five thousand six
$55,686.46 hundred and eighty-six dollars and forty-six cents, together with interest on said sum from the first day of February, 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Illinois and Southern Iowa Railroad Company to Lucien Tilton, John N. A. Griswold and James R. Jesup, as trustees, the sum of forty-
$47,700 seven thousand seven hundred dollars, together with interest on said sum at the rate of six per centum per annum
268 from the said first day of February, 1889, to the date of this decree.

2. For the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Illinois and South-
$195.46 ern Iowa Railroad Company the sum of one hundred and ninety-five dollars and forty-six cents, together with interest on said sum at the rate of six per centum per annum, from the first day of February, 1889, to the date of this decree.

3. For the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from bonds of the said Illinois and Southern Iowa Railroad Company the sum of seven thou-
$7,791 sand seven hundred and ninety-one dollars, together with interest on said sum at the rate of six per centum per annum, from the said first day of February, 1889, to the date of this decree.

4. That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage executed by said Illinois and Southern Iowa Railroad Company.

That in default of such payment or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause excepting the defendant John N. A. Griswold, of, in and to the property mentioned and described in the said mortgage executed by said Illinois and Southern Iowa Railroad Company to said Tilton, Griswold and Jesup, as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchise in said mortgage and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction, without re-
269 demption, to the highest bidder or bidders by the Special Masters hereinafter appointed.

XXIX.

It is further ordered, adjudged and decreed that within ten days after the entry of this decree the mortgagor corporation, or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this Court the sum of three million four hundred and seventeen thousand three hun- $3,417,341.32
dred and forty-one dollars and thirty-two cents, together with interest on said sum from the first day of February, 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

1. For the use and benefit of the holders of the first mortgage bonds and coupons of the Great Western Railroad Company, secured by mortgage to the Farmers' Loan and Trust Company,
$3,275.62 the sum of three thousand two hundred and seventy-five dollars and sixty-two cents, together with interest thereon at six per centum per annum from the first day of February, 1889, to the date of this decree.

2. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Great Western Railroad Company, of 1859, to George Griswold, Alexander M. White and Henry H. Warden as trustees, the sum of two mil-
$2,963,750 lions nine hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said

sum from the said first day of February, 1889, to the date of this decree, at the rate of six per centum per annum.

3. For the use and benefit of the holders of the scrip
270 certificates based upon coupons from the first mortgage bonds of the Great Western Railroad Company of 1859, the
$135,565.45 sum of one hundred and thirty-five thousand five hundred and and sixty-five dollars and forty-five cents, together with interest thereon from the said first day of February, 1889, to the date of this decree, at the rate of six per centum per annum.

4. For the use and benefit of the holders of the funded debt, bonds and coupons, based upon coupons from the said first mortgage bonds of the Great Western Railroad Company of 1859, the sum of three hundred and fourteen thousand seven hundred and fifty dollars and twenty-five cents, together with interest on said sum, at the rate of six per centum per annum, from the said first day of February, 1889, to the date of this decree. $314,750.25.

5. That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage.

That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in said mortgage executed by said Great Western Railroad Company of 1859, to said Griswold, White and Warden, as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described, be sold as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders, by the Special Masters hereinafter appointed.

271 XXX.

It is further ordered, adjudged and decreed that within ten days after the entry of this decree, the mortgagor corporation or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the amounts heretofore adjudged to be due on the first mortgage of the Great Western Railroad Company pay or cause to be paid into this Court the sum of nine hundred and fifty-nine thou-
$959,635.79. sand six hundred and thirty-five dollars and seventy-nine cents, together with interest on said sum from the first day of February, 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the second mortgage of the Great Western Railroad Company of 1859, executed to Solon Humphreys and James R. Jesup,

as trustees, the sum of eight hundred and twenty-seven
$827,750. thousand seven hundred and fifty dollars, together with interest on said sum from the first day of February, 1889, to the date of this decree.

2. For the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from the second mortgage bonds of the Great Western Railroad Company of 1859 the sum
$34,462.51. of thirty-four thousand four hundred and sixty-two dollars and fifty-one cents, and for the use and benefit of the holders of the seven per cent. scrip certificates based upon coupons from said bonds the sum of ten thousand
$10,785.68. seven hundred and eighty-five dollars and sixty-eight cents, together with interest on both said sums at the rate of six per centum per annum from the first day of February, 1889, to the date of this decree.

272 3. For the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from said second mortgage bonds of the Great Western Railroad Company of 1859 the sum of eighty-six thousand six hundred and thirty-seven dollars and sixty cents, together with interest on $86,637.60 said sum at the rate of six per centum per annum from the said first day of February, 1889, to the date of this decree.

4. That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage.

That in default of such payment or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in the mortgage executed by the said Great Western Railroad Company of 1859 to Solon Humphreys and James R. Jesup as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described be sold, as hereinafter directed, at public auction without redemption, to the highest bidder or bidders, by the Special Masters hereinafter appointed.

XXXI.

It is further ordered, adjudged and decreed, that within ten days after the entry of this decree the mortgagor corporation, or its successors or assigns, or other persons obligated to the payment of the said bonds or owning the equity of redemption, pay or cause to be paid into this Court the sum of ninety-seven thou-
$97,209.64 sand two hundred and nine dollars and sixty-four cents, together with interest on said sum from the first day of
273 February, 1889, to the date of this decree at the rate of six per centum per annum; that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Quincy and Toledo

Railroad Company to John T. Terry as trustee, the sum of eighty-two — nine hundred and fifty dollars, together with interest on said sum at six per centum per annum from the said first day of February, 1889, to the date of this decree. $82,950

2. For the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from the bonds of the Quincy and Toledo Railroad Company the sum of four thousand seven hundred and fifty-one dollars and twenty-two cents, and for the use and benefit of the holders of the seven per cent. scrip certificates based upon coupons from said bonds the sum of two thousand nine hundred and eighty-nine dollars and forty-two cents, together with interest on both said sums from the first day of February, 1889, to the date of this decree. $4,751.22 $2,989.42

3. For the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from bonds of the said Quincy and Toledo Railroad Company the sum of six thousand five hundred and nineteen dollars, together with interest on said sum from the first day of February, 1889, to the date of this decree at the rate of six per centum per annum. $6,519

4. That within this said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage.

That in default of such payment or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in the mortgage executed by the said Quincy and Toledo Railroad Company to John T. Terry as trustee be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described, be sold, as hereinafter directed, at public auction without redemption to the highest bidder or bidders, by the Special Masters hereinafter appointed. 274

XXXII.

It is further ordered, adjudged and decreed that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the various amounts hereinbefore adjudged to be due upon the divisional first and second mortgage bonds, pay or cause to be paid into this court the sum of four million three hundred and eleven thousand four hundred and eighty-nine dollars and nineteen cents, together with interest on said sums from the first day of February, 1889, to the date of this decree, at the rate of six per centum per annum; that is to say: $4,311,489.19

1. For the use and benefit of the holders of the bonds and coupons secured by the consolidated mortgage executed by the Toledo,

Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup, as trustees, the sum of three millions
$3,479,652 four hundred and seventy-nine thousand six hundred and fifty-two dollars, together with interest on said sum at the rate of six percentum per annum from the said first day of February, 1889, to the date of this decree.

2. For the use and benefit of the holders of the seven per
275 cent. scrip certificates based upon coupons from bonds of the Toledo, Wabash and Western Railway Company the sum of thirty-one thousand seven hundred and nineteen
$31,719.07 dollars and seven cents, and for the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from said bonds the sum of one hundred and thirty-one thousand three hundred and thirty-five dol-
$131,335.72 lars and seventy-two cents, together with interest on both said sums at six per centum per annum from the first day of February, 1889, to the date of this decree.

3. For the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from bonds of the said Toledo, Wabash and Western Railway Company the sum of six hundred and sixty-eight thousand seven hundred and eighty-two dollars and forty cents, together with interest at the rate of six per centum per annum from the said first day of February, 1889, to the date of this decree.

4. That within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage.

That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such Purchasing Committee, and of all the other defendants in this cause, of, in and to the property mentioned and described in the mortgage executed by the said Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup as trustees be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described be sold as hereinafter directed at public auction, with-
276 out redemption, to the highest bidder or bidders, by the Special Masters hereinafter appointed.

XXXIII.

It is further ordered, adjudged and decreed that within ten days after the entry of this decree the mortgagor corporation, or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court the sum of five hundred and sev-
$576,015.33 enty-six thousand and fifteen dollars and thirty-three cents, together with interest on said sum from the first day of February, 1889, to the date of this decree, at the rate of six per centum per annum, that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Decatur and East St. Louis Railroad Company to Isaac H. Knox, as trustee, the sum of
$500,850 five hundred thousand eight hundred and fifty dollars, together with interest on said sum at six per centum per annum from the first day of February, 1889, to the date of this decree.

2. For the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from bonds of the Decatur and East St. Louis Railroad Company the sum of twenty
$20,314.60 thousand three hundred and fourteen dollars and sixty cents, and for the use and benefit of the holders of the seven per cent. scrip certificates based upon coupons from said bonds the sum of eight thousand one hundred and
$8,184.23 eighty-four dollars and twenty-three cents, together with interest on both said sums at six per centum per annum from the first day of February, 1889, to the date of this decree.

277 3. For the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from said bonds the sum of forty-six thousand six hundred and sixty-
$46,666.50 six dollars and fifty cents, together with interest on said sum from the first day of February, 1889, to the date of this decree at six per centum per annum.

4. That within said time they also pay, or cause to be paid, into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage.

That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in the said mortgage executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox as trustee, be forever barred and foreclosed, and that all and singular the railroad property equipment and franchises in said mortgage and hereinbefore particularly described be sold, as hereinbefore directed, at public auction without redemption, to the highest bidder or bidders, by the Special Masters hereinafter appointed.

XXXIV.

It is further*ed* ordered, adjudged and decreed, that within ten days after the entry of this decree the mortgagor corporation, or its successors or assigns, or other persons obligated to the payment of said bonds, or owning the equity of redemption, pay or cause to be paid into this Court the sums following, that is to say:

1. For the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the Wabash Railway Company to Alfred T. White as trustee, covering the property for-
278 merly known as the Hannibal and Naples Railroad, the sum

of ninety-nine thousand four hundred and fifty-eight
$99,458.33 dollars and thirty-three cents, together with interest on said sum at six per centum per annum from the first day of February, 1889, to the date of this decree.

2. That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the costs and expenses of this cause properly chargeable to the property covered by the said mortgage.

That in default of such payments or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee as aforesaid, and of all the other defendants in this cause, of, in and to the property mentioned and described in the mortgage executed by the Wabash Railway Company to Alfred T. White as trustee, and which property was formerly known as the Hannibal and Naples Railroad, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described be sold, as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders, by the Special Masters hereinafter appointed.

XXXV.

It is further ordered, adjudged and decreed, that within ten days after the entry of this decree the mortgagor corporation, or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the amounts heretofore adjudged to be due upon the divisional first and second mortgages and the consolidated mortgage, pay or cause to be paid into this Court the sums following, that is to say:

For the use and benefit of the holders of the bonds and
279 coupons secured by the mortgage executed by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley as trustees, the sum of two millions six hundred and seventy-six thousand six hundred and $2,676,666.66.
sixty-six dollars and sixty-six cents, together with interest on said sum at the rate of six per cent. per annum from the first day of February, 1889, to the date of this decree.

That within said time they also pay or cause to be paid into this Court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage.

That in default of such payment or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause, of, in and to the property mentioned and described in the said mortgage executed by the said Wabash Railway Company to Solon Humphreys and Daniel A. Lindley as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage, and hereinbefore, particularly described, be sold

as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders, by the Special Masters hereinafter appointed.

XXXVI.

The periods of ten days herein limited for the various payments are so designated by consent in Court of all parties.

And it is further ordered, adjudged and decreed that in default of the several payments hereinbefore directed to be made, or any — them, the property mentioned and described in the mortgage or mortgages respectively, as to which such default in payment shall be made shall be sold by the Special Masters hereinafter appointed, at public auction, without appraisement or redemption to the
280 highest bidder or bidders at the north door of the United States Court House and Post Office building, in the City of Chicago, in the State of Illinois, between the hours of ten o'clock A. M. and five o'clock P. M., on such day as the said Special Masters shall appoint, or upon such other day or days to which the said Special Masters shall adjourn such sale or sales.

The said mortgaged property shall first be offered for sale separately as described respectively in each of the hereinbefore mentioned divisional mortgages, and said Special Masters shall also offer for sale separately the line of railway from Clayton to Camp Point, and the line of railway from Carthage to Elvaston, as described in the consolidated mortgage executed by the Toledo, Wabash and Western Railway Company to James R. Jesup and Isaac H. Knox as trustees.

It is further ordered that along with each division above mentioned and with the line from Clayton to Camp Point and with the line from Carthage to Elvaston when separately offered for sale, there shall be offered for sale, in connection with the road and property, as a part and parcel of the mortgaged premises, an undivided proportion of the equipment, to be determined by the proportion that the mileage of each said division and said two lines respectively bears to the whole mileage of the road, as hereinbefore in paragraph XIX. found and declared.

The proceeds of sale of said divisions and lines respectively and of said equipment shall go together to the lienholders upon such divisions and lines respectively in the order of their priorities as hereinbefore found, but as to the equipment, conditionally and subject to the right, which is hereby specifically reserved, of junior lienholders to assert and maintain, as they may be advised, their claim upon such proceeds of the said equipment, and in any such proceedings the proceeds and value of the said equipment shall be determined by the schedules of Mark Miller Martin and Joshua B. Barnes, witnesses, given in evidence before the Special Masters in this cause and attached to their report marked Exhibits 73
281 and 79 and 115, and the locomotives shown in said last exhibit not being included in the said valuation of Martin and Barnes are hereby, for the purposes of future distribution of the proceeds thereof, valued at eight thousand dollars each.

It is further ordered that the said Special Masters shall accept no bid from any bidder who shall not forthwith if required deposit with them either in cash or in bonds, as a pledge that he will make good his bid, if accepted by the Court, the sum of one hun-
$100,000. dred thousand dollars, which sum so deposited shall be forfeited in case the said bidder shall fail to comply with the terms of sale and the orders of the Court in that respect, but shall be applied on account of the purchase money, if the said sale shall be approved by this Court, and on compliance by such bidder with the said terms of sale and the orders of the Court in that behalf. If such deposit be not made immediately, the said property may be forthwith offered for sale and resold by the said Special Masters without notice.

It is further ordered that such bids shall in each case be accepted by the said Special Masters conditionally upon the result of the offer of said railways and property as a unit or entirety as hereinafter directed.

It is further ordered, that the said Special Masters, after having offered said railways, property and franchises for sale as described in each of the hereinbefore mentioned divisional mortgages, and the line from Clayton to Camp Point, and the line from Carthage to Elvaston separately, as above directed, shall then proceed to offer the said property for sale as a unit or entirety, and free and clear of liens and incumbrances, viz., as described in the mortgage from the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley as follows, viz., "all the railroad, road bed and right of way of the said Wabash Railway Company, extending from the City of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said
282 road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi River, at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State, together with all the embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables, engine, machinery, cars, tools, rolling stock, lots, lands, buildings and offices, and other things, real and personal, at the date of said mortgage owned or used, or that may thereafter have been owned or used, by the said Wabash Railway Company in connection with the said railroad and every appurtenant thereto, and all the powers, privileges, franchises and chartered or other rights of the said Wabash Railroad Company."

If the highest bid received by the said Special Masters for the said entire property shall exceed the aggregate amount of the highest bids for the several properties offered separately as hereinabove directed, then the said entire railway property and franchises, as hereinabove described, shall be struck off and sold as a unit and entirety to the person making such bid. If the highest bid received by the said Special Masters for the said entire property shall not exceed the aggregate amount of the highest bids for the several prop-

erties offered separately, then the sale of the said several properties shall become firm, subject only to the rights and power of the Court to reject any bids and to retake and resell as herein reserved and provided.

In case all the said property be sold as a unit and entirety, the said Special Masters in their report of sale shall bring into court a full record and report of the amounts of the bids made upon the respective divisions as hereinabove provided, for the instruction of the Court and to enable the Court to use the same as a basis for distribution in the further order or orders therefor, and the proceeds in the distribution shall be divided into as many separate parts as there were divisions and lines offered separately, such division being
283 made in proportion to the amounts bid separately on said divisions and lines, respectively, and shall be distributed to the bondholders in the same manner as if said constituent parts had been sold separately.

It is further ordered, that, also, in case of the sale of said property as a unit or entirety, the purchaser may be required to deposit with the said Special Masters, in cash or in bonds, nine hun-
$900,000 dred thousand dollars, as a pledge that he will make good his bid if the same shall be accepted by the Court. Such deposit shall be forfeited if said purchaser shall fail to comply with the terms of sale and the orders of this Court in that respect, but shall be applied on account of the purchase money if said sale shall be confirmed by the Court, and on compliance by the purchaser with said terms of sale and the orders of this Court. If the said deposit shall not be made immediately, the said property may be forthwith offered for sale and resold by said Special Masters without further notice.

It is further ordered, that in offering the said property for sale as a unit or entirety, the said Special Masters may, in their discretion, omit therefrom the division of said railways and property known as the Hannibal and Naples division, and covered by the mortgage to Alfred T. White, as trustee, together with its proportion of the rolling stock and equipment as found and declared in paragraph XIX. of this decree, and if the said Special Masters shall exercise the discretion hereby conferred, and shall not include said division with the remainder of said railways and property when offered for sale as a unit and entirety, then the bid received for said division and property when offered separately, with its proportion of equipment offered with it, as above provided, shall become firm, and said division and property shall be conveyed to such purchaser upon confirmation of such sale, subject, as also hereinbefore specified, to the readjustment of any questions hereafter arising as to said proportion of equipment.

284 The said Special Masters shall accept no bid for either of the following four divisions, viz.: the division from Toledo to the Indiana State line, the division running across the State of Indiana, the division running from the State line between Illinois and Indiana to Naples and Meredosia, and the division from Decatur to East St. Louis for a less amount than the full amount of the first

mortgage liens, as hereinbefore found in this decree, including the amount apportioned to the liens upon such divisions respectively for scrip certificates and funded debt bonds. Nor shall they receive any bid upon the said division running from Toledo to the Indiana State line for a less amount than the full amount of the first and second mortgages thereon, including the amounts apportioned thereto for scrip certificates and funded debt bonds.

And in case no bids shall be made on said divisions or either or any of them for said full amounts, application for further directions and decree in the premises at the foot of this decree may be made summarily and without notice, and the Court reserves to itself the right and power to direct the sale to be made upon such terms and conditions as may then seem proper. The power of the Masters for adjournment herein given shall cover power to adjourn the sale a reasonable time to allow of such application to the Court and to receive further direction thereon without any further advertisement or notice.

It is further ordered that the said Special Masters shall give public notice of the time and place of such sales by publication thereof at least once a week for four weeks in five newspapers of general circulation, one published in the City of Springfield, Illinois; one published in the City of Chicago, Illinois; one published in the city of Indianapolis, Indiana; one published in the City of Toledo, Ohio, and one published in the City of New York, which notice shall describe the property to be sold in general terms, and shall refer to this decree for a fuller and more particular description thereof, said period of four weeks being designated by consent in Court of all parties.

285 The said Special Masters may give such further notice of sale in addition to the notice above directed as in their judgment they may think proper.

The said sale may be adjourned by the said Special Masters at the time and place appointed by them as aforesaid, and said Special Masters may thereafter from time to time adjourn or postpone said sale, and may without further notice proceed with said sale on any day to which the same may thus have been adjourned. Said sale may also be continued from day to day by the said Special Masters, if deemed by them necessary.

The right is hereby reserved by the Court to reject any bid, and also to retake and resell the said property and premises or any part thereof upon failure of the purchaser to comply with any of the conditions of sale, or any of the orders of the Court in that regard. If the Court reject any bid, the purchaser shall receive back any deposit or payment he may have made.

There shall be paid in cash, of the price at which the said mortgaged premises and property shall be sold, in addition to the amount which may be paid at the time of sale, such further sums thereafter of the purchase money as the Court may direct. The remainder of such purchase price may be paid either in cash, or in bonds, with the overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive

thereon in case of said purchase price were paid by the purchasers in cash, and in all cases in which bonds shall be received by the said Special Masters, whether as a deposit at the time of said sale or sales, to bind the bids thereat, or in payment of the remainder of the purchase price at the time of the consummation of such sale or sales the said bonds shall be so received at the rate or amount to which the holders thereof will be entitled to dividend thereon; and, in case of the receipt of bonds for security at the time of sale, the said Special Masters shall at the time exercise their judgment in determining the probable amount of the dividend to which such bonds will be entitled.

286 It is further ordered that the said Special Masters shall make report of all their proceedings to this Court.

It is further ordered that upon the confirmation of the sale by the Court and the full payment of the whole of the purchase price therefor, and compliance by the purchaser with the conditions of sale and the orders of the Court in that behalf, the said Special Masters convey to the purchaser or purchasers, or his or their assigns, the premises and property so sold by good and sufficient deed therefor, which said deed or deeds when so executed and delivered shall vest in the grantee or grantees all the right, title, estate, interest, property and equity of redemption, except as hereby reserved, of, in and to all and singular the real estate, property, premises and franchises therein described in fee simple forever, and shall entitle said grantee or grantees to the possession thereof.

It is further ordered that all questions arising herein as to an accounting between the several different divisions of the said railways for or on account of or in relation to earnings and expenses, and payments heretofore made by the Receivers or any of them of coupons on any of the bonds secured by said mortgages upon said divisions, be, and the same hereby are reserved, and all disposition of proceeds arising from sales made under this decree shall be made subject to the future settlement and adjustment of all such questions.

It is further ordered that the said Special Masters pay into this court the proceeds of such sale or sales, and that the same remain subject to the further order of this Court; and such payment into court may be made in the discretion of the Masters by deposit of the same to the credit of the court in such banks or trust companies as may be selected or approved by them.

It is further ordered that Bluford Wilson, Esq., of Springfield, Illinois, and A. J. Ricks, Esq., of Cleveland, Ohio, be and are hereby appointed Special Masters to execute and carry out the pro-

287 visions of this decree, and upon confirmation of the sale hereby directed to execute and deliver to the purchaser or purchasers conveyance of the property so sold.

All other questions arising under any of the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication; including the claim for unearned interest on bonds not yet due.

And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree

in this cause at this time on the ground that the issues raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton to be filed herein have not been tried and determined, the Court overrules such objection and the defendant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance in the trial and determination of such issues is upon and subject to the following conditions, to wit:

If upon the determination of such issues it shall be adjudged by this Court that the decree rendered by the Supreme Court of the State of Ohio in the suit brought by said James Compton against The Wabash, St. Louis and Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered and affected of the said lien, or the successors in the title of said purchaser or purchasers shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent. per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court
288 of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this Court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this Court may direct.

And it is further ordered and adjudged, that notwithstanding the entry of this decree the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this Court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul or abridge any right, claim, interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

Any sale, conveyance or assignment of the railway and property hereinabove described made under this decree shall not have the

effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the Receivers of the Wabash, St. Louis and Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and Gen. John McNulta, or upon intervening claims allowed or to be allowed, or upon any other claims or
289 allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis and Pacific Railway Company, or any part thereof, or said Receivers or either of them, or the adjustment of any equities arising out of the same between the parties hereto, or their successors, either by this Court or by the Circuit Court of the United States for the Eastern District of Missouri, or by any United States Circuit Court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis and Pacific Railway Company, or any part thereof, or by any United States Circuit Court to which any of the parties in the consolidated cause of The Central Trust Company of New York and others against the Wabash, St. Louis and Pacific Railway Company and others in the Circuit Court of the United States for the Eastern District of Missouri, including the Receivers, have been by the said Circuit Court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named Court or otherwise.

Nor shall any such sale, conveyance, transfer or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other Courts aforesaid, but the same shall remain in the custody of the Receiver until such time as the Court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof or said Receivers as aforesaid shall not be paid within a reasonable time after being required by order of this or said other courts.

The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors
290 shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or said Receivers, by order of said courts shall be fully paid and discharged.

The provisions aforesaid shall apply to the purchasers of the same under this decree and all persons taking such property through or under them, but the foregoing provisions shall not nor shall any

reservation in this decree contained have the effect or be construed, nor are they or any of them intended to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist.

The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist.

And the Court reserves the right to make such further order and direction at the foot of this decree as may seem proper.

W. Q. GRESHAM,
Judge 7th District.
HOWELL E. JACKSON,
Circuit Judge.

291 STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

No. 22624.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

And now comes James F. Joy, and, by leave of Court first had, files this his supplemental answer in this cause, and says that since filing his answer in this cause the United States Circuit Court for the Southern District of Illinois, for the District of Indiana and for the Northern District of Ohio, Western Division, have duly entered decrees in the cause pending therein, wherein James R. Jesup and Isaac H. Knox were complainants, and the Wabash, St. Louis and Pacific Railway Company were defendants, being the same cause stated and referred to by this defendant in his original answer filed in this cause.

He says, further, that said decrees were decrees for foreclosure and sale under all the mortgages existing against all said railway lines and property formerly belonging to the Wabash, St. Louis and Pacific Railway Company east of the Mississippi River, and said decrees fixed and determined the amount and priority of the several liens upon said property, and provided for the sale of all the said property, franchises and interest to satisfy the said liens.

That in accordance with the said decrees the Commissioners appointed by the said Court have set the 15th day of May, 1889,
292 as the day for the sale of the said properties, the same to take place at the United States Court House, in the City of Chicago, in the State of Illinois.

This defendant says further that a copy of the said decree is at-

tached to the answer of James F. Joy *et al.*, purchasing committee, to which he refers for more particular statement of the contents of said decree.

DILLON & SWAYNE,
Attorneys of James F. Joy.

STATE OF NEW YORK, *New York County, ss:*

Rush Taggart, being duly sworn, says that he is one of the attorneys for James F. Joy, defendant herein, and that the facts stated in the foregoing supplemental answer are true as he verily believes, and that he makes this affidavit because James F. Joy is a non-resident of the County of Lucas, and now absent therefrom.

RUSH TAGGART.

Sworn to before me this 23d day of April, A. D. 1889.

[SEAL.] WM. J. HARDING,
Notary Public, New York and Kings County.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark.

293 Court of Common Pleas, Lucas County, Ohio.

Petition.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, Trustee; SOLON HUMPHREYS and DANIEL A. LINDLEY, as Trustees, Defendants.

Cross Petition of William F. Redmond and Others.

And now comes the Wabash Railroad Company, by Dillon & Swayne, its attorneys, and says:

That it is a consolidated corporation of the States of Ohio, Michigan, Indiana, Illinois and Missouri, and as such is the owner of the lines of railway formerly belonging to the Wabash, St. Louis and Pacific Railway Company, as hereinafter more particularly stated and alleged.

By way of answer to the allegations of the petition and the supplemental and amended petition of said plaintiff it says:

That it admits that on and prior to the first day of October, 1862, the Toledo and Wabash Railway Company was a corporation of the States of Ohio and Indiana and owning the line of railway, as in said petition set forth, in the States of Ohio and Indiana.

It admits that on or about the first day of October, 1862,
294 the directors of said Toledo and Wabash Railway Company issued bonds of said company known as equipment bonds,

of substantially the tenor as in said petition set forth, with coupons and interest warrants attached thereto, and that said bonds were issued and sold long prior to the commencement of this action; but as to whether or not plaintiff is a *bona fide* holder and owner for the value of the bonds and coupons in its petition set forth it has no knowledge or information sufficient to form a belief, and therefore denies the same.

It admits that on or about the 29th day of May, 1865, the said Toledo and Wabash Railway Company entered into an agreement of consolidation with the Great Western Railway Company of 1859, the Quincy and Toledo Railroad Company and the Illinois and Southern Iowa Railroad Company, forming by such consolidation a new company known as the Toledo, Wabash and Western Railway Company; and it admits that the said agreement for consolidation was consummated on or about the date named in said petition, but denies the effect claimed from said agreement of consolidation as in said petition alleged.

It admits that on or about the first day of February, 1867, said new consolidated company, to wit, the Toledo, Wabash and Western Railway Company, executed a mortgage to James R. Jesup and Isaac H. Knox to secure the payment of consolidated bonds, and it avers that under said mortgage there were issued 2,610,000 of the said bonds provided for in the said mortgage. It admits that in said mortgage it was recited that the purpose of issuing said bonds was for the retirement of first and second mortgage bonds upon the properties in Ohio and Indiana, as in said petition recited and set forth; and it asks for a full recital of the effect of said mortgage, that it may be enabled to produce the same upon the trial of this case.

It admits that on or about the 6th of October, 1868, the said Toledo, Wabash and Western Railway Company entered into an agreement of consolidation with the Decatur and East St. Louis Railroad Company, forming a new corporation known as the
295 Toledo, Wabash and Western Railway Company; and that the said agreement for the consolidation was duly perfected and the said Decatur and East St. Louis Railroad Company became a part of the said new company.

It admits that on or about the 22d day of February, 1875, an action was instituted and petition filed in the Court of Common Pleas of Lucas County, Ohio; that on or about the 24th day of February an action was instituted and complaint filed in the Cass County Circuit Court of the State of Indiana for the foreclosure of what is known as "the gold-bond mortgage," said suits being instituted by the Metropolitan National Bank of New York and others, plaintiffs, against the said Toledo, Wabash and Western Railway Company and others, defendants, and that a decree was entered for foreclosure of the said gold-bond mortgage; and it craves leave to refer to the said proceedings for the effect thereof, but avers that in the said proceedings no foreclosure was attempted of mortgages prior thereto and hereinafter enumerated and set forth by this defendant; but the said sale under said gold-bond mortgage was made expressly subject to the said prior mortgage liens; namely, the first mortgage made by

the Toledo and Illinois Railroad Company for the sum of $900,000, being a first mortgage upon the line of railway within the State of Ohio; a second mortgage made by the Toledo and Wabash Railroad Company for $1,000,000, securing bonds of said company due November first, 1878, for that amount, being second mortgage upon the line of railroad in Ohio; a first mortgage made by the Lake Erie, Wabash and St. Louis Railroad Company for twenty-five hundred thousand dollars ($2,500,000), securing first mortgage bonds of that company due, as extended, August first, 1890, being a first mortgage upon the line of railroad within the State of Indiana; a second mortgage made by the Wabash and Western Railway Company for the sum of fifteen hundred thousand dollars, securing the bonds of that company due November first, 1878.

It admits that on or about the 17th day of May, 1879, the
296 Wabash Railway Company made and executed its certain mortgage or deed of trust to the defendants Solon Humphreys and Daniel A. Lindley, as trustees, to secure payment of an issue of bonds, as in said petition set forth, and this defendant says that bonds secured by said mortgage have been issued and outstanding to the amount of two millions of dollars.

It denies the allegation of said petitions regarding the so-called "funding scheme," as set forth in the said complaint.

It admits that on or about the 14th day of August, 1879, the said Wabash Railroad Company consolidated its road, franchises and capital stock with the capital stock, property and franchises of the St. Louis, Kansas City and Northern Railway Company, and thereby formed a new corporation known as the Wabash, St. Louis and Pacific Railway Company, and that the said agreement of consolidation was duly consummated.

It admits that all of the property, assets and franchises of the Toledo, Wabash and Western Railway Company and of the Wabash Railway Company were vested in the said Wabash, St. Louis and Pacific Railway Company. It is not informed as to the payment or nonpayment of the interest coupons of the said plaintiff, and therefore denies the same.

It denies that, upon the transfer of the property and franchises of the said Toledo and Wabash Railway Company to the said Toledo, Wabash and Western Railway Company, part of the consideration for such transfer was an agreement on the part of the said Toledo, Wabash and Western Railway Company to pay said bonds known as "equipment bonds," or that such transfer constituted said bonds a lien on the said property and franchises of said Toledo and Wabash Railway Company.

It denies that said Toledo, Wabash and Western Railway Company in executing the said consolidated mortgage intended to recognize, or did recognize, a lien of said equipment bonds or other right in equity of the said equipment bonds to be secured by the said consolidated mortgage to said Knox and Jesup, trustees; and, for
297 a further answer to the petition of the said plaintiff the Wabash Railroad Company, says that it admits that the said Wabash, St. Louis and Pacific Railway Company on or about the first

day of June, 1880, to secure an issue of its bonds intended to be issued and disposed of, amounting in the aggregate to fifty millions of dollars, made and executed to the Central Trust Company of New York, a corporation of the State of New York, and James Cheney, of the State of Indiana, as trustees, a mortgage or deed of trust known as its general mortgage, and thereby conveyed to said trustees, subject to all the prior mortgage liens thereon, all and singular the lines of railroad of the said Wabash, St. Louis and Pacific Railway Company, together with the equipments and appurtenances and franchises thereunto belonging; and that thereafter bonds secured by said mortgage to the amount of $17,000,000 were sold and disposed of to *bona fide* purchasers and holders thereof.

This defendant further says on or about the 29th day of May, 1884, the said Wabash, St. Louis and Pacific Railway Company, being unable to discharge its obligations to pay interest upon bonds secured by mortgages upon its various lines of railway, as hereinafter recited, and also by reason of its large floating indebtedness, filed its bill of complaint in the United States Circuit Court for the Eastern District of Missouri against the Central Trust Company of New York, James Cheney and others, alleging its insolvency and inability to discharge said obligations, and that the interests of its creditors required that the said Court should appoint Receivers to preserve the said property for the benefit of said creditors; and that thereupon the said Circuit Court of the United States for the Eastern District of Missouri appointed Solon Humphreys and Thomas E. Tutt as Receivers of said property and put the said Receivers into possession of the same; and that thereafter by proper ancillary proceedings in the United States Circuit Court for the Southern District of Illinois, for the District of Indiana and for the Northern District of Ohio, Western Division, said Humphreys and
298 Tutt were duly appointed by the United States Circuit Courts for the said districts as Receivers, and were put in possession of all the property of the said Wabash, St. Louis and Pacific Railway Company. That thereafter the Central Trust Company of New York and James Cheney, as trustees of the said general mortgage, brought suits in the State Courts of Ohio, Indiana, Illinois and Missouri, alleging default in the payment of interest upon the bonds secured by said general mortgage, and making the said Wabash, St. Louis and Pacific Railway Company and others parties defendant to the said bills of complaint. That said suits were thereafter removed to the United States Circuit Courts within those respective States, and thereafter, by order duly entered, consolidated with the suit brought by the Wabash, St. Louis and Pacific Railway Company, as hereinbefore stated. That thereafter and thereupon said Humphreys and Tutt continued as Receivers of the said Wabash, St. Louis and Pacific Railway Company until on or about the — day of December, 1886, when the said Humphreys and Tutt were removed by the United States Circuit Court for the Southern District of Illinois and Thomas Cooley was appointed as Receiver, successor of said Humphreys and Tutt for the properties of the said

Wabash, St. Louis and Pacific Railway Company east of the Mississippi River; but said Humphreys and Tutt remained as Receivers of the said Wabash, St. Louis and Pacific Railway Company's property west of the Mississippi River until the same was turned over to purchasers at foreclosure sale, as hereinafter stated.

Defendant says that in the said consolidated cause in the United States Circuit Court for the Eastern District of Missouri, Southern District of Illinois, District of Indiana, Northern District of Ohio, Western Division, decree of foreclosure of the said general mortgage was duly entered on or about the — day of ——, 1886, and sale duly had under the said decree to the defendants herein, to wit, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Wells as a Purchasing Committee, and that thereupon the
299 said Purchasing Committee received a conveyance of all the property of the said Wabash, St. Louis and Pacific Railway Company, and duly complied with the orders of said Court, and were put in possession on or about the — day of —— of the property west of the Mississippi River; but as to the property east of the Mississippi River on or about the — day of ——, 1885, other suits were begun by Thomas A. Atkins and James McHarg and others, bondholders under the mortgages to James R. Jesup and Isaac H. Knox, Solon Humphreys and Daniel A. Lindley, and in said suits thus brought by said Atkins and McHarg, the Circuit Court of the United States for the Southern District of Illinois, District of Indiana, and Northern District of Ohio, Western Division, entered orders appointing said Thomas M. Cooley, as Receiver of the properties of the Wabash, St. Louis and Pacific Railway Company east of the Mississippi River in said suits; that said Thomas M. Cooley continued as Receiver of such properties until on or about the — day of April, 1887, when said Cooley resigned and John McNulta was appointed Receiver, successor to said Cooley.

It says further that on or about the — day of March, 1887, the said James F. Joy and others, Purchasing Committee, caused to be organized under the laws of the State of Missouri The Wabash Western Railway Company, and conveyed to said corporation the properties in the said State of Missouri formerly belonging to the Wabash, St. Louis and Pacific Railway Company, which thereafter continued to operate the same until the said Wabash Western Railway Company was merged in this defendant, as hereinafter set forth.

It says further that, on or about the month of June, 1887, suits were begun as follows: By the Farmers' Loan and Trust Company, of New York, against the said James F. Joy and others, Purchasing Committee, the Central Trust Company and James Cheney and others, in the United States Circuit Court for the Northern District of Ohio, Western Division, to foreclose a certain mortgage
300 given by the Toledo and Illinois Railway Company on or about the 8th day of September, 1853, the same being to secure an issue of bonds to the amount of $900,000, and being the first mortgage lien upon the premises formerly belonging to the

Wabash, St. Louis and Pacific Railway Company, situated within the State of Ohio. To the said suit said James F. Joy was made defendant, as trustee, successor in the trust to Edwin D. Morgan, deceased, to a certain mortgage executed by the Toledo and Wabash Railroad Company on or about the 15th day of October, 1858, to secure bonds of said company to the amount of $1,000,000, the said mortgage being the second mortgage upon the property formerly belonging to the Wabash, St. Louis and Pacific Railway Company situated within the said State of Ohio. The said Farmers' Loan and Trust Company also, on or about the month of ——, 1888, filed its bill of complaint in the Circuit Court of the United States for the District of Indiana against the said James F. Joy and others, Purchasing Committee, and others, defendants, asking the foreclosure of a certain mortgage executed and delivered by the Lake Erie, Wabash and St. Louis Railroad Company, on or about the 1st day of August 1853, to secure bonds of said company to the amount of $2,500,000. To said bill of complaint James F. Joy, trustee, successor in trust to Edwin D. Morgan, deceased, was made a party, the said Joy being trustee of a certain mortgage made by the Wabash Western Railway Company on or about the 15th day of October, 1858, to secure bonds of said company to the amount of $1,500,000, the said mortgage being second lien upon all of said premises formerly belonging to the Wabash St. Louis and Pacific Railway Company within the State of Indiana, upon the main line of said Wabash, St. Louis and Pacific Railway Company.

Defendant says further that on or about the same dates the trustees of various mortgages upon portions of said line of railway formerly belonging to the Great Western Railway Company of
1859, the Illinois and Southern Iowa Railroad Company, the Quincy and Toledo Railroad Company, the Hannibal and
301 Naples Railroad Company, and the Decatur and East St. Louis Railroad Company, filed bills of complaint for the foreclosure of certain mortgages which were respectively first liens upon said separate divisions of said railway; that prior to the filing of said bills, said James R. Jesup and Isaac H. Knox had filed bills of foreclosure in the consolidated mortgage executed and delivered in the year 1867 in the United States Circuit Courts for the Southern District of Illinois, District of Indiana, and the Northern District of Ohio, Western Division. That on or about the 22d day of October, 1888, by orders duly entered in all of said United States Circuit Courts, the said cause begun by said Jesup and Knox, and the suits brought by said Farmers' Loan and Trust Company and other trustees of first mortgages, as hereinbefore recited, were duly consolidated and all parties having liens or claiming liens upon said property, save and except the plaintiff in this suit and the cross-petitioners in this suit, were made parties to said proceedings in the United States Circuit Court, including therein James Compton, defendant herein; that orders were thereupon made appointing the said John MaNulta, Receiver of said properties in the said consolidated cause, and said John McNulta thereupon qualified

as such Receiver and continued to hold said property from date of said orders under the first and second mortgage foreclosure proceedings. That in said consolidated cause, the said James F. Joy, as trustee of the second mortgages of Ohio and Indiana, duly filed cross-bills asking for the foreclosure of said second mortgages, and said cause so proceeded that on or about the — day of March, 1889, decree was duly entered in said cause in each of said Courts, as in the supplemental answer of the Purchasing Committee herein is fully set forth; that said decrees were for the foreclosure and sale under all the mortgages existing against said railways, including therein the two mortgages hereinbefore named to the Farmers' Loan and Trust Company, trustee in Ohio and Indiana respectively, and the two mortgages to James F. Joy, trustee, in Ohio and Indiana respectively, and also the consolidated mortgages to James R.

302 Jesup and Isaac H. Knox, and the consolidated mortgage to Solon Humphreys and Daniel A. Lindley, trustees. That under and pursuant to said decrees of foreclosure, A. J. Ricks and Bluford Wilson, duly appointed Master Commissioners by said Courts in the said decrees on the 15th day of May, 1889, sold all the said properties formerly belonging to the Wabash, St. Louis and Pacific Railway Company in the City of Chicago at the United States Court House, and said James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Wells, as a purchasing committee, were the purchasers at said sale. That thereafter, by decrees duly entered in all of said courts, said sale was duly confirmed, and said Master Commissioners, Wilson and Ricks, duly executed and delivered their deed as such commissioners to said James F. Joy and others, Purchasing Committee, and said James F. Joy and others, Purchasing Committee, duly complied with all the terms of said sale, and on or about the first day of July 1889, were, by orders of said Court, duly put in possession of said property as the purchasers at said foreclosure sale. That thereafter corporations were duly formed in the States of Ohio, Michigan, Indiana and Illinois, which, by consolidation with the Wabash Western Railway Company of the State of Missouri, formed this defendant, and that prior to said consolidation said Purchasing Committee duly conveyed to each of said companies the lines of railway within the said respective States, and that said defendant or said constituent corporations have been in possession of said properties under and pursuant to said deeds since the date of the execution and delivery thereof.

This defendant says further, by way of answer to the cross-petition of William F. Redmond and others, that it adopts all the allegations of the answer of the Purchasing Committee, and of the supplemental answer of the said Purchasing Committee; and also adopts all the allegations of its answer heretofore made to the petition of the plaintiff, as a part of this its answer to the said cross-petition.

303 It says further that it is invested with all the title and rights formerly belonging to the said Farmers' Loan and Trust Company under the said two mortgages hereinbefore recited, as made

by the said Toledo and Illinois Railroad Company, and the Lake Erie, Wabash and St. Louis Railroad Company; and likewise is invested with all the right, title and interest formerly vested in James F. Joy, trustee of the mortgages executed by the Toledo and Wabash Railroad Company and the Wabash and Western Railroad Company, as hereinbefore recited.

It says further that the said mortgages in both Ohio and Indiana cover all the property described in the petition or in the cross-petition filed in this case as having belonged to the Toledo and Wabash Railway Company in the States of Ohio and Indiana, and that the same were valid and outstanding mortgages to the full amount of the principal of the bonds named in the said mortgages, together with a large amount of interest thereon, and prior to any claimed lien that can be asserted on behalf of the plaintiff or the cross-petitioners herein.

This defendant further says that it adopts all the allegations of the answer and supplemental answers of the said Purchasing Committee, and asks that the same may be taken as part of its answer, as though here set out in full.

This defendant likewise says that it adopts all the allegations of the answer filed by James F. Joy, and asks that the same may be taken as its answer, the same as though set forth in full in this its answer.

Wherefore this defendant asks to be dismissed with its costs.

DILLON & SWAYNE,
Attorneys for Wabash Railroad Company.

304 STATE OF NEW YORK,
City and County of New York, ss:

Rush Taggart, being duly sworn, says he is one of attorneys for the defendant, and that the defendant is a corporation; that it believes the allegations of the foregoing answer to be true.

RUSH TAGGART.

Sworn to before me this 11th day of December, 1889.

T. E. FELL,
Notary Public, Kings Co., New York.

Certificate filed in New York Co.

[Endorsement:] Filed in C. C., Jan. 14/95, L. E. Clark, Clk.

THE STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

Answer of James F. Joy to Cross-Petition of Henry F. James.

The defendant James F. Joy now comes, and, by way of answer to the cross-petition of Henry F. James, says that he adopts all the allegations of his answer filed herein to the cross-petition of
305 William P. Redmond *et al.*, the same as if said allegations were all set forth in detail herein, as an answer to the cross-petition of Henry F. James.

DILLON & SWAYNE,
Attorneys for James F. Joy.

STATE OF NEW YORK, *City and County of New York, ss:*

Rush Taggart, being duly sworn, says that he is one of the attorneys of James F. Joy in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and believes the same to be true; that the said Joy is a non-resident of the County of Lucas and now absent therefrom, and that on that account this verification is made by his attorney.

RUSH TAGGART.

Sworn to before me this 3d day of June, 1890.

WM. J. HARDING,
Notary Public, New York and Kings Counties, State of New York.

[Endorsed:] Filed in C. C. Jan. 14, '95, L. E. Clark, Clerk.

306 THE STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILROAD COMPANY, THE WABASH RAILROAD COMPANY, THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, GEORGE I. SENEY, Trustee, and SOLON HUMPHREYS and DANIEL A. LINDLEY, as Trustees.

Answer of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles to a Cross-Petition of Henry F. James.

And now come James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as a purchasing committee, and, for answer to the cross-petition of Henry F. James, say that they adopt as their answer to the said cross-petition all the allegations of all answers filed by them to the petition of the plaintiff and to the cross-petition of William P. Redmond and others, the same as if those allegations were here fully set forth in detail in this answer.

DILLON & SWAYNE,
Attorneys for James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, Purchasing Committee.

307 STATE OF NEW YORK,
City and County of New York, ss:

Rush Taggart, being duly sworn, says that he is one of the attorneys for the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that he believes it to be true; and that this verification is made by him as attorney because the defendants are non-residents of the County of Lucas and are now absent from said county.

RUSH TAGGART.

Sworn to before me this 3d day of June, 1890.

[SEAL.]

WM. J. HARDING,
Notary Public, New York and Kings Counties, State of New York.

[Endorsed:] Filed in C. C., Jan. 14/95. L. E. Clark, Clk.

THE STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

Answer of the Wabash Railroad Company to Cross-Petition of Henry F. James.

And now comes the Wabash Railroad Company, and, by way of answer to the cross-petition of Henry F. James, says it adopts as its answer thereto its answer heretofore filed to the petition of the
308 plaintiff and the cross-petition of William P. Redmond and others, the same as if the same were here repeated.

The Wabash Railroad Company further says that in and by the decree of the United States Circuit Court in and for the Southern District of Illinois, the District of Indiana, and the Northern District of Ohio, Western Division, of date of March 23d, 1889, under which the said sale of May 15th, 1889, took place, it was provided as follows relative to the said railroads and property, to wit:

"All other questions arising under any of the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication, including the claim for unearned interest on bonds not yet due.

"And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issues raised by the amendment to the complainant's amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton, to be filed herein, have not been tried and determined, the Court overrules such objection, and the defendant James Compton duly excepts to such ruling and the entry of this decree. But is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

"If upon the determination of such issues it shall be adjudged by this Court that the decree rendered by the Supreme Court of Ohio in the suit brought by said James Compton against the Wabash, St. Louis and Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that
"portion of the property sold, covered and affected by
309 "said lien, or the successors in the title of said purchaser "or purchasers, shall pay to said James Compton or his

" solicitors herein, within ten days after the entry of the de-
" cree herein in favor of said James Compton, the sum of
" three hundred and thirty-nine thousand nine hundred and
" twenty dollars and forty cents, with interest thereon at six
" per cent. per annum from May 1st, 1888, being the amount found
" due on the equipment bonds by him owned, by the Supreme Court
" of Ohio, in his said suit, upon the surrender by him of the bonds
" and coupons owned by him, referred to in his petition in such suit;
" and in default of such payment this Court shall resume possession
" of the property covered and affected by the said lien of the defend-
" ant James Compton, and enforced such decree as it may render
" herein in his favor by a resale of such property or otherwise as this
" Court may direct.

" And it is further ordered and adjudged that notwithstanding the
" entry of this decree the said issues concerning the claim and in-
" terest of said Compton shall proceed to a final determination and
" decree in accordance with the rules and practice of this Court, and
" any decree rendered thereupon shall bind the purchaser or pur-
" chasers at any sale or sales had hereunder, and all persons or cor-
" porations deriving any title to or interest in the said property
" affected by such lien from or through them or any of them, and
" nothing in this decree shall be construed as an adjudication of any
" matter or thing as against the said James Compton, or to prejudice,
" annul or abridge any right, claim, interest or lien which the said
" James Compton may have in, to or upon the premises hereby
" directed to be sold, or any part thereof, or in, to or upon any
" property whatsoever embraced in this decree; it being the inten-
" tion to hereby preserve the rights of said Compton in the relation
" in which he now stands towards the mortgagees parties hereto.

" Any sale, conveyance or assignment of the railway and property
" hereinabove described made under this decree shall not have
310 " the effect of discharging any part of said property from the
" payment or contribution to the payment of claims, or de-
" mands chargeable against the same, whether for costs and expenses,
" the expenses of the receivership of said property and the full pay-
" ment of all the debts and liabilities of the Receivers of the Wabash,
" St. Louis and Pacific Railway Company, namely, Solon Hum-
" phreys and Thomas E. Tutt, Thomas M. Cooley and Gen. John
" McNulta, or upon intervening claims allowed or to be allowed, or
" upon any other claims or allowances that have been or may here-
" after be charged against the property of the Wabash, St. Louis and
" Pacific Railway Company, or any part thereof, or said Receivers,
" or either of them, or the adjustment of any equities arising out of
" the same between the parties hereto, or their successors, either by
" this Court or by the Circuit Court of the United States for the
" Eastern District of Missouri, or by any United States Circuit Court
" exercising either original or ancillary jurisdiction over said prop-
" erty of the Wabash, St. Louis and Pacific Railway Company, or
" any part thereof, or by any United States Circuit Court to which
" any of the parties in the consolidated cause of the Central Trust
" Company of New York and others against the Wabash, St. Louis

"and Pacific Railway Company and others in the Circuit Court of "the United States for the Eastern District of Missouri, including "the Receivers, have been by said Circuit Court of the United States "remitted in proceedings or actions ancillary to the jurisdiction of "said last-named Court or otherwise.

"Nor shall any such sale, conveyance, transfer or assignment made "under and pursuant to this decree withdraw any of said railroad "property or interest to be sold under this decree as hereinbefore "directed from the jurisdiction of this and the other courts afore- "said, but the same shall remain in the custody of the Receiver until "such time as the Court shall on motion direct said property in
"whole, or from time to time in part, to be released to the
311 "purchaser or purchasers thereof, or any of them, and shall
"afterwards be subject to be retaken, and, if necessary, resold "if the sum so charged or to be charged against said property, or "any part thereof, or said Receivers, as aforesaid, shall not be paid "within a reasonable time after being required by order of this or "said other Courts.

"The conveyance and transfer of said property sold under this "decree shall be subject to the powers and jurisdiction of the said "Courts, and the purchasers of the property sold under this decree, "or any part thereof, and the parties hereto, or their successors, shall "thereby become and remain subject to said jurisdiction of said "Courts, so far as necessary to the enforcement of this provision of "this decree, and such jurisdiction shall continue until all the claims "and demands that have been or may be allowed against said prop- "erty of the Wabash, St. Louis and Pacific Railway Company, or "any part thereof, or said Receivers, by order of said Courts, shall "be fully paid and discharged.

"The provisions aforesaid shall apply to the purchasers of the "same under this decree, and all persons taking said property "through or under them, but the foregoing provisions shall not, "nor shall any reservation in this decree contained have the effect "to be construed, nor are they or any of them intended to give to "any claims that may exist, any validity, character or status superior "to what they now have, nor to decide nor imply that any such "claims exist."

This defendant says that as provided in said decree, the claim of James Compton to a lien upon a portion of said line of railway is still pending and undetermined in said Federal Courts, and has been referred to Hon. Bluford Wilson, Master in Chancery, to take the testimony and report upon the question of the existence and amount of his claimed lien.

The defendant says further that there is also pending and undetermined in said Federal Courts claims for expenses in conducting
the said foreclosures, and the questions relating thereto have
312 been duly referred to the Hon. William P. Fishback, Master
in Chancery, to take the testimony and report with all convenient speed the testimony relating thereto. And said cause is still pending and undetermined before said Master, and he has not yet reported upon the said questions.

The Wabash Railroad Company, therefore, avers the fact to be that the said United States Court is still in such possession and control of said property as that the exclusive jurisdiction to hear and determine all questions relating to liens upon the said lines of railway described in the cross-petition of said Henry F. James, William P. Redmond and others, and the petition filed in this cause.

Wherefore it asks to be dismissed with its costs.

DILLON & SWAYNE,
Attorneys for The Wabash Railroad Company.

STATE OF NEW YORK,
City and County of New York, ss:

Rush Taggart, being duly sworn, says he is one of the attorneys for The Wabash Railroad Company; that he has read the foregoing answer and knows the contents thereof, and believes the same to be true; that the defendant is a non-resident of Lucas County and now absent therefrom, and that on that account this verification is made by affiant as attorney.

RUSH TAGGART.

Sworn to before me this 2d day of June, 1890.

THOMAS E. FELL,
Notary Public, Kings Co., N. Y.

[SEAL.]

Certificate filed in New York Co.

[Endorsed:] Filed in C. C., Jan. 14, '95. L. E. Clark, Cl'k.

313 In the Circuit Court of Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
against
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, THE WABASH RAILROAD COMPANY, JAMES F. JOY, Trustees; SOLON HUMPHREYS and DANIEL A. LINDLEY, Trustees; JAMES CHENEY, Trustee; OSSIAN D. ASHLEY, EDGAR T. WELLES, THOMAS H. HUBBARD, THE FARMERS' LOAN AND TRUST COMPANY, JAMES COMPTON, and the Following-named Cross-petitioners, Namely, WILLIAM F. REDMOND, JOHN B. MANNING, DAVID KOHN, WILLIAM N. KOHN, and EDWARD POPPER, Partners Under the Firm Name of Kohn, Popper & Company; JAMES M. HAM and BENJAMIN F. HAM, Partners Under the Firm Name of Ham Brothers; ISRAEL M. SIMON, EDWARD H. LITCHFIELD, IRVING D. FERREY, JOHN S. A. WITTKE, JAMES M. HAM, HENRY W. SMITH, CHARLES S. WEBB, Dr. W. P. ROWE, and T. E. STEPHENS, Executors of James A. Sullivan, Deceased; SHELTON WING and WILLIAM H. SHELTON, Executors of Pres-
314 ton Wing, Deceased; ELLA R. JOHNSON, CHARLES E. THORNE, JAMES MOIR, GUSTAVUS ROLLINS, and EDWARD A. ROLLINS, Partners Under the Firm Name of Rollins & Co.; EUGENE E. BISHOP, FREDERICK HUBBARD, WILLIAM C. CREAMER, GEORGE B. MEADE, GEORGE B. MEADE and WALTER AIKMAN, Executors, and ELIZA MEADE, Executrix, of H. R. Meade, Deceased; JOHN W. ALLING, E. KELLOGG BEACH, CLARENCE MORFIT, JAMES WALKER, VASSAR BROTHERS HOSPITAL, a Corporation of New York; JOSEPH L. CADMUS, PRESTON WING, MARY L. OLIVEIRA, CHARLES G. PETERS, HENRY F. JAMES, LEWIS G. HAMPTON, WILSON H. PIERCE, AMBROSE D. HENRY, HOWARD H. HENRY, and FRANK L. HENRY, Executors of Maria C. Henry, Deceased.

Amendment to Answer and Cross-Petition of the Wabash Railroad Company.

The Wabash Railroad Company, by leave of Court first had, now comes, by Rush Taggart, its attorney, and files this amendment to its answer in this cause, and says, by way of an additional defense to the petition of the plaintiff and of the cross-petitioners herein, that it is now the owner and holder of the legal title to the line of railway described in the petition, formerly belonging to the Toledo and Wabash Railway Company, and all the property connected therewith; that, as such owner of said property, it is the successor in interest of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the Purchasing Committee, who were the purchasers of said property at the foreclosure sale described in the answer
315 of said Purchasing Committee filed in this cause and in the answer of this defendant, and of all the rights, title and interest vested in or acquired by the said Purchasing Committee in or

to the said property or to the mortgages executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company, or by the Toledo and Wabash Railroad Company to Edwin D. Morgan, or by the Wabash and Western Railroad Company to Edwin D. Morgan; that, under the execution of the plan of reorganization of the Wabash, St. Louis and Pacific Railway Company by said Purchasing Committeé, said Purchasing Committee became the possessors and owners of all the bonds and unpaid coupons and scrip certificates issued and outstanding under either of said above-described mortgages, and were entitled to all the rights and interests as owners and holders of said bonds and coupons and scrip certificates, and that all said rights have been conveyed to and now are owned by this defendant. This defendant says further that, at the time of entering into the articles of consolidation, the said Toledo and Wabash Railway Company had personally assumed the payment of all the bonds and interest thereon issued under the said mortgages hereinbefore described to the Farmers' Loan and Trust Company and Edwin D. Morgan by either the Indiana or the Ohio companies above named, having assumed the payment of all such bonds and obligations and unpaid interest thereon then outstanding, in the articles of consolidation entered into on the 7th day of October, 1858, the same being long prior to the issue of any of the equipment bonds now claimed to belong to the plaintiff in this action, or to any of the cross-petitioners herein; that in the said articles of consolidation of 1865, the personal obligation of the said Toledo and Wabash Railway Company upon the said bonds was recognized, and, likewise, the priority of the said bonds over the equipment bonds now sought to be enforced by the plaintiff and cross-petitioners in this action, and that, if the Court
316 shall adjudge the said equipment bonds to be a lien upon the property of the railway formerly belonging to the Toledo and Wabash Railway Company situated in the States of Ohio and Indiana; by the same instrument there was likewise created a lien on behalf of first mortgage bonds to the abount of $3,400,000, and of second mortgage bonds to the amount of $2,500,000 prior in time and prior in right to the said equipment bonds, the right to which liens this defendant is entitled to assert, as the owner of said bonds. It asks, therefore, that if the Court shall decree a lien on behalf of said equipment bonds it shall likewise decree a lien on behalf of this defendant as against the said railway property extending from Toledo, Ohio, through the States of Ohio and Indiana to the State line between Indiana and Illinois, formerly belonging to the Toledo and Wabash Railway Company, to the extent of the first mortgage bonds and interest thereon, now held by this defendant; and, also, to the extent of the second mortgage bonds aforesaid, with interest thereon; and that the Court take an accounting as to the amounts due upon the said $3,400,000 first mortgage bonds, together with interest unpaid thereon, and also the amount due upon said second mortgage to the amount of $2,500,000, thus decreed to be liens prior in point of time to the said equipment bonds upon the

whole of the said railway, and that any redemption or sale of said property, or any portion of the same, shall be subject to this defendant's prior liens thereon.

RUSH TAGGART,
Attorney for the Wabash Railroad Company.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Ossian D. Ashley, being duly sworn, says he is the president of the Wabash Railroad Company, a defendant in the above-entitled cause; that he is familiar with the affairs of said defendant;
317 that he has read the foregoing amendment to said defendant's answer and cross-petition in this cause, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

O. D. ASHLEY.

Sworn to before me this 11th day of February 1896.
[SEAL.] WM. ARNOUX,
Notary Public, New York County.

[Endorsed:] Filed in C. *O.*, Feb. 17, 1896. L. E. Clark, Clerk.

In the Court of Common Pleas, State of Ohio, Lucas County.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

Reply of William F. Redmond and Others to the Answer of the Purchasing Committee.

Now come William F. Redmond, John B. Manning, David Kohn, William M. Kohn, and Edward Popper, partners under the firm name of Kohn, Popper & Co., James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferry, John S. A. Wittke,
318 James M. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Mead; George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach,, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveira, cross-petitioners who have heretofore filed their cross-petition in this cause,

and, by way of reply to the answer of Ossian D. Ashley, James F. Joy, Edgar T. Welles and Thomas H. Hubbard, admit that the said Ashley, Joy, Welles and Hubbard are constituted and acting as a purchasing committee on behalf of the holders of some of the mortgage bonds outstanding upon the lines of railway formerly owned by the Wabash, St. Louis and Pacific Railway Company, including therein bonds secured by the mortgages, described in the cross-petition of these cross-petitions made to Edwin D. Morgan, trustee, and to the Farmers' Loan and Trust Company, trustee, and claimed to be secured by lien upon the lines of railway formerly owned by the Toledo and Wabash Railway Company, but these cross-petitioners do not know how many of said purchases of bonds said Ashley, Joy, Welles and Hubbard represent and are acting for, and, therefore, do not admit but deny the averment that they represent a very large majority of the same.

Secondly. Further answering, these defendants say with reference to the averment of the answer of said Ashley, Joy, Welles and Hubbard, relating to the retention of possession of the premises described in their cross-petition by said United States Courts, and to the beginning and prosecution of the said suits brought by said Atkins and others, and Jessup and Knox, and the appearance and filing of cross-bills by parties thereto, including the Farmers'
319 Loan and Trust Company and said Joy, and the orders made therein by said United States Courts, and the averment of the acquisition of prior jurisdiction and control over said property and the defendants thereto by said Courts, these cross-petitioners have no sufficient knowledge, information or belief to authorize them to admit any of said averments, and therefore deny the same.

Thirdly. These cross-petitioners admit that the said property is now in possession of Receivers appointed by the Circuit Court of the United States, which possession they have no intention or desire to disturb, but they say that they are not parties, nor is any one of them a party to any of the proceedings, suits or actions described in the answer of the said Ashley, Joy, Welles and Hubbard, and they deny that the Courts in which said actions are pending, or any one of them, has acquired prior jurisdiction and control of these cross-petitioners, or has the exclusive or any other right to determine the right of these cross-petitioners, or that these cross-petitioners are required to seek relief in said proceedings and in said Courts; on the contrary, they aver that, by reason of the fact that one of these cross-petitioners resides in the State of Michigan, another in the State of Connecticut, others in the State of New York and still others in the State of Ohio, the said Circuit Courts of the United States cannot acquire, and are forbidden by law to acquire, jurisdiction over these cross-petitioners, or the right to control their interests in said property.

Fourthly. These cross-petitioners, further answering, say that they have no knowledge or information to enable them to form a belief sufficient to justify them in admitting that Receivers' certificates have been issued under the authority of Courts of the United States

in said causes pending therein, named in said answer of said Ashley, Joy, Welles and Hubbard, or the amount thereof, or that said purchasing committee became the owners or holders thereof, or are equitably entitled to assert the lien thereof, or that said certifi-
320 cates, or any of them, are charged upon said property, or any part of it, by way of lien, and therefore they deny the same.

Fifthly. And, by way of further reply to the second defense in said answer stated, these cross-petitioners say, that they were not, and no one of them was, made party or served with process in any of the said causes named in said answer, or in any cause in which Receivers' certificates as described in said answer were authorized or issued, wherefore they deny that the said Receivers' certificates, if any were issued, or if any there be still outstanding, had or have any lien upon any part of said premises in anticipation or priority of the lien of the said equipment bonds held and owned by the said James Compton, the plaintiff and these cross-petitioners.

Sixthly. And by way of reply to the third defense these cross-petitioners repeat all the allegations of the first, second, third, fourth and fifth replies herein, the same as if each were herein separately set forth as a part thereof; and further deny that the said cross-petitioners or any one of them, with full knowledge or any knowledge of the facts stated in the first and second defense in the said answer contained, or of the said foreclosure proceedings, allowed the said defendants to go forward and purchase said properties and advance large sums of money therein without making any claim to any part thereof, and without asserting any lien thereon or any part of the same.

As to the averments in the said third defense contained that the said seventeen million dollars of bonds were put in the market and sold, and the several persons purchasing the said bonds did so without notice of the lien now claimed by the plaintiff, said James Compton and said cross-petitioners, these defendants deny said averment; and, also, deny that these cross-petitioners, or the holders of the bonds now owned by them, tacitly or otherwise permitted the execution of the said mortgages or the sale of bonds, and the sub-
321 sequent foreclosure and sale of said property or foreclosure of the same by said Purchasing Committee, or the expenditure of large sums of money by said Purchasing Committee, or that these cross-petitioners and the plaintiff set forth and raised no claim of lien, although fully aware of such proceeding; and they deny that they were bound to give notice of lien; and they aver that all actings and doings aforesaid were subject to the lien of these cross-petitioners for the amount of their said equipment bonds and the interest thereon, and with full legal and actual notice thereof. They further deny that the equities of these cross-petitioners have ever lapsed or are in any way estopped from asserting their lien.

Seventhly. And, by way of reply to the fourth defense in said answer contained, these defendants say that, while it is true and they admit that the suit was brought in the Circuit Court of the United States for the District of Indiana as described in the said

answer of the said Ashley, Joy, Welles and Hubbard, not, however, by Benjamin F. Ham and others, but by James Tyson, and to which Benjamin F. Ham and others became parties after and not at the time of its commencement, the said Tyson did not begin, nor did the said Ham and others prosecute the same for these cross petitioners or any of them, nor were these cross petitioners, or any of them (except Benjamin F. Ham individually and not as a partner with James M. Ham under the firm name of Ham Brothers, in which capacity he brings this action), parties to said action, and they aver that no notice or opportunity was given in said action by order of Court or otherwise to any of them, or to any other holders of equipment bonds except those who were named as parties thereto to appear therein, and while the said judgment was rendered by the Supreme Court of the United States, as stated in said fourth defense, the same is not an estoppel of record, except upon the parties thereto, and therefore does not bind these cross petitioners, or any of them.

They aver further that the action taken by the Circuit Court
322 of the United States after the reversal by the Supreme Court of the United States described in said answer was after the commencement of this suit and during the pendency of this suit.

Wherefore they deny that said proceedings of said Supreme and Circuit Courts of the United States are a bar to the prosecution of the cross petition of the cross petitioners in this action.

And, having fully answered, they pray as in their cross petition prayed.

GEO. HOADLY AND
JOHN C. F. GARDNER,
Attorneys for Cross Petitioners.

STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, says that he is one of the cross petitioners above named, and that he believes the statements of the foregoing reply to be true.

WILLIAM F. REDMOND.

Sworn to and subscribed in my presence this 26th day of April, 1889.

[SEAL.]

A. J. McCORMACK,
Notary Public (10), N. Y. County.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Cl'k.

323 In the Court of Common Pleas, State of Ohio, Lucus County.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

Reply of William F. Redmond and Others to Answer of James F. Joy.

Now come William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Mead; George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliveira, cross-petitioners who have heretofore answered and filed their cross-petition in this case, and, by way of reply to the answer of James F. Joy, say:

First. As to the averments of said answer relating to the execution of a mortgage by the Toledo and Wabash and the
324 Wabash and Western Railway Companies respectively to Edwin D. Morgan, the record of said mortgages, the execution of the bonds intended to be secured by the said mortgage, their issue and sale, and the amount thereof still claimed to be outstanding and unpaid, with interest, with reference also to the averments of said answer relative to the alleged extension of said mortgage debt, the death of Edwin D. Morgan, the appointment of his successor, and his action as trustee under said mortgage, and the alleged priority and superiority of the lien created by said mortgages, and also the mortgage in favor of the Farmers' Loan and Trust Company, as described in said answer; these cross-petitioners have no knowledge, information or belief, other than that stated in their cross-petition, sufficient to authorize them to admit any of said averments, and therefore they deny the same, except so far as the same have been admitted in their said cross-petition.

Secondly. With reference to the averments of said answer relative to the acquisition of the interests of the Wabash, St. Louis and Pacific Railway Company by the Purchasing Committee, as stated in the cross-petition of these cross-petitioners, the continuance of the Receivers in possession of said railways by order of the Circuit Court of the United States for the States of Illinois and Ohio, their con-

tinued possession, the bringing of suit by Thomas Atkins and others for foreclosure, the appointment of Receivers in said suit and their possession, the bringing of separate suits for foreclosure of the first or divisional mortgages upon the various divisions of said railways, the consolidation of said suits, the extension of the receivership over such consolidation and in said consolidated cause, the filing of cross bills in said consolidated cause, and the action of the United States Courts therein, these cross-petitioners have no other knowledge, information of belief than that contained in their cross-petition sufficient to enable them to admit the said averments, or any
325 of them, and therefore, deny the same except so far as they are admitted by said cross-petition.

Thirdly. These cross-petitioners, by way of further reply, say that they have not been made parties to and are not in any wise affected or charged in any of the suits for foreclosure or other actions described in the answer of James F. Joy.

Wherefore, they pray as in their original cross-petition they did pray.

GEO. HOADLY AND
JOHN C. F. GARDNER,
Attorneys for Cross-Petitioners.

STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, says that he is one of the cross-petitioners above named, and that he believes the statements of the foregoing reply to be true.

WILLIAM F. REDMOND.

Sworn to and subscribed in my presence this 26th day of April, 1889.

[SEAL.]

A. J. McCORMACK,
Notary Public (10), *N. Y. County.*

[Endorsed:] Filed in C. C. Jan. 14/95, L. E. Clark, Cl'k.

326 STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

No. 22624.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILROAD COMPANY and Others, Defendants.

The reply of William F. Redmond and others, cross-petitioners to the supplemental answer filed in this cause by James F. Joy, Ossian D. Ashley, E. T. Welles and Thomas H. Hubbard.

Now come William F. Redmond and his associated cross-petitioners and, by leave of the Court first had, file this their reply to the said supplemental answer, and, by way of such reply, say:

First. That they have no sufficient knowledge whereon to found a belief as to whether the averments of the said supplemental answer are true or not true, and they therefore deny the same.

Secondly. They say they were not nor was any one of them made parties to the said suits described in the said supplemental answer pending in the Circuit Court of the United States, for the Southern District of Illinois, for District of Indiana and for the Northern District of Indiana and for the Northern District of Ohio, Western Division, wherein James R. Jessup and Isaac H. Knox were complainants, and the Wabash, St. Louis and Pacific Railway Company was defendant, nor have they or any one of them been made parties
327 to any one of said suits, nor are they parties to any of said decrees, nor are they bound by any of said decrees, the said decrees and the said suits being transactions wholly between other persons and parties and not between them nor any one of them and any other person or party, and therefore they say that the said suits and all things that have occurred in them and the said decrees and all things contained therein do not nor do any of them in any way effect any of the interests or rights of any of these cross-petitioners or obstruct, hinder or prevent or defeat the relief claimed by these cross-petitioners in their original cross-petition.

Wherefore, they pray as in said cross-petition.

GEORGE HOADLY,
JOHN C. F. GARDNER,
Attorneys for William F. Redmond and Others, Cross-Petitioners.

THE STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, says that he is one of the cross-petitioners in the above-entitled suit, and that he has heard

read the foregoing reply and that he believes the statements thereof to be true as therein contained and made.

WILLIAM F. REDMOND.

Subscribed in my presence and sworn to before me this 23d day of May, 1889.

[SEAL.]

A. J. McCORMACK,
Notary Public (10), *N. Y. County.*

[Endorsed:] Filed in C. C. Jan. 14, '95, L. E. Clark, Cl'k.

328 Court of Common Pleas, Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

The reply of William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William G. Creamer, George B. Mead, George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of the State of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, and Charles G. Peters, to the answer filed by James Compton to their cross-petition:

Now comes the said cross-petitioners William F. Redmond and others above named, and by way of reply to the answer filed by James Compton to their cross-petition, say:

329 That they were not nor was any of them except Benjamin F. Ham, a party, or otherwise impleaded in the suit brought by David J. Tyson against the said Wabash Railway Company and others described in the said answer of James Compton, nor did the said suit involve the title of or any claim in reference to any of the bonds owned by any of these cross-petitioners.

These cross-petitioners further deny that they have been guilty of any laches or neglect or that their claims, as asserted in their cross-petition, are barred by lapse of time or otherwise. They were never asked, solicited or requested by said James Compton to furnish him any assistance in his said litigation and he has persistently denied them any benefit therefrom, and they now claim none. They do not

know what money, time and labor he has spent in prosecuting his suit and obtaining and maintaining his said decree, and they have no information upon which to found a belief relative thereto, and therefore deny all the averments of his answer in that regard.

They deny that they are now seeking to reap the benefit of his efforts in his said suits or to participate in the results of his said litigation. They aver that they did move this Honorable Court to admit them as parties to said litigation as stated in their cross-petition, but their motion was overruled and they have submitted thereto.

They further aver that they were not parties to said action brought by said Compton and wherein he recovered judgment or decree in the Supreme Court of Ohio as aforesaid, nor are they in any way bound thereby.

They deny that their lien and claim and that of each of them is inferior or subject to the lien and claim of said Compton as determined by his said judgment or decree.

They deny that the parties to the said actions and proceedings recited in their cross-petition or that the holders of the bonds secured by said fifty million mortgage, or any of them, or that the said purchasing committee took any title, rights, interests, claims or demands under said mortgage or under said proceedings or
330 under said purchase without notice of the claim of these cross-petitioners or any of them.

They aver that these cross-petitioners were not nor was any of them party to any of said litigations or controversies, but the same were wholly carried on, determined and are now ended without their having been made parties thereto or to any of them.

They deny that their equity has lapsed and is now barred by reason of said proceedings or otherwise, or that they or any of them are estopped from asserting the same.

These cross-petitioners, further replying, aver that the said proceedings to foreclose the said fifty million mortgage to the Central Trust Company and James Cheney, and the said suits brought by Thomas B. Atkins and others and by Jessup and Knox as trustees, and by the Farmers' Loan and Trust Company, have all been ended and finally closed, and all questions therein determined except such as may exist between said complainants, or some of them, and the said James Compton, and all the property enumerated and described in any of said bills of chancery or involved in any of said suits, has been sold and the title thereto confirmed, and possession thereof delivered, and all said receiverships have been closed, and the said premises and property described in the complaint in this cause, and in the answer and cross-petition of these cross-petitioners, and in the answer of said Compton thereto, is now in the possession of the Wabash Railroad Company, a corporation of Ohio and Indiana, and not in the possession of any Receiver, or in any way under the control of any Court, except this Honorable Court, in the conduct of this action.

These cross-petitioners, further replying, say that they know nothing, and have no information sufficient to form a belief, as to the present state of the controversy between the said Compton, and

others in said suits in said United States Courts. They have never seen the pleadings therein, and do not know, and have no information sufficient to justify a belief, whether the said Compton is
331 or is not within the jurisdiction of the said Federal Courts, and they, therefore, deny all the averments of the answers relating thereto.

Further replying, these cross-petitioners deny each and every averment of the said answer of James Compton in conflict with their answer and cross-petition, and not hereinbefore specifically admitted, denied or answered.

Wherefore they pray as heretofore in their original answer and cross-petition prayed.

GEO. HOADLY,
JOHN C. F. GARDNER,
Attorneys for Plaintiffs.

STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, says that he is one of the cross-petitioners above named, and that he believes the statements of the foregoing reply to be true.

WILLIAM F. REDMOND.

Subscribed in my presence and sworn to before me this 18th day of October, 1889.

A. J. McCORMACK,
[SEAL.] *Notary Public, New York County.*

[Endorsed:] Filed in C. C., Jan. 14, '95; L. E. Clark, Clk.

332 In the Court of Common Pleas.

STATE OF OHIO, *Lucas County:*

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

Reply of William F. Redmond and Others to the Answer of the Wabash Railroad Company.

Now come William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James H. Ham, Henry W. Smith, Charles S. Webb, Jane A. Sullivan, Ella R. Johnson, Charles E. Thorne, James Moir; Gustavus Rollins and

Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Mead; George B. Mead and Walter M. Atkinson, executors, and Eliza Mead, executrix, of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveria and Charles G. Peters, cross-petitioners, who have heretofore filed their cross-petitions in this cause, and, by way of reply to the answer of the Wabash Railroad Company:

Admit that the said Wabash Railroad Company is a consolidated corporation, duly organized under the laws of the States of Ohio, Michigan, Indiana, Illinois and Missouri, and, as such, has come into possession, during the pendency of this suit, and since the
333 filing of their cross-petitions, of the lines of railway formerly belonging to the Wabash, St. Louis and Pacific Railway Company, including the lines of railway in the States of Ohio and Indiana described in the cross-petitions of these cross-petitioners, and as to which relief is prayed by them therein.

Secondly. Further answering, these cross-petitioners, with reference to the averments of the said answer relating to the appointment of Receivers and the taking possession of the premises described in said answer by such Receivers, and the beginning and prosecution of the said suits for the sale of said premises described therein, and the filing of cross-bills thereto, including the filing of cross-bills by the Farmers' Loan and Trust Company, and the orders made in said suits by the said United States Courts, and generally as to the course and manner of proceedings in said suits, and as to the acquisition of prior jurisdiction and control over said property and over the defendants to said suits by said courts, these cross-petitioners have no sufficient knowledge, information or belief to justify them in admitting any of the said averments, and therefore deny the same.

Thirdly. These cross-petitioners further aver that they are not and were not, nor is nor was any one of them a party to any of the said proceedings, suits or actions described in said answer, and they deny that the courts in which said suits were pending or any one of them have acquired or attempted to acquire jurisdiction or control of these cross-petitioners or had the exclusive or any right to determine the rights of these cross-petitioners, or that these cross-petitioners were required to seek relief in said proceedings and in said courts; on the contrary, they aver that said Circuit Courts of the United States, could not, and were forbidden by law to acquire jurisdiction over these cross-petitioners, or the right to control their interest in said property by reason of the fact of the residence of some one or more of these cross-petitioners in each of the States of Michigan,
334 Connecticut, New York and Ohio in which the said complainants in said suits reside.

Fourthly. These cross-petitioners further replying to said answer, aver that no action was taken or had, and no suit commenced or possession of said premises acquired by, had or held by the Farmers'

Loan and Trust Company, or by any of the holders of the bonds secured by the said mortgages made by the Toledo and Illinois Railroad Company and the Lake Erie, Wabash and St. Louis Railroad Company, or either of them, to the Farmers' Loan and Trust Company, described in said answer, until more than twenty-one years after the causes of action had severally accrued in favor of said Farmers' Loan and Trust Company and said bondholders for the collection of said bonds, and the enforcement and foreclosure of said mortgages, and each of them, and more than twenty-one years after the accruing of the rights of these cross-petitioners as described in their original cross-petition. Wherefore these cross-petitioners say that by lapse of time, laches and the statutes of limitations, the said the Wabash Railroad Company has lost all right to assert any lien or incumbrance upon said premises growing out of or founded on the said mortgages made by the said Toledo and Illinois Railroad Company and the said Lake Erie, Wabash and St. Louis Railroad Company, or either of them.

Fifthly. By way of reply to that part of the said answer which adopts the allegations of the answer and supplemental answer of the purchasing committee and the answer of James F. Joy and adopts the allegations of its answer heretofore made to the petition of the plaintiff as part of its answer to said cross-petition, these cross-petitioners adopt as part of this reply all the allegations of their replies heretofore filed to the answer and supplemental answer of the purchasing committee and the answer of James F. Joy, as fully and completely as if the same were herein repeated and set forth at large, and pray that the same and every allegation thereof
335 may be treated as a reply by them to the answer of the said railroad company.

Sixthly. Further replying these cross-petitioners deny that the said mortgages of the said Toledo and Illinois Railroad Company and the Lake Erie, Wabash and St. Louis Railroad Company and the Wabash and Western Railway Company, to the Farmers' Loan and Trust Company, and to Edward D. Morgan, described in the said answer are in existence as valid and outstanding incumbrances on the said premises. They aver that the same have been fully paid and discharged, canceled and satisfied, and that they are no longer any lien upon the said premises or any part thereof.

And, having fully replied, they pray as in their respective cross-petitions they have heretofore prayed.

GEO. HOADLY,
JOHN C. F. GARDNER,
Attorney- for Cross-Petitioners.

STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, says that he is one of the cross-petitioners named in the foregoing reply; that he has read the said reply and is acquainted with its contents; that he believes the statements thereof to be true.

WILLIAM F. REDMOND.

Subscribed in my presence and sworn to before me this 4th day of January, 1890.

[SEAL.]

A. J. McCORMACK,
Notary Public, N. Y. County.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Cl'k.

336 Court of Common Pleas of Lucas County, Ohio.

THE ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE WABASH, ST. LOUIS AND PACIFIC RAILROAD COMPANY ET AL.,
Defendants.

Reply of Plaintiff to the Answer of the Wabash Railroad Company.

Now comes the plaintiff, and for reply to the answer of the Wabash Railroad Company herein filed on the — day of December, 1889, says:

It admits that the said Wabash Railroad Company is a consolidated corporation, duly organized under the laws of the States of Ohio, Michigan, Indiana, Illinois and Missouri, and as such it has come into possession during the pendency of this suit of the lines of railroad formerly belonging to the Wabash, St. Louis and Pacific Railway Company, including the line of railway in the States of Ohio and Indiana described in the cross-petitions of William F. Redmond and others herein filed, and as to which relief is prayed by them therein.

Second. In further answer the plaintiff says, with reference to the averments of the said answer relating to the appointment of Receivers and the taking possession of the premises described in said answer by such Receivers, and the beginning and prosecution of the said suits for the sale of said premises described therein, and the filing of cross-bills thereto, including the filing of cross-bills by the Farmers' Loan and Trust Company and the orders made in said suits by the said United States Court, and generally as to
337 the course and manner of proceedings in said suits and as to the acquisition of prior jurisdiction and control over said property and over the defendants to said suits by said courts; that the plaintiff has no sufficient knowledge, information or belief to justify it in admitting any of the said averments, and therefore it denies the same.

Third. The plaintiff further avers that it is not and was not a party to any of the said proceedings, suits or actions described in said answer, and it denies that the courts in which said suit or suits were pending, or any of them, have acquired or attempted to acquire jurisdiction or control over plaintiff or had the exclusive or any right whatever to determine the rights of plaintiff, or that plaintiff was required to seek relief in said proceedings and in said courts,

and on the contrary plaintiff avers that said Circuit Courts of the United States did not acquire jurisdiction over plaintiff or the right to control its interests in said property by reason of the fact of the residence of plaintiff or by reason of any fact in said answer alleged.

Fourth. The plaintiff further replying to said answer avers that no action was taken or had, and no suit commenced, or possession of said premises acquired by, had or held by the Farmers' Loan and Trust Company, or by any of the holders of the bonds secured by the said mortgages made by the Toledo and Illinois Railroad Company, and by the Lake Erie, Wabash and St. Louis Railroad Company, or either of them, to the Farmers' Loan and Trust Company described in the said answer until more than twenty-one years after the causes of action had severally accrued in favor of the said Loan and Trust Company, and said bond holders for the collection of said bonds, and the enforcement and foreclosure of said mortgages, and each of them, and more than twenty-one years after the accruing of rights of plaintiff as described in its original and amended petitions.

Wherefore plaintiff says that by a lapse of time, laches,
338 and the statute of limitations, the said Wabash Railroad Company has lost all right to assert any lien or encumbrance upon said premises, growing out of, or founded on the said mortgages made by the said Toledo and Illinois Railroad Company and the said Lake Erie, Wabash and St. Louis Railroad Company, or either of them.

Fifth. By way of reply to that part of the said answer which adopts the allegations of the answer and supplemental answer of the purchasing committee, and the answer of James F. Joy, and adopts the allegations of its answer heretofore made to the petition of plaintiff as part of its answer to plaintiff's petition, the plaintiff adopts as part of this reply all the allegations of this reply heretofore filed to the answer and supplemental answer of the purchasing committee, and the answer of James F. Joy, as fully and completely as if the same were herein repeated and set forth at large, and prays that the same and every allegation thereof may be treated as a reply by it to the answer of the said railroad company.

Sixth. Further replying, the plaintiff denies that the said mortgages of the said Toledo and Illinois Railroad Company and the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company, described in the answer, are in existence as valid and outstanding encumbrances on the said premises. It avers that the same has been fully paid and discharged, canceled and satisfied, and that they are no longer any lien upon the said premises, or any part thereof.

Where*upon* plaintiff prays as in its petition it has heretofore prayed.

LEE & BROWN,
Attorneys for Plaintiff.

339 STATE OF OHIO, *Lucas County, ss:*

John C. Lee, being duly sworn, says that he believes the facts alleged in the foregoing reply are true, and that he makes this verification because the plaintiff is a corporation under the laws of Ohio, and affiant is one of its attorneys in this action.

JOHN C. LEE,

Sworn to before me and subscribed in my presence this — day of January A. D. 1890.

RATHBORN FULLER,
[SEAL.] *Notary Public, Lucas County, Ohio.*

[Endorsed:] Filed in C. C., Jan. 14/95. L. E. Clark, Clk.

Court of Common Pleas, Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY ET AL.,
Defendants.

The further and additional reply of the plaintiff and of the cross-petitioners William F. Redmond, John B. Manning, David
340 Kohn, William M. Kohn and Edward Pepper, partners under the firm name of Kohn, Pepper & Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Brothers; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, W. P. Rowe and E. E. Stevens, executors of Jane A. Sullivan; Ella R. Johnson, Charles P. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Company; Eugene E. Bishop, Frederick Hubbard, William G. Craemer, George B. Mead and Walter A. Aikinson, executors, and Eliza Mead, executrix, of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of the State of New York; Josephine L. Cadmus, Sheldon Wing and William H. Sheldon, executors of Preston Wing; Mary A. Oliviera, Charles G. Peters and Henry F. James, and each of them, to the answer of the Wabash Railway Company; the answer and amended answer of the Wabash, St. Louis and Pacific Railway Company; the answers of James Compton, James F. Joy, The Farmers' Loan and Trust Company, and the answer and supplemental answer of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Wells, purchasing committee, and by way of such reply said plaintiff and said cross-petitioners state:

That in June, 1856, the Toledo and Illinois Railroad Company, and the Lake Erie, Western and St. Louis Railroad Company, were

duly consolidated in pursuance of law, and that the consolidated company formed by their said union, known as the Toledo, Wabash and Western Railroad Company, became insolvent, and all its railway property was sold under judgments rendered in both Ohio and Indiana to purchasers who, among other things, organized the Toledo and Wabash Railroad Company, on the 1st day of July, 1858, as a corporation of Ohio, for the purpose of constructing, owning and maintaining so much of the railroad of said Toledo, Wabash and Western Railroad Company as was situated within the State of Ohio.

341 That on the 15th day of July, 1858, the Wabash and Western Railway Company was incorporated under the laws of the State of Indiana, for the purpose of owning and maintaining so much of the railroad of the Toledo, Wabash and Western Railroad Company, so sold, as was situated within the State of Indiana, and that all said railway property was duly conveyed to the purchaser at the said sale, and by him conveyed as follows: that portion thereof situate in Ohio to the Toledo and Wabash Railroad Company, and that lying in Indiana to the Wabash and Western Railroad Company.

That the Toledo and Wabash Railroad Company continued to exist until the 5th day of November, 1858, on which day it was duly consolidated with the Wabash and Western Railroad Company under the name of the Toledo and Wabash Railway Company.

That the Toledo and Wabash Railway Company had no existence prior to the said 5th day of November, 1858.

That by the force of the foregoing facts the said mortgage in the said pleadings described, made by the said Toledo and Illinois Railroad Company, while remaining a lien upon all the railway and other property upon which it was charged prior to and at the date of the said consolidation of said company, and the said foreclosure and sale of its property, and the said mortgage in the pleadings described, made by the Toledo and Wabash Railroad Company while continuing to be after November 5th, 1858, as far as the same were then, but no further, a lien on the said railway and railway property of the said company, but said mortgage did not constitute a lien on any other property thereafter acquired by either of said companies. The mortgage of the Toledo and Illinois Railroad Company remained a lien upon the property which said company owned at the date of its consolidation with the Lake Erie, Western and St. Louis Railroad Company in June, 1856, and the mortgage of the Toledo and Western Railroad Company on the property by it owned at the date of its con-

342 solidation with the Wabash and Western Railway Company on the 5th day of November, 1858, but neither of said mortgages extended to after acquired property of which the title was acquired by said companies after the said dates respectively.

That the Toledo and Wabash Railway Company created by the last-mentioned consolidation continued to exist until it in turn was consolidated on the 29th day of May, 1865, with the Great

Western Railroad Company of 1859, the Quincy and Toledo Railroad Company and the Illinois and Southern Ohio Railroad Company by articles of consolidation duly executed, filed and recorded on the day last mentioned, whereby was formed the Toledo, Wabash and Western Railway Company.

That during the period of the existence of the Toledo and Wabash Railway Company, being the same company which executed and delivered the equipment bonds, described in the pleadings in this case owned by the plaintiff and the said cross-petitioners and James Compton, said company acquired and owned, free from any mortgage or lien thereon, a large amount of valuable property in or near the City of Toledo, in the State of Ohio, upon all of which, by force and effect of the articles of consolidation last mentioned, made in 1865, and of the law relating thereto, the holders of the said equipment bonds acquired and hold a lien prior, superior and preferable to that of any other lien whatsoever, held by any other party in this cause.

The description of the said property thus acquired and upon which this plaintiff and these cross-petitioners hold said first lien, will be fully stated and given to the Court when, where and as the same may be required by it.

For which reasons the plaintiff and cross-petitioners above described, without withdrawing any part of the amended petition or cross-petition, or of their former reply, but still insisting thereon, demand judgment for the same relief prayed in their amended petition and cross-petitions, and for such other and further re-
343 lief as in equity and good conscience they may upon final hearing of this cause prove entitled to.

JAMES M. BROWN,
Attorney for Plaintiff.
GEO. HOADLY,
R. R. KINKADE,
JOHN F. C. GARDNER,
Attorneys for Cross-Petitioners.

STATE OF NEW YORK, *City and County of New York, ss:*

Wiliam F. Redmond, being duly sworn, says that he is one of the cross-petitioners above named, and that the statements of the foregoing further and additional reply are true, as he verily believes.

WILLIAM F. REDMOND.

Subscribed in my presence and sworn to before me this 4th day of January, 1894.

A. J. McCORMACK,
Notary Public, N. Y. County

[Endorsed:] Filed in C. C. Jan. 14, '95. L. E. Clark, Clk.

344 STATE OF OHIO, *Lucas County:*

Circuit Court.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Plaintiff,
against
THE TOLEDO AND WABASH RAILWAY COMPANY and Others,
Defendants.

Now comes the plaintiff and all the cross-petitioners, and, uniting, reply to the amendment of the answer of the Wabash Railroad Company, and by way of such reply say that, while they do not deny that the Wabash Railroad Company is the owner and holder of the legal title to the line of railway described in the petition formerly belonging to the Toledo and Wabash Railway Company in the State of Ohio, subject, however, to liens thereon, they do deny that either the said Wabash Railway Company or the Purchasing Committee, described in said amendment to the answer, ever acquired or now hold the said property, except subject to the first and prior lien of the equipment bonds held by the plaintiff and the cross-petitioners and others described in the pleadings in this cause; they aver that said equipment bonds are the first lien upon said property, but, if in the opinion of the Court there are other liens upon said property in the State of Ohio, they amount only at par to the sum of nine hundred thousand dollars, secured by mortgage to the Farmers' Loan and Trust Company, and of one million dollars, secured by mortgage to Edwin D. Morgan, upon which all interest which has accrued to the present date has been paid.

345 Further replying, the petitioner and cross-petitioners allege that this Court has no jurisdiction or authority over any part of said railroad, except in the State of Ohio.

Further replying, this petitioner and these cross-petitioners state that if it be true (which they deny) and this Court shall decree that said Toledo and Wabash Railway Company was the owner of a railroad in the State of Indiana, mortgaged to others than this petitioner and these cross-petitioners, and which mortgages have become as alleged in the said answer (but which they deny), the property of the Wabash Railroad Company, then this petitioner and these cross-petitioners pray that the said Wabash Railroad Company may be compelled to exhaust all of said property, except that which is within the State of Ohio, before resorting to the last-named estate, upon which alone your petitioner and these cross-petitioners hold their lien.

Further replying, this petitioner and these cross-petitioners, while they deny that there are or ever were any liens superior to that of the said equipment bonds upon said property in the State of Ohio, except the said mortgages hereinbefore described to the Farmers' Loan and Trust Company and Edwin D. Morgan, they also aver that said mortgages are not and never were liens upon the terminal

properties in the City of Toledo, acquired and held by the Toledo and Wabash Railway Company.

That said terminal properties so acquired by the Toledo and Wabash Railway Company were not and never were mortgaged, or in any way encumbered by the Toledo and Wabash Railway Company other than by the equipment bonds described in the petition and cross-petition herein.

And having fully answered, they pray, as in their original amended and supplemental petitions and cross-petitions.

GEO. HOADLY,
JOHN C. F. GARDNER,
JAMES M. BROWN,
R. R. KINKADE,
Attorneys for Petitioner and Cross-Petitioners.

346 STATE OF NEW YORK, *City and County of New York, ss:*

William F. Redmond, being duly sworn, deposes and says that he is one of the cross-petitioners hereinbefore named, and that he believes the statements of the foregoing reply to be true.

WILLIAM F. REDMOND.

Subscribed in my presence and sworn to before me this 9th day of March, 1896.

A. J. McCORMACK,
Notary Public, N. Y. County.

[Endorsed:] Lucas Co. Circuit Court, Filed Apr. 7, 1893. L. E. Clark, Clerk.

346½ 5100.

In the Supreme Court of the State of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL., Defendants in Error.

RECORD.—VOL. II.—Bill of Exceptions.

Henry Crawford, Rush Taggart, Attorneys for Plaintiff in Error.
George Hoadley, James M. Brown, R. R. Kinkade, John C. F. Gardner, John H. Doyle, John G. Milburn, Attorneys for Defendants in Error.

Filed Aug. 8, 1896, in Supreme Court of Ohio.

J. B. ALLEN, *Clerk.*

347 *Bill of Exceptions.*

In the Circuit Court of Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
against
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, THE WABASH RAILROAD COMPANY, JAMES F. JOY, Trustee; SOLON HUMPHRIES and DANIEL A. LINDLEY, Trustees; JAMES CHENEY, Trustee; OSSIAN D. ASHLEY, EDGAR T. WELLES, THOMAS H. HUBBARD, THE FARMERS' LOAN & TRUST COMPANY, JAMES COMPTON and the following-named cross-petitioners, viz.: WILLIAM F. REDMOND, JOHN B. MANNING, DAVID KOHN, WILLIAM H. KOHN and EDWARD POPPER, partners under the firm name of Kohn, Popper & Company; JAMES M. HAM and BENJAMIN F. HAM, Partners under the Firm Name of Ham Bros.; ISRAEL M. SIMON, EDWARD H. LITCHFIELD, IRVING D. FERREY, JOHN S. A. WITTKE, JAMES M. HAM, HENRY W. SMITH, CHARLES S. WEBB, DR. W. P. ROWE and T. E. STEVENS, Executors of James A. Sullivan, deceased; SHELDON WING and WILLIAM H. SHELDON, Executors of Preston
348 Wing, deceased; ELLA R. JOHNSON, CHARLES E. THORN, JAMES MOIR, GUSTAVUS ROLLINS and EDWARD A. ROLLINS, Partners under the Firm Name of Rollins & Co.; EUGENE E. BISHOP, FREDERICK HUBBARD, WILLIAM C. CREAMER, GEORGE B. MEADE; GEORGE B. MEADE and WALTER AIKMAN, Executors, and ELIZA MEADE, Executrix, of H. R. Meade, Deceased; JOHN W. ALLING, E. KELLOGG BEACH, CLARENCE MORFIT, JAMES WALKER, VASSAR BROTHERS HOSPITAL, a Corporation of New York; JOSEPHINE L. CADMUS, PRESTON WING, MARY L. OLIVEIRA, CHARLES G. PETERS, HENRY F. JAMES, LEWIS G. HAMPTON, WILSON H. PIERCE, AMBROSE D. HENRY, HOWARD H. HENRY and FRANK L. HENRY, Executors of Maria C. Henry, Deceased.

Bill of Exceptions of the Wabash Railroad Company.

Be it remembered that upon the trial of this cause in the Circuit Court of Lucas County, at the January Term, 1896, before Honorables George H. Haynes, Charles H. Scribner and E. B. King, the following proceedings were had: The plaintiff and cross-petitioners, to maintain the issues on their part, offered in evidence the agreed statement of Facts, together with all the exhibits referred to and named therein, all of which are hereto attached and made a part of this bill of exceptions, the said Agreed Statement of Facts being identified by being marked "Exhibit A to the Bill of Exceptions," and all the said exhibits being identified by attachment to said
349 Agreed Statement of Facts. The said complainant and the said cross-petitioners also offered in evidence certain tran-

scripts of certain proceedings had in the Probate Court of Lucas County, Ohio, and certain contracts and marked "Plaintiff's and Cross-petitioners' Exhibits to the Bill of Exceptions 'B,' 'C,' 'D' and 'E,'" and made part of this Bill of Exceptions. Thereupon the defendants called as a witness upon the trial of said cause D. B. Howard, who, being sworn, testified as follows:

That he lives in St. Louis; that he was the Auditor of the Wabash Railroad Company; that prior to being auditor of the Wabash Railroad Company, he had been Auditor for the Receivers of the property owned by the Wabash Railroad Company, that as such he had kept books for the Receivers and knew the amount of Receivers' debts which the Purchasing Committee, composed of O. D. Ashley, Edgar T. Welles, Thomas H. Hubbard and James F. Joy, had paid in the form of Receivers' Certificates and otherwise, under the orders of the United States Court appointing the receivers Humphries and Tutt; that he had a statement of such Receivers' Certificates paid and that there were payments made to the amount of $250,000 by deposit in the National Bank of Commerce, in New York, and $750,000 were paid upon a bond ordered by the court; that $288,211.36 was paid by E. T. Allen, Master, on behalf of the Purchasing Committee. Upon cross-examination said witness testified that these payments were ordered by the Court at St. Louis, and that the Receivers' Certificates were issued before Judge Cooley's receivership, and in the case of The Wabash, St. Louis & Pacific Railway Co. *vs.* The Central Trust Co. *et al.;* that the following is the form of certificate, and the same formed the Receiver's Certificate on which said certificates were issued, the same being attached hereto, marked "Wabash Railroad Company's Exhibit to Bill of Exceptions No. 1," the same being made part of this Bill of Exceptions; that the witness further
350 testified that he had prepared a statement showing the amount of these payments, which statement was introduced as a part of his evidence, and is marked "Wabash Railroad Company's Exhibit No. 2 attached to the Bill of Exceptions," the same being made part of this Bill of Exceptions."

There being no further or additional testimony offered by either of the parties to said cause, and the foregoing being all of the testimony offered by either party upon the trial thereof, the court thereupon having heard arguments of counsel and considered the case, and having rendered a decision herein in favor of the plaintiff and cross-petitioners and against the defendant The Wabash Railroad Company, and The Wabash Railroad Company having, within three days after the rendition of said decision, filed its motion herein for a new trial, and the court, upon consideration thereof, having overruled the said motion for a new trial, the Wabash Railroad Company, in open court, and upon the overruling of said motion for a new trial, brings this its Bill of Exceptions herein, and having tendered the same, and the same having been duly allowed by the court, the court does order that the same be signed, sealed and ordered to be made

a part of the record in this cause, which is accordingly done this 15th day of April, 1896.

GEO. R. HAYNES,
C. H. SCRIBNER,
E. B. KING,
Judges of the Circuit Court for Sixth Circuit, Ohio.

[Endorsed:] Lucas Co. Circuit Court. Filed Apr. 15, 1896. L. E. Clark, Clerk.

EXHIBIT A TO THE BILL OF EXCEPTIONS.

[Endorsed:] Filed in C. C. Jan. 14, '95, L. E. Clark, Clk.

351 THE STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN UNIVERSITY, Plaintiff,
vs.
THE TOLEDO, WABASH & WESTERN RAILROAD COMPANY and Others, Defendants.

Agreed Statement of Facts.

For the purpose of facilitating the trial of the above-entitled case, it is hereby agreed between the undersigned parties thereto, by their attorneys, that the following is a correct statement of facts, and that the same may be used as testimony upon the trial of the cause so far as competent and relevant. No valid exception on the ground of competency or relevancy is waived.

The deeds, agreements, papers and proceedings hereinafter referred to are stated in outline and by reference only, and it is agreed that they may be read in full either from the Exhibits printed herewith, or from originals or certified copies, or from the pages of the two printed volumes of the Record of what is known as the Wabash foreclosure case lately pending in the United States Circuit Courts for the Southern District of Illinois, the District of Indiana and the Northern District of Ohio, Western Division, wherein James R. Jesup and Edward H. Dixon were complainants and the Wabash, St. Louis and Pacific Railroad Company, and others were defendants, and hereinafter referred to as "Wabash Record."

352 (1.) The Toledo & Illinois Railroad Company was organized on or about the 20th day of April, 1853, as a corporation of the State of Ohio, for the purpose of constructing, owning and maintaining a railroad from the city of Toledo, State of Ohio, towards the town of Fort Wayne, as shown by articles of association, Exhibit No. 1, printed in Wabash Record, Vol. 2, beginning at page 1.

(2.) The said Toledo & Illinois Railroad Company executed a mortgage on the 8th day of September, 1853, to the Farmers' Loan

and Trust Company, to secure an issue of $900,000 of bonds, a copy of which is set forth in Exhibit No. 2 in said foreclosure record, and issued and sold under this mortgage the whole number of bonds provided for therein (Wabash Record, Vol. 2, page 4). This mortgage is recorded in Lucas County, Ohio, Vol. 8; and also is recorded in all other counties along the line of the railroad.

(3.) On the 24th day of June, 1852, the Lake Erie, Wabash & St. Louis Railroad Company was organized as a corporation of the State of Indiana, for the purpose of building a railroad across the State of Indiana from the east line of Allen or Dekalb County, through the Counties of Dekalb, Allen, Whitley, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain, Warren and Vermilion, and terminating on the west line of said State as shown by Exhibit 3 (2 Wabash Record, page 11).

(4.) On the first day of August, 1853, the Lake Erie, Wasbash & St. Louis Railroad Company executed and delivered its mortgage to the Farmers' Loan and Trust Company of the City of New York, to secure the payment of twenty-five hundred thousand dollars of bonds. A copy of the mortgage is set forth in Exhibit 4 (2 Wabash Record, page 13). This mortgage was duly recorded in the various counties in the State of Indiana along the line of the road, and all the bonds provided for in said mortgage were issued and sold.

353 (5.) On June —, 1856, the Toledo & Illinois and The Lake Erie, Wabash & St. Louis Railroad Companies entered into the agreement of consolidation, a copy of which is set forth in Exhibit 5 (Wabash Record, page 20).

(6.) The Consolidated Company thus formed, known as The Toledo, Wabash & Western Railroad Company, became insolvent and foreclosure sales were had in both Ohio and Indiana under a second mortgage given by said Consolidated Company covering its entire line of railway. These sales were made in suits in Chancery brought in the Circuit Court of the United States for the Northern District of Ohio by the Farmers' Loan and Trust Company, Joseph B. Varnum and Russell Sage, complainants, *vs.* The Toledo & Illinois Railroad Company, The Toledo, Wabash & Western Railroad Company, The Lake Erie, Wabash & St. Louis Railroad Company and John N. Drummond, defendants, and in the Circuit Court of the United States for the District of Indiana by the same complainants against the same defendants.

Under said decrees the said property was duly sold and legally conveyed to Azariah Boody, subject to the mortgages hereinbefore described in the second and third paragraphs of this agreed statement of facts. For copy of deeds to Boody, which sufficiently recite purport of mortgages and contents of decrees, see Exhibit 6 to Wabash Record, page 26, and Exhibit 7 to Wabash Record, page 49.

(7.) On the first day of July, 1858, The Toledo & Wabash Railroad Company was formed under the laws of the State of Ohio, for the purpose of constructing, owning and maintaining a railroad from the city of Toledo to the State line between Ohio and Indiana; copy of articles is Exhibit 8 (2 Wabash Record, page 76).

(8.) On the 15th day of July, 1858, the Wabash & Western Railway Company was incorporated under the laws of the State
354 of Indiana, as shown by copy of articles of association, Exhibit 9 (2 Wabash Record, page 84).

(9.) On the 8th day of October, 1858, Azariah Boody conveyed to said Toledo & Wabash Railroad Company, the property formerly belonging to the Toledo & Illinois Railroad Company in the State of Ohio, as shown by deed, copy of which is Exhibit 8 A (2 Wabash Record, page 79).

(10.) On the 5th day of October, 1858, Azariah Boody and wife conveyed to the Wabash & Western Railway Company all the property in the State of Indiana formerly belonging to the Lake Erie, Wabash & St. Louis Railroad Company, as shown by copy of deed, Exhibit 9 (2 Wabash Record, page 87).

(11.) On the 9th day of October, 1858, The Toledo, Wabash & Western Railroad Company quit claimed to The Toledo & Wabash Railroad Company all its railroad and railroad property in Ohio as described in the decree of the United States Circuit Court for the Northern District of Ohio, at the suit of the Farmers' Loan and Trust Company and others against the said Toledo, Wabash & Western Railroad Company rendered at the July Term of 1858 of the said Court (see Exhibit 8 B, 2 Wabash Record, p. 81).

(12.) On the 5th day of October, 1858, the Toledo, Wabash & Western Railroad Company of Indiana, quitclaimed to the Wabash & Western Railway Company of Indiana, the railroad and railroad property in Indiana specified in the decree of the United States Circuit Court for the District of Indiana, rendered in the suit of the Farmers' Loan and Trust Company and others against the said Toledo, Wabash & Western Railroad Company at the May Term of 1858 of said Court (see Deed Exhibit 9 B, 2 Wabash Record, p. 89).

(12*a*.) On the 12th day of October, 1858, the Toledo & Wabash Railroad Company duly executed and delivered its deed to
355 Edwin D. Morgan to secure a bond in the sum of nine hundred thousand dollars, as shown by a copy of the mortgage, Exhibit A, herewith filed. This mortgage was duly recorded in all the counties along the line of the said railroad.

(12*b*.) On the 12th day of October, 1858, the Wabash & Western Railway Company duly executed and delivered its mortgage to Edwin D. Morgan to secure a bond to the amount of $2,500,000, as shown by a copy of the mortgage, Exhibit B, herewith filed. This mortgage was duly recorded in all the counties along the line of the said railroad.

(13.) On the 15th day of October, 1858, the Toledo & Wabash Railroad Company executed and delivered its mortgage to Edwin D. Morgan, to secure bonds to the amount of $1,000,000, as shown by copy of the mortgage, Exhibit 10 (2 Wabash Record, p. 92). This mortgage was duly recorded in all the counties along the line of the railroad.

(14.) On the 15th day of October, 1858, the said Wabash & Western Railway Company duly executed and delivered its mortgage to Edwin D. Morgan, of the City and State of New York, trustee, to

secure its bonds, amounting in all to $1,500,000 *dollars*, as shown by copy of mortgage, Exhibit 12 (2 Wabash Record, p. 101). This mortgage was duly recorded in all the counties along the line of the railroad.

(15.) All the bonds secured by the mortgage described in paragraphs 13 and 14 hereof were issued and sold to divers purchasers thereof. On the 14th day of February, 1883, Edwin D. Morgan, named as trustee in both said mortgages, departed this life. On the 3d day of April, 1888, by proceedings in the Court of Common Pleas of Lucas County, Ohio, James F. Joy was appointed successor of said Edwin D. Morgan in the trust created by the mortgage of the Toledo and Wabash Railroad Company, described in
356 paragraph 13 hereof. For copy of such appointment see Exhibit 12 (2 Wabash Record, p. 99). By like proceedings in the Circuit Court of Tippecanoe, Indiana, on the 9th day of May, 1888, said James F. Joy was appointed successor of Edwin D. Morgan in the trusts created by the mortgage given by the Wabash & Western Railway Company, described in paragraph 14 hereof. See copy of such proceedings, Exhibit 13 (2 Wabash Record, 108).

(16.) On the 3d day of November, 1858, the Toledo and Wabash Railroad Company and the Wabash & Western Railway Company, aforesaid, were consolidated by the execution of an agreement of consolidation wherein the Consolidated Company was designated and named as the Toledo & Wabash Railway Company. For said agreement of consolidation see copy Exhibit 14 (2 Wabash Record, page 110).

(17.) On the first day of November, 1862, the Toledo & Wabash Railway Company issued and sold equipment bonds to the total amount of $600,000, of different denominations, but all in the form, except as to amount, shown by copy attached hereto and marked "Exhibit C" hereof, and that all coupons thereon have been paid until and including November 1, 1874, but none maturing at later dates.

(18.) On the 8th, 11th, 16th and 29th days of May, 1865, the Toledo & Wabash Railway Company, the Great Western Railroad Company, of 1859, the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company entered into articles of consolidation, and thereby formed the Toledo, Wabash & Western Railway Company; for copy of said articles of consolidation see Exhibit 14 (2 Wabash Record, page 178), also see copy hereto attached, marked "Exhibit D."

(19.) On the first day of February, 1867, the Toledo, Wabash & Western Railway Company executed its mortgage to Isaac
357 H. Knox and James R. Jesup, Trustees, to secure an intended issue of bonds to the amount of $15,000,000, as shown by copy of said mortgage, Exhibit 15 (2 Wabash Record, page 193); which mortgage was duly recorded in all the counties through which the line of railroad of said company passed. On or about the — day of ——, 1888, said Isaac H. Knox died and Edward H. Dixon was thereupon appointed his successor in said trust, and James R. Jesup died on or about the — day of ——, 1889, and said Dixon died July

23, 1891, and no successor of said Jesup or said Dixon has been appointed.

(20.) On the first day of February, 1873, the Toledo, Wabash & Western Railway Company executed its mortgage to the New York Guaranty & Indemnity Company, Trustee, to secure the payment of an intended issue of bonds to the amount of $5,000,000, payable in gold, with interest, likewise payable in gold. See description of said mortgage contained in Exhibit 28 (2 Wabash Record, beginning at page 266). Said mortgage was duly recorded in all the counties through which the line of railroad of said company passed. The New York Guaranty and Indemnity Company afterwards resigned said trust and Valentine H. Ketcham was duly appointed trustee in his place and stead.

(21.) In actions brought in the Court of Common Pleas of Lucas County, Ohio, and in the Circuit Court of Cass County, Indiana, and in the Circuit Court of Vermilye County, Illinois, wherein and in each of which the Metropolitan National Bank of the City of New York, the Nassau Bank of the City of Brooklyn, the Union National Bank of the City of New York, John S. Kennedy, Charles Perkins, Edward Livingston and Henry A. V. Post, who were partners by the name of Perkins, Livingston, Post & Company, and James F. D. Lanier were plaintiffs, and the Toledo, Wabash & Western Railway Company, the Farmers' Loan and Trust Company, Trustee, Edward D. Morgan, Trustee, George Griswold, Alex-
358 ander M. White and Henry H. Warden, Trustees, Solon Humphreys and James R. Jesup, Trustees, John N. A. Griswold, James R. Jesup, and Lucien Tilton, Trustees, Isaac H. Knox, Trustee, Abraham D. Bayliss, Trustee, John T. Terry, Trustee, and Valentine H. Ketcham, Trustee, were defendants, for the foreclosure of said mortgage described in paragraph 20 hereof, all the railroad and railroad property of the Toledo, Wabash & Western Railway Company was sold upon default in the payment of the bonds secured by said last named mortgage, subject to all prior mortgages upon the line of said railway, and was duly conveyed to the purchasers who formed in the States of Ohio, Indiana and Illinois, respectively, corporations known respectively as the Wabash Railway Company of Ohio, the Wabash Railway Company of Indiana, and the Wabash Railway Company of Illinois. For the decrees of sale in said causes see Exhibit 28, page 256, Exhibit 29, page 277, and Exhibit 30, page 282 (2 Wabash Record), and for certificates of incorporation of the several railway companies so incorporated see 2 Wabash Record, Exhibit 31, page 287, Exhibit 32, page 288, and Exhibit 33, page 290.

(22.) Thereafter the Wabash Railway Company of Ohio, the Wabash Railway Company of Indiana, and the Wabash Railway Company of Illinois aforesaid, entered into articles of consolidation and became and were organized as a consolidated railway company of the States of Ohio, Indiana and Illinois, under the name of The Wabash Railway Company. For articles of consolidation see Exhibit 34, page 294 (2 Wabash Record).

(23.) On the 26th of December, 1876, Jacob D. Cox, Special Master Commissioner, under the authority of the decree aforesaid, con-

veyed all the railway and railway property aforesaid, described in said decrees, rendered in the Courts of Common Pleas of Lucas County, Ohio, and the Circuit Court of Cass County, Indiana,
359 and Vermilye County, Indiana, to John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, who were the purchasers at the said foreclosure sales. For deed of conveyance see Exhibit 35, page 299 (2 Wabash Record).

(24.) On the 12th day of January, 1877, the said John W. Ellis, Alexander M. White, John T. Morton, George I. Seney and Henry A. V. Post conveyed the same railway and railway property hereinbefore described to the Wabash Railway Company. For this deed of conveyance, see copy Exhibit 36, page 313 (2 Wabash Record).

(25.) On the 24th of January, 1877, the Wabash Railway Company prepared and formulated a plan for funding interest coupons unpaid since 1875, upon the various mortgages upon its lines of railway. For a copy of circular relating thereto, under which certificates of deposit of coupons and funded debt bonds were issued, see Exhibit 16 (2 Wabash Record, page 492), in which by typographical error the date is stated as January 24, 1887. See also copy of certificates of deposit of coupons issued under said plan, Exhibit 54 (2 Wabash Record, page 502). See also copy of funded debt bond issued in accordance with this plan, Exhibit 38 (2 Wabash Record, page 321).

(26.) On May 17th, 1879, the said Wabash Railway Company duly executed and delivered its deed and mortgage to Solon Humphreys and Daniel A. Lindley, Trustees, to secure an intended issue of bonds to the amount of $2,000,000, which mortgage was duly recorded in all the counties along the line of said railroad. For copy of said mortgage see Exhibit 41 (2 Wabash Record, page 341). All of the said bonds secured by said mortgage were issued and sold as therein provided. In printing said mortgage at page 341 of 2 Wabash Record, by a typographical error, the date is given as May 17th, 1888, instead of May 17, 1879.

360 (27.) On August 14th, 1879, the said Wabash Railway Company and the St. Louis, Kansas City and Northern Railway Company, a corporation of Missouri, entered into an agreement of consolidation whereby was created in accordance with law the Wabash, St. Louis and Pacific Railway Company, a consolidated corporation of the States of Ohio, Indiana, Illinois and Missouri. For articles of consolidation see 2 Wabash Record, page 357.

(28.) On June 1st, 1880, the said Wabash, St. Louis and Pacific Railway Company executed its general mortgage to the Central Trust Company of New York and James Cheney of Indiana, trustees, to secure an intended issue of $50,000,000 of general mortgage bonds, as shown by copy of said mortgage, Exhibit 43 Wabash Record, page 367.

(29.) On or about the 27th day of May, 1884, the said Wabash, St. Louis and Pacific Railway Company, complainant, having filed its bill in equity in the Circuit Courts of the United States for the Eastern District of Missouri, for the Southern District of Illinois, for the District of Indiana, for the Northern District of Ohio, Western

Division, for the Eastern District of Michigan, and for the Southern District of Iowa, Eastern Division, against the Central Trust Company of New York, James Cheney and the Mercantile Trust Company of New York, and others, alleging its insolvency and asking for the appointment of Receivers to take possession of its property for the benefit — its creditors; and thereupon the said several Courts, each acting upon bills severally filed therein, as aforesaid, on the 27th day of May, 1884, appointed Solon Humphreys and Thomas E. Tutt Receivers of said property, who thereupon qualified and took possession, under the orders of said Courts, of all the property of the Wabash, St. Louis and Pacific Railway Company in said States. For copy of order of appointment and qualification of Receivers in the Eastern District of Missouri, see Exhibit 46 (2 Wabash
361 Record, 463). Neither the plaintiff, nor any of the cross petitioners, nor James Compton, was a party to said cause.

(30.) In the months of January and February, 1885, the Central Trust Company and James Cheney, trustees, under the general mortgage described in paragraph 27 hereof, instituted suits for the foreclosure of said mortgage in the State Courts of the several States of Ohio, Indiana, Illinois, Missouri, Michigan and Iowa, against the Wabash, St. Louis and Pacific Railway Company and others, and said causes were thereafter severally removed to the United States Circuit Courts in the respective jurisdictions, and thereafter orders were made consolidating the said suits so begun by the Central Trust Trust Company of New York and James Cheney with the said suits begun by the Wabash, St. Louis and Pacific Railway Company, under the name of the Wabash, St. Louis and Pacific Railway Company *versus* the Central Trust Company of New York, James Cheney and others; and it was provided by said orders that the original bill of the Wabash, St. Louis and Pacific Railroad Company should stand as an original bill, and the bill of the Central Trust Company of New York and James Cheney as a cross-bill, in the said consolidated causes. For names of defendants to said causes and each of them, and statement of service of process upon them respectively, see list of such defendants as were made defendants in the Circuit Court of the United States for the Northern District of Ohio, Western Division, hereto attached, marked Exhibit "E," and herewith filed. Those of said defendants to whose names is not attached any memorandum or notice of service or appearance, were not served and did not appear.

(31.) At the June Term of the Circuit Court of the United States, within and for the Western Division of the Northern District of Ohio, to wit: on the 17th day of October, 1884, in the said consolidated causes, it was upon the Court's own motion ordered that the original bill of complaint of The Wabash, St. Louis and
362 Pacific Railway Company, and the cross-bill of The Central Trust Company be dismissed as to all parties who claimed liens prior to the general mortgage upon complainant's property sought to be foreclosed in said cross-bill at the costs of the Central Trust Company as to all such persons made parties at its own motion and at the costs of the complainant as to all such persons made parties

to its motion, and that said original and cross-bills be retained as to all other parties for further proceedings. For copy of said order of dismissal see "Exhibit F," herewith filed.

(32.) Thereafter and in the month of January, 1886, in said consolidated causes, decrees and supplemental decrees of foreclosure and sale under said mortgage were rendered. For copy of said decree as rendered in the Circuit Court of the United States for the Eastern District of Missouri, see Exhibit 44 (2 Wabash Record, page 392). The decree in each of the other Courts was the same in terms as the above.

(33.) On April 26, 1886, the decree of foreclosure named in the preceding paragraph No. 31 hereof, was executed by a sale of the premises, franchises and property in said decree described to James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, trustees, in the manner and upon the terms and for the price described in the next paragraph hereof, viz., No. 34.

(34.) On the 15th day of June, 1886, in the Circuit Court of the United States for the Eastern District of Missouri, the said sale hereinbefore described in paragraph 33 hereof was confirmed by said Court. For Decree of Confirmation with description of terms and price, see Exhibit No. 49 (2 Wabash Record, page 484).

(35.) On September 21, 1886, an order was entered by the Circuit Court of the United States, for the Eastern District of
363 Missouri, directing the conveyance of said franchise and property by the Commissioner who had made the sale aforesaid; also by the Central Trust Company and James Cheney, as trustees of the general mortgage by the Mercantile Trust Company as trustee of the collateral trust mortgage by the Wabash, St. Louis and Pacific Railway Company and by Solon Humphreys and James F. Joy, trustees, to the said Joy, Ashley and Hubbard, trustees or purchasing committee, as aforesaid. For copy of said order see Exhibit 50 (2 Wabash Record, page 490).

(36.) Afterwards on or about the — day of ——, 1886, Edmund T. Allen, Commissioner, appointed by the Circuit Court of the United States for the Eastern District of Missouri, who had made the sale described in paragraph 35 hereof, conveyed the premises so sold to James F. Joy, Ossian D. Ashley, Thomas M. Hubbard and Edgar T. Welles as will more fully appear by his deed, a true copy whereof is herewith filed, marked "Exhibit G."

(37.) On or about the 16th day of December, 1886, Thomas B. Atkins, Henry K. McHarg and other holders of the bonds of the Wabash, St. Louis and Pacific Railway Company similarly situated, filed a bill in the Circuit Court of the United States for the Southern District of Illinois against the said company and others, to foreclose the said mortgage made on February 1st, 1867, by the Toledo, Wabash and Western Railway Company, to James R. Jesup and Isaac H. Knox, as trustees, and also to foreclose the said mortgage made on or about May 17th, 1879, by the Wabash, St. Louis and Pacific Railway Company to Solon Humphreys and Daniel A. Lindley, trustees. Similar suits by the same parties against the same defend-

ants were also entered at the same time in the United States Circuit Court for the District of Indiana and the Northern District of Ohio, Western Division, and in all said causes cross-bills were filed by the Farmers' Loan and Trust Company, as trustee in the two mortgages given by the Toledo and Illinois Railroad Company
364 and the Lake Erie, Wabash and St. Louis Railroad Company, respectively aforesaid; but neither plaintiff nor James Compton, nor any of the cross-petitioners in this suit, were at any time made parties to said causes, and in all said causes orders were duly entered on or about the 16th day of December, 1886, removing Solon Humphreys and Thomas E. Tutt from their offices as Receivers of the railroad property formerly belonging to the Wabash, St. Louis and Pacific Railway Company, East of the Mississippi River, and appointing in their place and stead Thomas M. Cooley as Receiver of said property. For copy of said order see Exhibit 47 (2 Wabash Record, page 468).

(38.) Said Thomas M. Cooley duly qualified as Receiver until the first day of April, 1887, when he resigned his said trust, and John McNulta was appointed in his place and stead as such Receiver and the said McNulta thereupon qualified and continued to perform the duties of said trust until discharged by the order of said Court on the 1st day of July, 1889. Copy of order may be found in Vol. 2, Wabash Record, p. 480.

(39.) On the — day of ——, 1887, James R. Jesup and Isaac H. Knox brought their bills in the United States Circuit Court for the Southern District of Illinois, in the United States Circuit Court for the District of Indiana, and in the United States Circuit Court for the Northern District of Ohio, Western Division, against the Wabash, St. Louis & Pacific Railway Company, the Central Trust Company, James Cheney, Solon Humphreys and Thomas E. Tutt, Receivers, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, purchasing committee, Solon Humphreys and Daniel A. Lindley and other defendants to foreclose said mortgage given by the Toledo, Wabash and Western Railroad Company to them as trustees, in the year 1867. To this suit neither the
365 plaintiff nor any of the cross-petitioners in this cause were made defendants.

(40.) Thereafter and on or about the 16th day of June, 1888, the Farmers' Loan and Trust Company filed its several bills in the Circuit Court for the Northern District of Ohio, Western Division, and for the District of Indiana against James F. Joy, Edgar T. Welles, Thomas H. Hubbard and Ossian D. Ashley, purchasing committee, James F. Joy, trustee, James R. Jesup and Isaac H. Knox, trustees, and Solon Humphreys and Daniel A. Lindley, trustees, viz.: In the first named of said Courts to foreclose the said mortgage given by the Toledo and Illinois Railroad Company in the year 1853, and in the Circuit Court of Indiana to foreclose the said mortgage given to it as trustee, by The Toledo, Wabash & St. Louis Railroad Company in the year 1853. In each of these suits James F. Joy appeared by counsel and filed his answer and cross-bill setting up the several mortgages given by the Toledo and Wabash Railroad

Company, and the Wabash and Western Railroad Company to Edwin D. Morgan, trustee, in whose place and stead he was appointed trustee as aforesaid, as also did Solon Humphreys and Daniel A. Lindley.

(41.) Afterwards, on or about the 22d day of October, 1888, the suits thus begun by the Farmers' Loan and Trust Company for the foreclosure of said mortgages with other suits pending in the Circuit Court of the United States for the Southern District of Illinois, for the foreclosure of first mortgages upon the Great Western Railroad, of 1859, upon the Illinois and Southern Iowa Railroad, upon the Quincy and Toledo Railroad, upon the Hannibal and Naples Railroad and upon the Decatur and East St. Louis Railroad, were, by orders, duly entered by the said Circuit Courts of the United States for the Southern District of Illinois, for the District of Indiana and for the Northern District of Ohio, Western Division,
366 Consolidated with the said foreclosure suits so begun by James R. Jesup and Isaac H. Knox under the title, for the said consolidated causes, of James R. Jesup and Isaac H. Knox *vs.* The Wabash, St. Louis and Pacific Railroad Company and others. Neither the plaintiff nor any one of the cross-petitioners in this cause were parties to said consolidated cause, or to any of the causes so consolidated.

(42.) In the said consolidated cause of James R. Jesup and Isaac H. Knox against the Wabash, St. Louis and Pacific Railroad Company and others, aforesaid, orders were duly entered by each of said Courts on or about the 22d day of October, 1888, appointing in said cause said John McNulta as Receiver of all property formerly belonging to the Wabash, St. Louis and Pacific Railway Company lying east of the Mississippi river, copy of said orders being herewith filed, marked "Exhibit H."

(43.) Afterwards, on or about the 23d day of March, 1889, in said consolidated cause of James R. Jesup and Isaac H. Knox against the Wabash, St. Louis and Pacific Railway Company and others, in each of said Circuit Courts there were entered decrees of foreclosure and sale under the mortgages so sought to be foreclosed in the said cause of Jessup and Knox against the said Wabash, St. Louis and Pacific Railway Company. A copy of one of said decrees is attached to the answer of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, purchasing committee, filed in this cause. The decrees in each of said Courts were in like terms.

(44.) Afterwards, on the 15th day of May, 1889, Bluford Wilson and A. J. Ricks, as Master Commissioners, duly appointed and qualified therein, sold all the property formerly belonging to the Wabash, St. Louis and Pacific Railway Company under said decrees and as described therein, by public sale made in the city of Chicago,
367 Illinois, to James F. Joy, Ossian D. Ashley, Thos. H. Hubbard and Edgar T. Welles, as purchasing committee, for divers bondholders under the various mortgages which were liens upon the said lines of railway, and who had associated themselves and appointed said purchasing committee for that purpose, which sale was afterwards, by said Courts, duly confirmed, and the said

property duly conveyed by said Wilson and Ricks, as Master Commissioners as aforesaid, by orders of said Courts, to the said Joy, Ashley, Hubbard and Wells, as said purchasing committee; a copy of said orders, as entered in the said consolidated cause and in the said Atkins case, are herewith filed, marked "Exhibit I." At the said sale the bids upon the Ohio division of said road were equal to the amounts found to be due by the said decree under the mortgages thereon issued to The Farmers' Loan & Trust Company and Edwin D. Morgan, hereinbefore referred to, together with the funded debt bonds and scrip issued upon account of coupons under said mortgages. In Indiana the amount bid upon the said railway was equal to the amount found due under the said mortgage to The Farmers' Loan & Trust Company and the funded debt and scrip certificates outstanding on account of coupons issued under said mortgage. Neither the plaintiff nor any of the cross-petitioners in this cause, nor James Compton were among the associate bondholders who appointed the said purchasing committee, or were otherwise interested in making the said purchase.

(45.) Afterwards, said purchasing committee caused corporations to be formed in the States of Ohio, Indiana, Illinois, Michigan and Missouri, respectively, to which corporations respectively the said purchasing committee conveyed the property acquired by them within said States respectively at the said foreclosure sale.

(46.) Afterwards, on or about the first day of August, 1889, the said corporations thus formed in the said States of
368 Ohio, Indiana, Illinois, Michigan and Missouri were, in accordance with law, duly consolidated into and formed the Wabash Railroad Company, defendant herein.

(47.) Possession of the property so sold and conveyed under said foreclosure decree and sale was delivered to said purchasing committee by the said Receiver, John McNulta, on or about the first day of July, 1889, in pursuance of orders of the Circuit Court of the United States for the Northern District of Ohio, made and entered June 18, 1889, true copies whereof are hereto attached marked "Exhibit K," and he, the said Receiver, was then discharged, and the said purchasing committee and its grantee have been in possession of said railway property and premises since the said first day of July, 1889. The said Wabash Railroad Company as such grantee took possession of all said property immediately after its said formation by consolidation on the first day of August, 1889, and has ever since been and still is in possession thereof, under the terms of the said decree of March 23, 1889, and said order of June 18, 1889.

(48.) On the 6th day of October, 1863, the Board of Directors of the Toledo and Wabash Railway Company passed a resolution as follows:

"*Resolved*, That the holders of the first mortgage bonds of the Lake Erie, Wabash and St. Louis and the Toledo and Illinois Railroad Companies, due the first of August, 1865, have the privilege of extending the date of maturity of said bonds to the first of August, 1890, and if presented at the office of this company in the city of

New York by the first day of January, 1864, to have the extension endorsed thereon and coupons for the extended period attached."

For full report of the proceedings of said directors, see Exhibit 74A (2 Wabash Record, p. 546).

(49.) The bonds described in the foregoing paragraph
369 of this agreed statement of facts were presented at the office of the Toledo and Wabash Railway Company, and across the face of all the said bonds so issued by the Toledo and Illinois Railroad Company, described in the foregoing resolution, and secured by the mortgage to the Farmers' Loan and Trust Company, described in paragraph No. 2 of this agreed statement of facts, was stamped in red ink the following:

"For value received, it is hereby agreed between the Toledo and Wabash Railway Company and the holder of this bond, that the time for the payment of the principal thereof shall be extended until August 1st, 1890, provided the annexed coupons for interest issued by said company shall be paid when due."

(50.) Also, at the time said bonds were thus stamped, there was attached to each of them interest coupons or warrants in the following form:

"Toledo and Illinois Railroad Company interest warrant issued by the Toledo and Wabash Railway Company for $35, payable August 1st, 18—, in the city of New York, to bearer, for six months' interest on Toledo and Illinois Railroad Company's bonds for one thousand dollars.

"No. ——

"J. N. DRUMMOND,
"Secretary T. & W. Railway Co."

All of said coupons were alike except as to date of maturity and embraced periods of maturity from February 1st, 1866, to August 1st, 1890.

(51.) Upon bonds of the Lake Erie, Wabash and St. Louis Railroad Company, described in the fourth paragraph of this agreed statement of facts, front and back, were stamped in red and black ink the same words as heretofore stated as having been stamped upon the Toledo and Illinois Railway Company bonds. In-
370 terest warrants were attached thereto which matured between February 1st, 1866, and August 1st, 1890, both inclusive, and which were as follows:

"Lake Erie, Wabash and St. Louis Railroad Company: Interest warrant issued by the Toledo and Wabash Railway Company for $35, payable August 1st, 18—, in the city of New York, to bearer for six months' interest on Lake Erie, Wabash and St. Louis Railroad Company's bond for one thousand dollars.

"J. N. DRUMMOND,
Secretary T. & W. R'w'y Co."

(52.) After the year 1865 the interest warrants or coupons of the mortgage bonds of the Toledo and Illinois, and the Lake Erie, Wabash and St. Louis Railroad Companies were paid by the Toledo, Wabash and Western Railway Company until February first, 1875, when payments were suspended by said company until 1877, when the interest payments were again resumed as they fell due by the Wabash Railway Company, and the interest coupons continued to be regularly paid until the default in 1885 by the Wabash, St. Louis and Pacific Railway Company.

(53.) Coupons maturing in 1875 and 1877 on all the said bonds were deposited in the Metropolitan Bank of the City of New York in accordance with the funding scheme of the Wabash Railroad Company aforesaid.

(54.) Prior to June 24th, 1889, all outstanding bonds and coupons attached thereto and unpaid, issued and sold under the mortgages described in the foregoing paragraphs 2 and 4, had been cancelled by the order of Bluford Wilson, Master Commissioner, acting under direction of the Court, and on or about said June 24th, 1891, all the outstanding bonds and coupons attached thereto and unpaid, issued and sold under the mortgages described in the foregoing paragraphs 13 and 14, and which were kept in the possession of The Central Trust Company in accordance with the plan of reorganization, as described in paragraph 56, were cancelled by the said Trust
371 Company, by order of the board of directors of The Wabash Railroad Company, in conformity with the provisions of the first and second mortgages issued by said The Wabash Railroad Company, in conformity with said plan of reorganization.

(55.) That of the coupons issued to the holders of the said mortgages given by the said Toledo and Illinois Railway Company and the Lake Erie, Wabash and St. Louis Railroad Company described in the forty-seventh, eighth, ninth and fiftieth paragraphs of this agreed statement of facts, no coupons have been paid since February 1st, 1885, except three coupons paid by the Receiver John McNulta by order of the Court, viz., those maturing on * * * no interest has been paid thereon since July 1st, 1889, but since that date of July 1st, 1889, interest has been paid by the Wabash Railroad Company upon mortgage bonds issued in accordance with the plan of reorganization described in paragraph 56.

(56.) The foreclosure and sale hereinbefore described and the organization by the purchasing committee, of said corporations, together with their consolidation into and formation thereby of the Wabash Railroad Company, defendant herein, and its possession, were, in pursuance of a plan of reorganization which has been subscribed and carried into full effect by the holders of the various amounts of securities therein described, and of which plan of reorganization a true copy is herewith filed, marked "Exhibit L," and thus made part hereof.

(57.) In an action originally brought by him in the Lucas Common Pleas against the Toledo, Wabash and Western Railway Company and others, appealed to the District Court, and by it reserved

to the Supreme Court of Ohio, James Compton, as plaintiff, recovered in the Supreme Court of Ohio a judgment which is in full force unreversed and wholly unsatisfied, a true copy of
372 the record and proceedings in which action in all of said Courts marked "Exhibit M" is herewith filed.

(58.) Plaintiff and the several cross-petitioners, including the personal representatives of Jane A. Sullivan and Preston Wing, who have died since the filing of cross petitions by them and as to whom proof of letters testamentary is waived, are the holders and owners of equipment bonds executed by the Toledo and Wabash Railway Company, part of the issue described in the seventeenth paragraph of this agreed statement of facts, each in the form shown by the copy attached hereto, marked "Exhibit C," hereof, and referred to in said paragraph. The numbers of said bonds and the names of the owners thereof respectively, except those owned by the plaintiff, are stated in the list of the same herewith filed, marked "Exhibit N." Each of said bonds has attached to it coupons as stated in the petition of the plaintiff and the several cross-petitions on file, viz., all coupons maturing on and after May 1, 1875, but none of earlier maturity. These bonds are of the same issue and tenor (amounts and numbers excepted), as the bonds held by James Compton, and upon which he recovered judgment aforesaid.

The dates of the acquisition of said bonds by the cross-petitioners are, as far as ascertainable, stated in Exhibit O, herewith filed.

(59.) On the 13th day of May, 1878, David Tysen and others, filed a petition in the Circuit Court of Fountain County, Indiana, against The Wabash Railway Company, Isaac H. Knox, James R. Jesup, trustees; Edwin D. Morgan, trustee; The Farmers' Loan and Trust Company, trustees, and George I. Seney, trustee. This suit was afterwards removed to the United States Circuit Court for the District of Indiana, and decree entered in said Court in favor of the petitioners and others similarly situated, who might appear in said cause and take its benefits, and appealed to the Supreme
373 Court of the United States, where the same was reversed, and other proceedings had as stated in Exhibit P hereto, and final decree was entered in the said Circuit Court of the United States as in said exhibit also shown. All the proceedings in said cause are shown by copy of the record filed herewith, marked "Exhibit P."

(60.) Prior to the entry of decrees in the said several consolidated causes entitled James H. Jesup and Edward H. Dixon *vs.* The Wabash, St. Louis & Pacific Railway Company *et al.* in The United States Circuit Court for the Northern District of Ohio, Western Division, the District of Indiana and the Southern District of Illinois, respectively, by proceedings had in the year 1888, James Compton was made a party defendant in said causes, and, although at all times denying and contesting the jurisdiction of said Courts, and the proceedings by which he was made a party and the service made on him therein, appeared and set up his

rights under the decree obtained by him in the Supreme Court of the State of Ohio, a copy of which decree is filed herewith, marked "Exhibit M." That by the decree entered on the 23d of March, 1889, and hereinbefore set forth, the rights of said Compton were reserved, as shown by paragraph 36 of said decree: that thereafter, in the United States Circuit Court for the Northern District of Ohio, Western Division, on the 17th day of August, 1889, the issues relating to the claim of James Compton were referred to Bluford Wilson, as master, to take the testimony and report upon the same, as shown by order hereto attached, marked "Exhibit R." On the same day, by like order, the issues relating to the claims of James Compton were likewise referred to Bluford Wilson as Master by the United States Circuit Court of the District of Indiana. That on the 11th day of June, 1892, decree was entered upon the said report in the Circuit Court of the United States for the Northern
District of Ohio, Western Division, respecting the claim of
374 the said James Compton, which decree remains in full force, unreversed and unmodified, copy of which is hereto attached, marked "Exhibit S."

And on the 30th day of July decree was entered thereon in the United States Circuit Court for the District of Indiana, of precisely the same tenor and effect as the decree shown by Exhibit S.

James Compton did not make tender of amounts named in said decrees, but has taken appeal from said decree of the United States Circuit Court for the Northern District of Ohio, Western Division, which appeal is now pending in the Circuit Court of Appeals at Cincinnati, Ohio.

A copy of the record of said cause upon appeal is herewith filed, marked "Exhibit T," and it is agreed that any party to this cause may read in evidence any portion of said record, which may be competent and relevant herein.

No appeal has been taken from the decree entered in the United States Circuit Court for the District of Indiana and the same stands unreversed and unmodified.

(61.) The statement of amounts due upon the various mortgages, and of funded debt and scrip, as shown in Wabash Foreclosure Record, Vol. I., pp. 573 to 582, inclusive, is correct, and may be referred to or read by either party upon the trial of this cause, as showing the indebtedness existing upon which said foreclosure, judicial sale and reorganization were based.

(62.) And it is further agreed by and between the parties hereto, that, in the event any judgment shall be rendered in this case, either in the Court of Common Pleas of Lucas County, or upon appeal or writ of error, in favor of the plaintiff, or of the defendant cross-petitioners, or any of them, then before any execution and order of sale, or for redemption, shall be issued and made mandatory, the cause shall be referred to a Master Commissioner to report the exact extent in detail, as far as may be practicable, of the

several properties to be embraced in any such execution,
375 order of sale, or for redemption, together with the liens thereon.

Toledo, Ohio, November 1, 1893.

(Signed) GEO. HOADLY,
JOHN C. F. GARDINER,
Attorneys for Cross-Petitioners.
JOHN H. DOYLE,
JOHN G. MILBURN,
Attorneys for James Compton.
RUSH TAGGART,
Attorney for Wabash Railroad Company.
HENRY CRAWFORD,
Attorney for Trustees.
JAMES M. BROWN,
Surviving Partner of Lee & Brown,
Attorney for Plaintiff.

EXHIBIT A (AGREED STATEMENT OF FACTS).

Mortgage: Toledo & Wabash R. R. Co. to Edwin D. Morgan.

This indenture, made this 12th day of October, A. D. 1858, between the Toledo & Wabash Railroad Company, a corporation duly constituted under the laws of the State of Ohio, of the first part, and Edwin D. Morgan, Esq., of the city of New York, of the second part, witnesseth:

Whereas the party of the first part hath caused to be executed and delivered unto the party of the second part its bonds signed by its president and countersigned by its treasurer, and its corporate seal affixed thereto, for the sum of Nine Hundred Thousand Dollars, payable to the party of the second part on the first day of February, A. D. 1876, with interest thereon at the rate of seven per centum per annum semi-annually, on the first days of May and
376 November in each year, until the maturity of the principal sum, which bond is of even date herewith.

Now therefore, the party of the first part, in order to secure the payment of said bond and interest maturing thereon, and in consideration of One Dollar paid by the party of the second part, and for divers and other considerations, hath granted, bargained, sold and conveyed, and doth by these presents give, grant, bargain, sell and convey unto the said Edwin D. Morgan and his successors in the trust hereby created, the following described property of the party of the first part; that is to say, its railroad made and to be made, all right of way and all land occupied thereby, together with the superstructure, depots, depot grounds and buildings erected thereon, and the rails, tracks, side-tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises and accessions of the party of the first part, together with all its rolling stock, machinery, furniture and equipments, of its said road, now and hereafter to be acquired, being

the same property described in the deed of Matthew Johnson, marshal and commissioner to A. Boody, Esq., and dated October 8, 1858, and by A. Boody conveyed to the party of the first part. But nothing herein contained shall be so construed as to prevent the party of the first part from disposing of any of its property not immediately connected with the operation of its railroad.

To have and to hold the premises and every part and parcel thereof, and all its increase, accessions and incidents unto the said Morgan and his successors in trust, unto the following trusts, viz.: Upon failure to pay the interest or principal, or any part of either, according to the tenor of said bond, then, after sixty days from such default, upon the request of the holder of any interest in said bond, the trustee or his successor in the trust may enter and take possession of all or any part of said mortgaged premises and property, and as the attorney in fact or agent of the party of the first part, by himself or agents, or otherwise, have, use and operate said railroad and make all needful repairs, alterations and additions thereto,
377 and after paying the expenses of such use, repairs, &c., apply the overplus to the payment of the interest due and unpaid, and after that the principal, or such default, the said trustee may, at his discretion, or on the written request of the majority in interest of said bond, shall proceed by judicial decree to foreclose and sell the road and property herein mortgaged, and apply the proceeds to the payments of costs and to the interest and principal remaining unpaid on such sale, all benefit of valuation and appraisement laws is hereby waived.

It is hereby agreed and made part of the condition of this mortgage that, whereas the bond intended to be secured hereby was executed for the benefit of the holders of the first mortgage and convertible bonds of the Toledo & Illinois Railroad Company. And whereas the principal and interest of said bonds are a lien upon the property hereinbefore described, by virtue of a mortgage dated September 8, 1853, and the payment of the same is part of the consideration for the purchase and ownership of said property by the party of the first part; It is, therefore, to be understood that, upon payment of the interest of said bonds by the party of the first part, the same is to be considered payment of the interest of the bond secured by this mortgage, and the right is hereby reserved, at the maturity of said bonds of the Toledo & Illinois Railroad Company, to substitute in lieu of the bonds secured by this mortgage other bonds of such different numbers and denominations, but not exceeding in amount or time the condition of the said bond, as the first party or any consolidated company, of which it may become a component part, may deem necessary and proper, and such bonds are to be considered as fully and completely secured by this indenture of mortgage as though they were now made and herein actually described and set forth, the object and intent being to preserve the lien of Nine Hundred Thousand Dollars, by whatever evidence it may exist, as a valid and subsisting lien prior to any other upon the property de-
378 scribed in this indenture. And it is hereby agreed, and these presents are upon this express condition, that, on payment of

the principal and interest of the said bond, or of the bonds which may hereafter be substituted in place of the same, as hereinbefore provided, then the estate granted to the party of the second part shall cease, determine and become void, and the right to the premises and property hereby conveyed shall revert to, and revert in, the party of the first part without acknowledgment of satisfaction, reconveyance, re-entry, or other act, and it is further agreed that said party of the second part and his successors in said trust shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the wrongful acts of any agent employed by him, when such agent is selected with reasonable discretion, and said party of the second part shall be entitled to receive proper compensation for any labor or service performed by him in the discharge of his trust, in case he shall be compelled to take possession of said premises or any part thereof, or manage the same. It is further agreed that, in case of the death or incapacity of the said trustee to hold the property, the same shall not be invested in his heir or personal representative, but as to him and all persons claiming through him, the trust shall then cease and determine, and the party of the first part or any company into which it may become consolidated shall forthwith "appoint a successor to said trust and in case of neglect or refusal for thirty days thereafter the holders in interest to the amount of three hundred thousand dollars may apply to the person who, for the time being, is judge of the Court of Common Pleas of the County of Lucas and State of Ohio, to appoint some suitable person as trustee, and after such appointment and acceptance of the trust, the new trustee shall become vested with all the rights of the party of the second part, without further assurance or conveyance for the same.

In witness whereof The Toledo & Wabash Railroad Com-
379 pany has caused these presents to be sealed with its corporate seal and to be subscribed by J. R. Osborne, its president, and countersigned by John N. Drummond, its secretary, at Toledo, in the State of Ohio, on this day and year above written.

J. R. OSBORNE, *President.*

Countersigned,
JOHN N. DRUMMOND, [SEAL.]
Secretary.

In presence of
CALVIN BULLOCK.
EDWARD BISSELL, JR.

STATE OF OHIO, *Lucas County, ss:*

This day came before me the undersigned, a notary public within and for the county aforesaid, the above-named John R. Osborn, president, and John N. Drummond, secretary, of the Toledo and Wabash Railroad Company, and severally acknowledged that they signed and countersigned the foregoing instrument as such president and secretary, and affixed thereto the corporate seal of said company,

in pursuance of a resolution of the Board of Directors of said company and that the same is the act and deed of the Toledo and Wabash Railroad Company, for the purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my seal of office this 16th day of October, A. D. 1858.

EDWARD BISSELL, JR., [SEAL.]
Notary Public.

Received for record October 19th, 1858, at 4 o'clock P. M., and recorded October 20th, 1858.

THOMAS BROPHY, *Recorder.*

380 I, Wm. V. McMaken, Recorder of Lucas County, Ohio, do hereby certify that the within and foregoing is a true and correct copy of a certain mortgage executed by Toledo and Wabash Railroad Company to Edwin D. Morgan, bearing date of October 12th, A. D. 1858, and duly recorded in my office October 19th, A. D. 1858, at 4 o'clock P. M., in volume 12 of Mortgages, on page 260. Witness my hand and official seal this 3d day of December, A. D. 1890.

WM. V. McMAKEN,
[SEAL.] *Recorder of Lucas County, Ohio.*

[Endorsed:] Filed in C. C. Jan. 14, '95, L. E. Clark, Clerk.

EXHIBIT B (AGREED STATEMENT OF FACTS).

This indenture made this 12th day of October, 1858, between the Wabash & Western Railway Company, a corporation duly constituted under the laws of the State of Indiana, of the first part, and Edwin D. Morgan, Esq., of the city of New York, of the second part.

Witnesseth, Whereas the party of the first part hath caused to be executed and delivered unto the party of the second part its bond signed by its president, countersigned by its treasurer and the seal of its corporation to be affixed thereto for the sum of Two Million Five Hundred Thousand Dollars, payable to the said party of the second part, on the first day of February, A. D. 1876, with interest thereon at the rate of seven per centum per annum, semi-annually on the first day of May and November, in each year, until the maturity of the principal sum, which bond is of even date herewith.

Now, therefore, the party of the first part in order to secure the payment of said bond and of the interest maturing thereon, and in consideration of the sum of One Dollar paid by the party
381 of the second part, and for divers other considerations, hath granted, bargained, sold and conveyed, and doth by these presents give, grant, bargain, sell and convey unto the said Edwin D. Morgan, and his successors in said trust hereby created, all the following described property of the party of the first part, that is to say, its railroad made and to be made, all rights of way, and all land occupied thereby, together with the superstructures, depots, depot-grounds and buildings erected or to be erected thereon, and the rails,

tracks, side-tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises and accessions of the said party of the first part, together with all its rolling stock, machinery, furniture and equipments of its said road, now held and hereafter to be acquired, being the same property described in the deed of John L. Robinson, Marshal and Commissioner, made to A. Boody and dated Oct. 5, 1858, and by A. Boody conveyed to the party of the first part, but nothing herein contained shall be so construed as to prevent the party of the first part from disposing of any of its property not immediately connected with the operation of its railroad.

To have and to hold the premises and every part and parcel thereof and all its increase, accessions and incidents unto the said Morgan and to his successors severally in the said trust, viz., on failure to pay the interest or principal or any part of either according to the tenor of said bond, then after sixty days from such default upon request of the holder of any interest in said bond, the said trustee or his successors in the trust may enter and take possession of all or any part of said mortgaged premises and property, and as the attorney in fact or agent of the party of the first part, by himself or agents or otherwise, have, use and operate said railroads and make all needful repairs, alterations and additions thereto, and after paying the expenses of such use, repair, &c., apply the overplus to the payment of the interest due and unpaid, and after that to the principal, or on such default the said trustee or his successors in said trust may at his discretion, or on the written request of the
382 majority in interest in said bond shall proceed by judicial decree to foreclose and sell the road and property herein mortgaged, and apply the proceeds to the payment of the costs and to the interest and principal remaining unpaid. On such sale all benefit of valuation and appraisement laws is hereby waived.

It is hereby agreed and made part of the condition of this mortgage that, whereas the bond intended to be secured hereby was executed for the benefit of the holders of the first mortgage and convertible bonds of the Lake Erie, Wabash & St. Louis Railroad Company; and

Whereas, the principal and interest of said bonds are a lien upon the property hereinbefore described by virtue of a mortgage dated August 1, 1853, and the payment of the same in part of the consideration for the purchase and ownership of said property by the party of the first part, it is therefore to be understood that upon payment of the interest of said bonds by the party of the first part the same is to be considered payment of the interest upon the bond secured by this mortgage, and the right is hereby reserved, at the maturity of said bonds of the Lake Erie, Wabash & St. Louis Railroad Company, to substitute in lieu of the bond secured by this mortgage, other bonds of such different numbers and denominations, but not exceeding in amount or time of the condition of the said bond, as by the first party or any consolidated company of which it may become a component part may be deemed necessary and proper, and such bonds are to be considered as fully and completely secured by this indenture of mortgage as though they were now made and

herein accurately described and set forth, the object and intent being to preserve the lien of Two Millions Five Hundred Thousand Dollars by whatever evidence it may exist as valid and subsisting lien prior to any other upon the property described in this indenture.

And it is hereby agreed, and these presents are upon the express condition that, on the payment of the principal and interest
383 of the said bond, or of the bonds which may hereafter be substituted in the place of the same as above provided, then the estate granted to the party of the second part shall cease, determine and become void, and the right to the premises and property hereby conveyed shall revert to and revest in the party of the first part, without acknowledgment of satisfaction, reconveyance, re-entry or other act; and it is further agreed that said party of the second part and its successors in said trust shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the wrongful acts of any agent employed by him when such agent is selected with reasonable discretion, and said party of the second part shall be entitled to receive proper compensation for any labor or service performed by him in the discharge of his trust, in case he shall be compelled to take possession of said premises, or any part thereof, or manage the same.

It is further agreed that in case of the death or incapacity of the said trustee to hold the property, the same shall not be vested in the heirs or personal representatives, but as to him and all persons claiming through him the trust shall cease and determine, and the party of the first part or any company into which it may become consolidated shall forthwith appoint a successor to said trust, and in case of neglect or refusal for the space of thirty days thereafter the holder of interest in said bonds to the number of Five Hundred Thousand Dollars may apply to the person for the time being who is judge of the Circuit Court of Tippecanoe County, Indiana, to appoint some suitable person as trustee, and after such appointment and acceptance of the trust the new trustee shall become vested with all the rights of the party of the second part without [illegible]ther assurance or conveyance for the same.

In witness whereof, The Wabash & Western Railroad Company has caused these presents to be sealed with the corporate seal
384 and to be subscribed by A. Boody, its president, and countersigned by John N. Drummond, its secretary, at Lafayette, in the State of Indiana, on this day and year above written.

[SEAL.] A. BOODY, *President.*

JNO. N. DRUMMOND, *Secretary.*

In presence of:
L. TILTON.
JOSEPH S. GANNIS.

STATE OF OHIO, *Cuyahoga County, ss:*

Be it remembered that on the 18th day of October, A. D. 1858, before me, the subscriber, a notary public within and for the county

aforesaid, personally came the above named A. Boody, president of the Wabash & Western Railway Company, and acknowledged the above instrument to be the act and deed of the said company, and that the same was executed by him in that behalf.

In witness of which I have hereunto set my hand and affixed my official seal this day and year above written.

[L. S.] JOSEPH S. GRANNIS,
Notary Public.

STATE OF OHIO, *Lucas County, ss:*

On this the 18th day of October, A. D. 1858, before me, the subscriber, a notary public in and for said county, personally appeared Jno. N. Drummond, secretary of the Wabash & Western Railway Company, who acknowledged that he countersigned the foregoing instrument as such secretary by order of the Board of Directors of said company, and that he affixed the corporate seal thereto
385 by like order of said board for the uses and purposes therein expressed and that the same is the act and deed of said company.

[L. S.] EDWARD BISSELL, JR.,
Notary Public.

A true record recorded October 20th, 1858, at 8 o'clock A. M.
JOSEPH YUNDT, *Recorder.*

THE STATE OF INDIANA, *County of Tippecanoe, ss:*

I, J. W. McCrea, Recorder in and for said county, do hereby certify that the above and foregoing is full, true and complete copy of the mortgage from the Wabash & Western Railway Company to Edwin D. Morgan, Esq., as recorded in Mortgage Record No. 3, on pages 508, 509 and 510, of the records in the Recorder's office of Tippecanoe County, State of Indiana.

In witness whereof, I have hereunto set my hand and affixed my official seal at office in Lafayette, said County and State, this 26th day of November, A. D. 1890.

[SEAL.] J. W. McCREA, *Recorder.*

[Endorsed:] Filed in C. C. Jan. 14, '95, L. E. Clark, Clk.

386 EXHIBIT C.

"No. 557. $500.

"UNITED STATES OF AMERICA, *States of Ohio and Indiana:*

"Toledo and Wabash Railway Company.

"Issue of equipment bonds not to exceed $600,000 in amount.

"The Toledo and Wabash Railway Company, a body corporate, acknowledges itself to be indebted to the bearer hereof, for money borrowed, in the sum of five hundred dollars, to be paid on the first day of May, 1883, with interest from and after the first day of May, 1863, at the rate of seven per cent. per annum, payable semi-annually on the first day of May and the first day of November in each year, on the surrender of the respective interest warrants hereto appended, both principal and interest payable at the company's agency in the City of New York.

"This bond is one of a series authorized to be issued under resolutions of the board of directors of said company passed on the first day of October, 1862, to an amount not exceeding $600,000.00, and is convertible into common stock of said company at par, at any time within five years from the date thereof, but the stock to be issued therefor shall not be entitled to a dividend for any time for which the interest may be paid on this bond, which is convertible only at the option of the holder thereof.

"In witness whereof, the said company has caused its corporate seal to be hereunto affixed, and its president and treasurer to subscribe their names hereto this first day of November, 1862.

"[SEAL.] A. WOODS, *President.*

"J. N. DRUMMOND, *Treasurer.*"

387 "17.50 Toledo and Wabash Railway Company.

"Interest warrants for seventeen 50/100 dollars, payable in the city of New York May 1st, 1875, for six months' interest on equipment bond for $500.

"No. 557.

"J. N. DRUMMOND, *Treas'r.*"

EXHIBIT D (AGREED STATEMENT OF FACTS).

Articles of consolidation by and between the Toledo & Wabash Railway Company—The Great Western Railroad Company of 1859—The Quincy & Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company.

Witnesseth, that whereas, by the laws of the several States of Ohio, Indiana and Illinois, railroad companies, whose roads connect with or form continuous lines within or at the boundary lines of

these States, or either of them, are authorized to consolidate their property and capital stock with each other, and become one corporation.

And whereas, the said roads above named form continuous lines from Toledo, in the State of Ohio, to the Mississippi river at Quincy and Hamilton, respectively; and for the mutual benefit of the stockholders of each of said roads, and the greater convenience of the public, the directors of said roads have proposed to unite and consolidate, and become one corporation, so as to obviate all change of cars over the whole route, as well as to obviate the frequent failures to connect, when operated as separate roads.

Now, therefore, the said companies, by their respective
388 directories, agree to consolidate their said roads, property and capital stock into one company, upon the basis and conditions hereinafter specified, to be submitted by the directories of each of said roads to the stockholders thereof for ratification, to wit:

The Toledo & Wabash Railway Company enters into said consolidation on the following basis, viz.:

Its capital is	$10,000,000
composed as follows:	
1st Mortgage bonds	$3,400,000
2d Mortgage bonds	2,500,000
Convertible equipment bonds	600,000
Convertible preferred stock	1,000,000
Common stock	2,500,000

The Great Western Railroad Company of 1859 enters into said consolidation on the following basis, viz.:

Its capital is	$7,400,000
composed as follows:	
First Mortgage bonds	$2,500,000
Second Mortgage bonds	2,500,000
Stock	2,400,000

Of the said first mortgage bonds, $1,150,000 are in the hands of a trustee to take up at maturity, an issue of $1,000,000 of ten per cent. bonds falling due in 1868, and the residue to be used in retiring $1,350,000 of seven per cent. bonds maturing this year.

Said Great Western Railroad Company of 1859 shall also pay to the consolidated company the sum of seven hundred eighty thousand three hundred dollars, in cash, that sum being the amount required to place their road in equal condition with the Toledo and Wabash Railway, as estimated on the 13th March last, by Messrs. Tilton and Colburn, appraisers appointed for that purpose, and is to be expended on the line of the present Great Western Railroad as speedily as practicable; from which sum, however, is to be deducted
389 any expenditure made previous to consolidation for engines, cars or buildings, and to which shall be added a sum representing the value of fuel, materials and additional equipment which

the Great Western Railroad should possess, to be equal to the Toledo and Wabash Railway, at the time of consolidation, which sum shall be ascertained and determined by the said appraisers.

The Great Western Railroad Company of 1859 hereby assigns to the consolidated company, in indemnification of extra interest and expenses, all of its first mortgage bonds remaining in the hands of the trustees thereof, after retiring the one million of ten per cent. bonds due in 1868.

The Quincy & Toledo Railroad Company enters into said consolidation on the following basis, viz.:

Its capital is	$776,000
composed as follows:	
First mortgage bonds, secured by a mortgage on the road from Clayton to Meredosia, and bearing interest from Nov. 1st, 1865, at the rate of seven per cent	500,000
Stock	276,000

The said Quincy & Toledo Railroad Co. to be entirely freed from all debts for construction and equipment purposes.

The Illinois & Southern Iowa Railroad Company enters into said consolidation on the following basis, viz.:

First mortgage bonds	$300,000
Stock	10,000

It is hereby further agreed that on the terms and conditions above specified, the four railroad companies, parties hereto, do agree, each for itself severally, that the several companies named shall be, and they hereby are, consolidated into and form one corporation, by the name and style of The Toledo, Wabash and Western Railway Company.

390 All and singular the rights, franchises, privileges, real estate, depot grounds, rights of way, road bed, railroad iron, rails, engines, cars, machinery, machine shops, buildings and structures, rolling stock, debts, dues, demands, choses in action, and property of every description, name and nature, in which the said consolidating roads, and any or either of them, may possess any right, and all property, real, personal and mixed, and all choses in action or in possession, and all privileges and appurtenances, reversions and remainders, in any or either of said consolidating companies, shall, from the day when this agreement shall be ratified by all the parties hereto, and copies thereof filed with the Secretary of State of the various States through which the roads pass, be and become vested in the said consolidated company, without any further or other deed, transfer or conveyance in that behalf.

It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereof, as the same shall respectively fall due, *be protected* by the said consolidated company, according to the true meaning and

effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced.

The capital stock of the said consolidated company shall be fifteen millions of dollars, to be divided into one hundred and fifty thousand shares of stock of one hundred dollars each, and the directors of said new corporation may increase the capital stock thereof when necessary.

All the books, vouchers, records, muniments of titles and other documents pertaining to the business or property of said several companies, parties hereto, shall be placed in the office of the secretary of said consolidated company, and the said books, records and papers shall be deemed and taken, so far as necessary, as the records and books of the consolidated company; and said books, records,
391 vouchers and papers shall be subject to the proper examination and inspection of all persons interested as stockholders therein, during business hours, and at said office, who shall have otherwise the same access thereto as if the same had remained in the office of the original company.

The said books, vouchers, records, muniments of title and other documents pertaining to the said consolidating companies shall be and remain in the office aforesaid as part of the records of the consolidated company, and the secretary for the time being, of the consolidated company, shall be the custodian thereof.

The first board of directors of the consolidated company, until notice can be given and a board of directors regularly elected, shall consist of the following persons, viz.: A. Boody, W. Colburn, W. Kidd, Jas. Spears, I. H. Knox, Wm. Baker, Geo. Cecil, Jas. R. Jessup, Robt. Brackenridge, Wm. Kent, John Ross, Henry Keep, Wm. Williams, Edward Wells, John N. Drummond, L. Tilton, Jas. Dunlap, S. Humphreys, Wm. A. White, H. W. Gray and Jas. L. Lamb, who shall, within sixty days after the ratification of this agreement, call a meeting of the stockholders of the consolidated company for the election of directors.

Each of the parties hereto are hereby required, immediately after the ratification of this agreement, to forward to the Secretary of the Consolidated Company a full and properly certified list of its stockholders, showing the number of shares owned or held by each stockholder, and the number of shares of consolidated stock each stockholder is entitled to upon surrendering his certificate of stock in the original company.

The officers of said consolidated company shall consist of fifteen directors, and such other officers appointed by the directors as may be required by law, or deemed proper for the transaction of the business of the company, who shall hold their offices at the pleasure of the directors.

The directors shall be elected annually, after the first regular election, at such time and place as may be designated; and,
392 if no other place is designated, then the election will be held at the principal office of the consolidated company. Not less than two directors shall be chosen from resident stockholders of the

State of Ohio, Indiana and Illinois respectively, and the residue may be chosen fom the stockholders at large, without reference to their place of residence.

The directors shall enter on the discharge of their duties in a reasonable time after their election, and at their first meeting shall choose one of their own number president, appoint other necessary officers, and do and perform all other acts necessary and proper in the management of the business of the corporation.

The directors shall be elected annually by the stockholders, voting in person or by proxy. Every share of consolidated stock shall entitle the holder to one vote, and a majority of all the votes cast shall elect.

The directors shall have power to issue any other and further bonds of said corporation, to such an amount that the indebtedness of the consolidated company, at any time, shall not exceed the amount of the capital stock authorized by this agreement, and they may secure the bonds so issued, by mortgage or -ther lien on the property of the consolidated company, or any specified part thereof.

This article of consolidation, or a duplicate thereof, shall be signed by the President, attested by the Secretary, and sealed with the corporate seal of each of said consolidating companies, and spread upon the records of each; but such consolidation shall not take place until the terms thereof shall have been approved by such majority of the stockholders in interest as may be required by the laws of the state or states from which each consolidating company may have originally derived its corporate existence; and for this purpose a called meeting of the stockholders of each of the consolidating companies shall be held separately and these articles of consolidation shall be submitted thereto for ratification, and if ratified, either at such called meeting or by the proper majority of the stockholders
393 in interest, in writing, such ratification shall be filed in the proper office of the consolidated company, and if this consolidation be ratified by each of the consolidating companies, parties hereto, then the secretaries of each of the consolidating companies shall certify that fact on this article, or a duplicate thereof, and the consolidation shall then be deemed complete and obligatory, and copies thereof shall be filed with the secretaries of state of the said states of Ohio, Indiana and Illinois.

It is further agreed that a contract heretofore made and executed by and between Messrs. Wells, Hornish & Co. on the one part and A. Boody of the other for the control and possession of certain additional depot grounds, side-track and other benefits in connection with the Illinois & Southern Iowa Railroad Company be, and it is hereby, assumed by the consolidated company.

It is further agreed that the consolidation hereby made shall be perpetual during the legal existence of the consolidated company.

[Four Five-Cent Revenue Stamps.]

In witness whereof, these articles of consolidation have been signed by the presidents and attested by the secretaries of the Toledo and Wabash Railway Company, the Great Western Railroad Company

of 1859 the Quincy & Toledo Railroad Company and the Illinois & Southern Iowa Railroad Company and sealed with the corporate seals of said companies respectively at a called meeting of the directors of said companies, and in pursuance of the resolutions of said companies, duly entered on their records, and in the presence of the several boards of directors thereof on the following days; that is to say, The Toledo & Wabash Railway Company, at the city of Toledo, Ohio, on the 8th day May, 1865; The Great Western Railroad Company of 1859, at the city of Springfield, Illinois, on the 11th day of May, 1865; The Quincy & Toledo Railroad Company at New York, State of New York, on the 29th day of May,
394 1865, and the Illinois & Southern Iowa Railroad Company at Carthage, State of Illinois, on the 16th day of May, 1865.

[CORPORATE SEAL.] A. BOODY,
President of the Toledo & Wabash Railway Company.

Attest: JOHN N. DRUMMOND,
Secretary of the Toledo & Wabash Railway Company.

[CORPORATE SEAL.] L. TILTON,
President of the Great Western Railroad Company of 1859.

Attest: WM. B. CORNEAU,
Secretary of the Great Western Railroad Company of 1859.

[CORPORATE SEAL.] JAMES R. JESUP,
President of the Quincy & Toledo Railroad Company.

Attest: E. BEMENT,
Secretary of the Quincy & Toledo Railroad Company.

[CORPORATE SEAL.] L. TILTON,
President of the Illinois & Southern Iowa Railroad Company.

Attest: WM. B. CORNEAU,
Secretary of the Illinois & Southern Iowa Railroad Company.

Certificate.

Office of the Toledo & Wabash Railway Co.

TOLEDO, OHIO, *June 28th*, 1865.

I, John N. Drummond, Secretary of the Toledo and Wabash Railway Company, do hereby certify that on this the 28th day of June, A. D. 1865, a meeting of the stockholders of said company was held at its office in the City of Toledo, Ohio, in pursuance of a resolution of its Board of Directors, to take into consideration the ratification or rejection of the foregoing contract for consolidation with the Great Western Railroad Company of 1859; the Quincy and Toledo Rail-

road Company, and the Illinois and Southern Iowa Railroad
395 Company; that due notice of the time, place and object of said meeting was given by publishing the same in the Toledo "Blade" and other newspapers of general circulation in the States of Ohio and Indiana, and also by printed notices, deposited in the post office, addressed to each stockholder of said company; that at said meeting of stockholders sixty-two thousand six hundred and nine (62,609) shares of the capital stock were represented, and that the stockholders proceeded to consider the question of adopting or rejecting said contract, and to determine the same by ballot, one vote being given for each share of stock so represented.

I further certify that upon counting said votes there were given fifty-one thousand three hundred and forty-nine (51,349) votes for adopting, and eleven thousand two hundred and sixty votes for rejecting, said contract.

I further certify that the whole number of shares of the stock of said company, issued and registered on the books thereof, is seventy thousand (70,000) shares, and that the aforesaid number of fifty-one thousand three hundred and forty-nine (51,349) votes given for the adoption of said contract for consolidation is more than two-thirds of the whole number of shares of the capital stock of the Toledo and Wabash Railway Company.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said company the day and year above written.

[Corporate seal. Five-cent Revenue Stamp.]

JOHN N. DRUMMOND, *Secretary.*

Certificate.

Office of the Great Western Railroad of 1859.

SPRINGFIELD, ILLINOIS, *June 30th*, 1865.

I, William B. Corneau, Secretary of the Great Western Railroad Company of 1859, do certify that on this the 30th day of June, A. D. 1865, a meeting of the stockholders of said company was held
396 at its office in the City of Springfield, Illinois, in pursuance of a resolution of its Board of Directors, to take into consideration the ratification or rejection of the foregoing contract for consolidation with the Toledo & Wabash Railway Company, the Quincy & Toledo Railroad Company and the Illinois Southern Iowa Railroad Company; that due notice of the time, place and object of said meeting was given by publishing the same in the "Illinois State Journal" and other newspapers of general circulation in the State of Illinois, and also by printed notices, deposited in the post office, addressed to each stockholder of said company; that at said meeting of stockholders fifteen thousand one hundred and fifty-nine shares of the capital stock were represented, and that the stockholders proceeded to consider the question of adopting or rejecting said contract, and to determine the same by ballot, one vote being given for each share of stock so represented.

I further certify that upon counting said votes there were given fifteen thousand one hundred and fifty-nine votes for adopting, and no votes for rejecting said contract, the whole of said affirmative votes being further attested by a written assent of the approval of said stockholders, duly entered thereon.

I further certify that the whole number of shares of the stock of said company, issued and registered on the books thereof, is seventeen thousand one hundred and forty-three, and that the aforesaid number of fifteen thousand one hundred and fifty-nine votes given for the adoption of said contract for consolidation is more than three-fourths of the whole number of shares of the capital of the Great Western Railroad Company of 1859.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said company the day and year above written.

[Corporate Seal. Five Cent Revenue Stamp.]

WM. B. CORNEAU, *Secretary.*

397 *Certificate.*

Office of the Quincy & Toledo Railroad Co.

JUNE 30, 1865.

I, Edward Bement, Secretary of the Quincy & Toledo Railroad Company, do hereby certify that on this, the 30th day of June, A. D. 1865, a meeting of the stockholders of said company was held at its office, in Springfield, Illinois, in pursuance of a resolution of its board of directors, to take into consideration the ratification or rejection of the foregoing contract for consolidation with the Toledo & Wabash Railway Company; the Great Western Railroad Company of 1859, and the Illinois & Southern Iowa Railroad Company; that due notice of the time, place and object of said meeting was given by publishing the same in the Quincy "Herald" and other newspapers of general circulation in the State of Illinois, and also by printed notices, deposited in the post office, addressed to each stockholder of said company; that at said meeting of stockholders seventy-seven hundred and thirty-five shares of the capital stock were represented, and that the stockholders proceeded to consider the question of adopting or rejecting said contract, and to determine the same by ballot, one vote being given for each share of stock so represented.

I further certify that, upon counting said votes, there were given seventy-seven hundred and thirty-five votes for adopting, and no votes for rejecting, said contract, the whole of said affirmative votes being further attested by a written assent of the approval of said stockholders, duly entered thereon.

I further certify that the whole number of shares of the stock of said company issued and registered on the books thereof is eight thousand, and that the aforesaid number of seventy-seven hundred and thirty-five votes for the adoption of said contract for consolida-

tion is more than seven-eighths of the whole number of shares of the capital stock of the Quincy and Toledo Railroad Company.

398 In witness whereof, I have hereunto set my hand and affixed the corporate seal of said company the day and year above written.

[Corporate seal. Five cent revenue stamp.]

E. BEMENT, *Secretary.*

Certificate.

Office of the Illinois & Southern Iowa Railroad Co.

JUNE 1ST, 1865.

I, Wm. B. Corneau, Secretary of the Illinois & Southern Iowa Railroad Company, do hereby certify that on this, the first day of June, 1865, a meeting of the stockholders of said company was held at its office in Hamilton, Illinois, in pursuance of a resolution of its board of directors, to take into consideration the ratification or rejection of the foregoing contract for consolidation with the Quincy & Toledo Railroad Company, the Great Western Railroad Company. of 1859, and the Toledo & Wabash Railway Company; that due notice of the time, place and object of said meeting was given by publishing the same in the "Carthage Republican" and other newspapers of general circulation in the State of Illinois, and also by printed notices, deposited in the post office, addressed to each stockholder of said company; that at said meeting of stockholders one thousand and thirty-one shares of the capital stock were represented, and that the stockholders proceeded to consider the question of adopting or rejecting said contract, and to determine the same by ballot, one vote being given for each share of stock so represented.

I further certify that upon counting said votes there were given one thousand and twenty-eight votes for adopting, and no vote for rejecting, said contract, the whole of said affirmative votes being further attested by a written assent of the approval of said stockholders, duly entered thereon.

I further certify that the whole number of shares of stock
399 of said company, issued and registered on the books thereof, is one thousand and one hundred, and that the aforesaid number of one thousand and twenty-eight votes given for the adoption of the said contract for consolidation is more than three-fourths of the whole number shares of the capital stock of the Illinois & Southern Iowa Railroad Company.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said company the day and year above written.

[Corporate seal. Five cent revenue stamp.]

WM. B. CORNEAU, *Secretary.*

UNITED STATES OF AMERICA,
State of Ohio, Office of the Secretary of State, ss:

I, C. L. Poorman, Secretary of State of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporation of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody, as Secretary of State, and found to be true and correct, of the articles of consolidation by and between The Toledo & Wabash Railway Company, The Great Western Railroad Company of 1859, The Quincy & Toledo Railroad Company, and The Illinois & Southern Iowa Railroad Company, forming The Toledo, Wabash & Western Railway Company, filed in this office on the 6th day of July, A. D. 1865, and recorded in Volume 3, pages 91, 92, 93, 94, 95, 96, 97, 98 and 99, of the records of incorporations; that said exemplification is in due form and
400 made by me as the proper officer, and is entitled to have full faith and credit given it in every Court and office within the United States.

In testimony whereof, I have hereunto attached my official signature and the great seal of the State of Ohio, at Columbus, this 16th day of December, A. D. 1892.

[SEAL.]

C. L. POORMAN,
Secretary of State.

EXHIBIT E (AGREED STATEMENT OF FACTS).

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Names of Defendants.

In the case of The Wabash, St. Louis and Pacific Railway Company *vs.* The Central Trust Company, of New York, *et al.*, No. 404.

Central Trust Company, of New York. Served. Appearance entered Sept. 12, 1884.

James Cheney, Trustee. Served. Appearance Sept. 12, 1884.

St. Louis, Iron Mountain and Southern Ry. Co. Served. Appearance entered Aug. 18, 1884.

Mercantile Trust Co., of New York. Served. Appearance entered Sept. 11, 1884.

Farmers' Loan and Trust Co., of New York. Served. Appearance entered Sept. 11, 1884.

James R. Jessup. Served. Aug. 19, 1884.

John T. Terry. Appearance entered Aug. 19, 1884.

Daniel A. Lindley. Appearance entered Sep. 9, 1884.
Alfred T. White. Appearance entered Sept. 9, 1884.
401 H. F. Spaulding. Served. Appearance entered Sep. 12, 1884.
Wager Swayne. Appearance entered Aug. 19, 1884.
Lewis H. Meyer. Served.
J. P. Giraud Foster. Served.
Clifford A. Hand. Not served.
Robert C. Martin. Served.
George P. Gould. Appearance entered Sep. 13, 1884.
George S. Coe. Appearance entered Aug. 29, 1884.
George T. M. Davis. Served.
George I. Seney.
John Paton. Served.
Solon Humphreys. Appearance entered Aug. 19, 1884.
Archibald Hopkins. Appearance entered Aug. 25, 1884.
John H. Woodson. Appearance entered Aug. 29, 1884.
James B. Eads.
H. T. Vail.
Charles Parsons.
James Cheney. Appearance entered Aug. 13, 1884.
Abraham W. Hendricks. Appearance entered Aug. 16, 188–.
H. W. Ford. Served.
R. S. Brock. Served.
G. E. Leighton. Appearance entered Aug. 27, 1884.
Thomas B. Coulter. Appearance entered Aug. 29, 1884.
P. H. Brown. Served.
R. A. Betts. Appearance entered Aug. 29, 1884.
George M. Rice. Appearance entered Sep. 13, 1884.
J. Kimball. Served.
E. P. Burnham. Appearance entered Sep. 13, 1884.
J. A. Jameson. Appearance entered Sep. 9, 1884.
The Eel River Railroad Co. Appearance entered Aug. 26, 1884.
Toledo, Peoria & Western R. R. Co. Appearance entered Sept. 1, 1884.
Boone County and Booneville R. R. Co. Appearance entered Dec. 20, 1884.
402 St. Louis, Ottumwa & Cedar Rapids R. R. Co. Appearance entered Aug. 12, 1884.
St. Joseph & St. Louis R. R. Co.
Brunswick & Chillicothe R. R. Co. Appearance entered August 12, 1884.
St. Louis, Council Bluffs and Omaha R. R. Co. Appearance entered Sep. 5, 1884.
St. Louis, Kansas City & Northern Ry. Co.
Des Moines & St. Louis R. R. Co. Appearance entered Aug. 29, 1884.
St. Louis, Jerseyville & Springfield R. R. Co. Appearance entered Aug. 12, 1884.
Des Moines & Northwestern R. R. Co. Served.

Champaign & Southeastern R. R. Co. Appearance entered Sept. 5, 1884.
St. Louis Bridge Co. Appearance entered Aug. 18, 1884.
Quincy, Missouri & Pacific Ry. Co. Appearance entered Sept. 13, 1884.
Hannibal Bridge Company. Appearance entered Oct. 20, 1884.
Tunnel Railroad of St. Louis. Appearance entered Aug. 18, 1884.
John R. Lionberger. Appearance entered Aug. 25, 1884.
Isaac H. Knox. Appearance entered Sept. 13, 1884.
Council Bluffs & St. Louis Ry. Co. Appearance entered Sept. 5, 1884.
Clarinda & St. Louis R. R. Co. Appearance entered Sept. 5th, 1884.
Missouri, Iowa & Nebraska Ry. Co. Appearance entered Sept. 1, 1884.
Humeston & Shenandoah R. R. Co.
Havana, Pantoul & Eastern R. R. Co. Appearance entered Sept. 1, 1884.
Peoria & Pekin Union Ry. Co. Appearance entered Sept. 1, 1884.
Chicago & Western Indiana R. R. Co. Served.
Amos Green. Appearance entered Sept. 13, 1884.
Charles H. Bull. Appearance entered Sept. 13, 1884.
403 Indianapolis, Peru & Chicago Ry. Co. Appearance entered Aug. 19, 1884.
Michigan City & Indianapolis R. R. Co. Appearance entered Aug. 19, 1884.
Chicago, Cincinnati & Louisville R. R. Co. Appearance entered Aug. 19, 1884.
Attica, Covington & Southern R. R. Co. Appearance entered Sept. 5, 1884.
United States Trust Co. Served.
Metropolitan National Bank. Served.
Alexander M. White. Appearance entered Aug. 19, 1884.
David J. Tyson, Jr.
Henry H. Worden. Served.
John N. A. Griswold. Appearance entered Aug. 19, 1884.
Charles E. Whitehead.
William Hill. Appearance entered Aug. 29, 1884.
Edward K. Goodnow. Not served.
Anthony J. Thomas. Not served.
Edward De Rose.
Henry A. Mott.
John W. Ferdon.
Charles Jackson.
G. M. Whittemore.
Townsend Underhill. Served.
James H. Britton. Served.
W. J. Ladd. Served.
J. C. Rogers. Served.

James Compton.
Thomas Mayo.
Benjamin Ham. Served. Appearance entered Sep. 12, 1884.
Henry Phelps. Not served.
Henry Brown.

404 THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

I, Martin W. Sanders, Clerk of the Circuit Court of the United States within and for said District, do hereby certify the foregoing to be a true copy of the names of the defendants in the above entitled cause, and whether they were served with process or not, or whether they entered their appearance or not in said Court.

Witness my official signature and the seal of said Court at Toledo, in said District, this 17th day of November A. D. 1890, and in the 115th year of the Independence of the United States of America.

[SEAL.] MARTIN W. SANDERS, *Clerk,*
By HALLIE W. BROWN,
Deputy Clerk.

EXHIBIT F (AGREED STATEMENT OF FACTS).

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

At a Stated Term of the Circuit Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the first Tuesday in June, being the third day of said month, in the year of our Lord, One thousand eight hundred and eighty-four, and of the Independence of the United States of America, the one hundred and eighth.

Present—The Honorable John Baxter, Circuit Judge.

Among the proceedings then and there had were the following, to wit:

405 FRIDAY, *Oct. 17th.*

No. 404.

THE WABASH & ST. LOUIS RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK.

Chancery.

In this case, upon its own motion, the Court doth order that the original bill of the complainant and the cross-bill of the Central Trust Company of New York, be dismissed as to all parties who claim liens prior to the general mortgage upon complainant's property sought to

be foreclosed in said cross-bill, and that as to all such persons made parties hereto, upon the motion of The Central Trust Company, it pay all costs incident thereto; and, as to all such persons made parties hereto upon complainant's motion, it pay all costs incident thereto; and that said original and cross-bills be retained as to all other parties for such further proceedings as may be proper in the premises.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

I, Martin W. Sanders, clerk of the Circuit Court of the United States, within and for said district, do hereby certify that the within is a true copy of an order entered upon the journal of the proceedings of said court in the therein-entitled cause; and I have compared the same with the original entry of said order, and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said Court at Toledo, in said district, this 15th day of November, A. D. 1890, and in the 115 year of the independence of the United States of America.

MARTIN W. SANDERS, *Clerk,*
By HALLIE W. BROWN,
Deputy Clerk.

406 [Endorsed:] No. 404. United States circuit Court, Northern District of Ohio, Western Division. W., St. L. and P. Ry. Co. *vs.* Central Trust Co. *et al.* Certified copy of dismissal as to certain parties. Fees, 60 cents.

[Endorsed:] Filed in C. C., Jan. 14/95, L. E. Clark, Cl'k.

EXHIBIT G (AGREED STATEMENT OF FACTS).

Commissioner's Deed to Purchasing Committee.

This Indenture made this — day of ——, in the year 1886, between Edmund T. Allen, Commissioner, party of the first part, and James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, trustees, parties of the second part, witnesseth:

Whereas, I, Edmund T. Allen, Commissioner, under and in pursuance of the several decrees and supplemental decrees of the Circuit Courts of the United States, hereinafter named, rendered in a certain cause in Chancery therein then pending, entitled "The Central Trust Company of New York and James Cheney, Complainants, against The Wabash, St. Louis and Pacific Railway Company and others, Defendants, Consolidated Cause," foreclosing the equity of redemption of said defendant railway company in its railway, and its appurtenances, franchises and property hereinafter described, under a certain mortgage or deed of trust, executed by said railway company and described in said decrees as "The General Mortgage" of said railway company, and also foreclosing the equity of redemption of said railway company in certain property, described in an instrument in

writing, executed by said railway company and described in said decrees as "The Collateral Trust," to wit, the decree and supplemental decree rendered in said cause in the Circuit Court of the United States, for the Eastern District of Missouri, on the sixth day
407 of January, and fifth day of March, 1886; for the Southern District of Illinois, on the eighth day of January and the sixth day of March, 1886; for the District of Indiana, on the ninth day of January, and the sixth day of March, 1886; for the Southern District of Iowa, Eastern Division, on the twelfth day of January, and twentieth day of March, 1886; for the Northern District of Ohio, Western Division, on the twelfth day of January, and seventeenth day of March, 1886, and for the Eastern District of Michigan, on the twelfth day of January, and eighth day of March, 1886, did, on the twenty-sixth day of April, A. D. 1886, in the City of St. Louis, in the State of Missouri, offer for sale, and did sell, the property, franchises and appurtenances hereinafter described to James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, constituting a Purchasing Committee under an agreement, bearing date July 15th, 1885, made between the holders of all of the collateral trust bonds and a majority of the general mortgage bonds, and the said purchasers as such committee made the deposit required by said decrees; and,

Whereas, I, the said Edmund T. Allen, Commissioner, as aforesaid, did, within three days after said twenty-sixth day of April, 1886, make due report of the said sale to the several Circuit Courts of the United States hereinbefore named, and the said several Courts did thereafter, on and subsequently to the fifteenth day of June, 1886, make their orders confirming said sale, subject to certain terms and conditions contained in said orders of confirmation, and among them the following, to wit:—

"And it is further ordered, adjudged, and decreed, that, as a further condition of the taking effect of this order, and before the said sale shall stand as finally confirmed, the purchasers last above named shall procure from the trustees of the general mortgage of the Wabash, St. Louis and Pacific Railway Company surrenders and cancellations of the following leasehold interests, reported by the Master as offered for sale and not sold, to wit: the leasehold
408 interest in the Council Bluffs and St. Louis Railroad; the leasehold interest in the Attica, Covington and Southern Railway; the leasehold interest in the Clarinda and St. Louis Railroad; the leasehold interest in the Des Moines and St. Louis Railroad; the leasehold interest in the St. Louis, Jerseyville and Springfield Railroad; the leasehold interest in the Champaign and Southeastern Railroad; and shall also procure the consent of the Wabash, St. Louis and Pacific Railway Company, defendant, and of the said several lessors, to the surrender and cancellation of each of said several leases, which shall also be entered of record in this cause. And any deficit or loss incurred by the Receivers herein from the operation of any of said railroads, as also of the Eel River Railroad, from the first day of June, 1886, shall, as a further condition of the confirmation of said

sale, be charged upon the interests of said purchasers in the property acquired by them at said sale;" and,

Whereas, said Joy, Ashley, Hubbard and Welles, constituting said committee, as aforesaid, did, on the thirty-first day of July, 1886, deposit in the Third National Bank, in the City of St. Louis, subject to my order as such Commissioner, the full amount remaining unpaid of the aggregate of their several bids theretofore reported by me, as aforesaid; and have procured and caused to be entered of record in said cause from the trustees of said "General Mortgage" surrenders and cancellations of the following leasehold interests of said Wabash Railway Company, to wit, in the Council Bluffs and St. Louis Railroad; the Attica, Covington and Southern Railway; the Clarinda and St. Louis Railroad; the Des Moines and St. Louis Railroad; the St. Louis, Jerseyville and Springfield Railroad, and the Champaign and Southeastern Railroad; also, the consent of said Wabash Railway Company and of the railway companies, the owners and lessors of said railways, to the surrender and cancellation of each of said several leases;

Now, therefore, in consideration of the premises, I, Edmund T. Allen, Commissioner as aforesaid, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and
409 convey, unto James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the survivors or survivor of them, and their or his successors or assigns, as trustees under the aforesaid agreement of July 15th, 1885, and in trust for the parties interested thereunder.

All the right of way and railroad of the said The Wabash, St. Louis, and Pacific Railway Company extending from the city of Toledo, in the State of Ohio, through the State of Indiana, into the State of Illinois to Meredosia, with branch to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, with branch from Clayton to the Mississippi river at Hamilton, and with branch from Decatur to East St. Louis; and, also, extending from St. Louis, in the State of Missouri, to Kansas City, Missouri, with extension from Moberly, Missouri, to the State line of Iowa, and a branch from Salisbury, Missouri, to Glasgow, Missouri; that portion of the Clarinda and St. Louis Railway in the State of Missouri; the Peoria, Pekin and Jacksonville Railroad, extending from Pekin, Illinois, to Jacksonville, Illinois; the Springfield and Northwestern Railroad, extending from Springfield, Illinois, to Havana, Illinois; the Braidwood Branch, extending from near Braidwood, Illinois, to the Chicago Branch of the Wabash Railroad; the Madison County Railroad, extending from Edwardsville, Illinois, to its junction with the Chicago and Alton Railroad; the Detroit, Butler and St. Louis Railway, extending from Butler, in the State of Indiana, to Detroit, in the State of Michigan; the Chicago and Paducah Railway, extending from Effingham and Altamont to Streator, in the State of Illinois; the Chicago and Strawn Railway, extending from Strawn to Chicago, in the State of Illinois; the Council Bluffs and St. Louis Railroad, extending from Pattonsburg, Missouri, to the Iowa State line; together with all the embankments, bridges, turnouts, side

tracks, engine and other houses, depots, turntables, engines, cars, machinery, tools, ferry and other boats, depot grounds, real
410 estate pertaining thereto or belonging to said company at any of the terminals thereof, franchises, rights, interests and property and every other thing appurtenant to said railroad or used in connection therewith, together with all rents, issues, profits, credits and choses in action accruing from said railroad and appurtenances not required to be used by the Receivers according to the terms of the decrees heretofore entered in this cause; and also the real estate taken in the name of James F. How, as trustee for said company, in Marion County, Iowa; in Chicago, Illinois; St. Joseph, Missouri, and St. Louis, Missouri; the right of use to the bridge over the Missouri River at Kansas City, Missouri; the right to use certain tracks and terminal facilities in Cook County, Illinois, and in Chicago, Illinois; the right to use certain tracks and terminal facilities owned by the Peoria and Pekin Union Railway Company in Illinois; the right to use certain tracks and depot facilities in the Union Depot in Kansas City, Missouri; the right to use certain tracks and depot facilities in the Union Depot at Hannibal, Missouri; the right to use certain tracks and depot facilities in the Union Depot at St. Joseph, Missouri; the right to use certain tracks and depot facilities in the Union Depot at Detroit, Michigan; the right to use certain tracks extending from Clayton to Quincy, Illinois, and certain depot and station houses in said last-named city; an interest in the elevator company at Council Bluffs, Iowa; the right to use and buy 300 coal cars acquired from the National Rolling Stock Company, November 23, 1883; certain real estate with improvements thereon and terminal privileges in Burlington, Iowa, being lots 13, 13*a*, 14, 15, 15*a*, 16, 17, 18, 19, 20, 21, 22, 23, 24, in the original plat of the City of Burlington, Iowa; and also the leasehold interests of The Wabash, St. Louis and Pacific Railway Company in the following railways and properties, to wit: Boone County and Boonville Railway, extending from Centralia to Columbia, in the State of Missouri; St. Louis, Ottumwa and Cedar Rapids Railway, extending from Coatesville, on the State line between Missouri
411 and Iowa, to Ottumwa, in the State of Iowa; Brunswick and Chillicothe Railway, extending from Brunswick to Chillicothe, in the State of Missouri; St. Louis, Council Bluffs and Omaha Railway, extending from Chillicothe to Elm Flats, in the State of Missouri; Humeston and Shenandoah Railroad, extending from Humeston to Shenandoah, in the State of Iowa; bridge over the Mississippi at St. Louis, with tunnel and terminal rights in said city; bridge over the Mississippi River at Hannibal, Missouri; also all the property, rights, interests and choses in action acquired by said Wabash Railway Company after June 1st, 1880, whether hereinbefore described or not, excepting the railroad and property of the Havana, Rantoul and Eastern Railroad Company, and excepting the property described in said decree as included within the terms of the Collateral Trust, also certain lands and lots adjacent to the lines of railroad aforesaid in Missouri, Illinois, Ohio, Indiana, Iowa, and particularly described in the report of the Special Master, bear-

ing date December 29, 1885, and filed in this cause, the title of which lands and lots has been acquired by the Receivers in said cause in the name of James F. How, trustee.

To have and to hold the above-granted premises, with all the appurtenances and every part thereof, unto the said James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as trustees as aforesaid, their survivors or survivor, and their or his successors or assigns, subject, however, to all the terms and conditions of said orders of said several Courts confirming said sale, as aforesaid, and to all the terms, provisions, conditions, qualifications and restrictions of said decrees, in pursuance of which this deed is made as aforesaid.

In witness whereof, I, the said Edmund T. Allen, Commissioner, as aforesaid, have hereunto set my hand and seal this — day of ——, 1886, to six originals hereof.

—— ——, [SEAL.]
Commissioner.

412 UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis:

Be it remembered, that on this — day of ——, A. D. 1886, during the September term, 1886, of the Circuit Court of the United States, within and for the Eastern District of Missouri, personally appeared in open court Edmund T. Allen, the Commissioner duly appointed by said court in the case of "The Central Trust Company, of New York, and James Cheney against The Wabash, St. Louis & Pacific Railway Company and others, In Equity, Consolidated Cause," who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and acknowledged the same to be his act and deed as Commissioner, as aforesaid, for the consideration and purposes therein mentioned.

In witness whereof, I, A. P. Selby, Clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, have this day, by order of said court, hereunto set my hand and affixed the seal of said court.

——— ———,
Clerk of the United States Circuit Court,
Eastern District of Missouri.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Clerk.

413 EXHIBIT H (AGREED STATEMENT OF FACTS).

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Consolidated Cause. In Equity.

JAMES R. JESUP and ISAAC H. KNOX
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Come again the parties by their respective solicitors, and on motion of the complainants, no objection thereto being made, it is ordered by the Court that John McNulta, the present receiver of certain railway and other property, commonly called the Wabash Railway, formerly owned or controlled and operated by the Wabash, St. Louis & Pacific Railway Company, under an order of appointment heretofore made by this Court in the pending case of Thomas B. Atkins *et al. vs.* said Wabash, St. Louis & Pacific Railway Company, *et al.* be, and he is hereby, appointed also in this cause receiver of all and singular the said railway and other property, being property described in the pleadings herein, with like powers and duties as are already devolved upon him by the orders heretofore entered from time to time in the said cause of Atkins *et al.*

It is further ordered that the said receiver hereafter file his reports or accounts in this cause as well as in the cause of said Atkins *et al.*, that he so keep and state the earnings and expenditures of the railway property under his charge as to show at all times and with all practicable accuracy the separate earnings and expenses of the several divisions of such railway property, and that he keep and

414 state separate accounts from and after the first day of September, A. D., 1888, of the earnings of the several portions of the property respectively covered by each of the underlying mortgages commonly known as "first mortgages."

[Endorsed:] Filed in C. C., Jan. 14/95. L. E. Clark, Cl'k.

EXHIBIT I (AGREED STATEMENT OF FACTS).

In the Circuit Court of the United States for the Northern District of Ohio, May 15, 1889.

Present—The Hon. Martin Welker, Judge.

Consolidated Cause. In Equity. No. 552.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL., Defendants.

And now on this day this cause came on further to be heard on the application of the complainants to confirm the sale made by Bluford Wilson and A. J. Ricks, Esqs., the Special Masters appointed by the decree heretofore entered in this cause for that purpose, to James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, purchasing committee, for fifteen millions five
415 hundred and fifty thousand dollars, and upon producing the said report of sale made by the said Special Masters, which report bears date the fifteenth day of May, 1889, and the Court having fully examined the same, and the proceedings of the said Special Masters, in pursuance of the decree heretofore entered in this cause, finding the same correct in all respects and in conformity with law and said decree, and that the amount bid at the sale of the railways, premises and property mentioned and described in the said decree as reported by the said Special Masters in their said report of sale, to wit, the sum of fifteen millions five hundred and fifty thousand dollars is the highest and best bid that could be obtained for the said railways, premises and property so ordered to be sold, and exceeds the aggregate amount of the highest bids received for the several properties when offered separately as directed by the said decree, and the solicitors for the several parties consenting and waiving all exception and right of exception to the said report,

On motion of Foster & Thomson, solicitors for the complainants,

It is ordered, adjudged and decreed, that the said report of the said Bluford Wilson and A. J. Ricks, Special Masters as aforesaid, be, and the same hereby is, in all things confirmed; that the said bid of the said James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, Purchasing Committee, be, and the same hereby is, accepted; that the said sale be, and the same hereby is, in all things ratified, approved and confirmed, and that all the proceedings of the said Special Masters in regard to the said sale be, and the same hereby are, approved and confirmed.

It is further ordered, that the sum of nine hundred thousand dollars heretofore paid to the said Special Masters in accordance with the terms of said decree of sale by the said purchasers as a pledge that they would make good their said bid if accepted by the Court and

comply with the terms and conditions of the said sale, be, and
416 the same hereby is, accepted in part payment of the said purchase price of the said railways, premises and property.

It is further ordered, that the remainder of the said bid after the payment of the said sum of nine hundred thousand dollars so made at the time of the said sale, viz., the sum of fourteen millions six hundred and fifty thousand dollars be paid by the said purchasers as directed by the said decree of foreclosure and sale in cash, and in the outstanding bonds and funded debt bonds and scrip certificates secured by the several mortgages in this action foreclosed, together with the unpaid and overdue coupons thereto appertaining as provided in the decree and as shall be determined and required by the Court under the decree, and to the extent that the said purchase price shall be paid in bonds and shall not be required or directed by the Court to be paid in cash, the same shall be received at such proportion or value as the holder thereof would be entitled to receive thereon in case the said purchase price were wholly paid in cash.

It is further ordered that upon the full payment to the said Special Masters of the remainder of the said bid, either in cash or in bonds as herein provided, the said Special Masters shall convey to the said purchasers or to their assigns all and singular the railways, premises and property described in and covered by the said several mortgages foreclosed in this action and sold as aforesaid under the decree in this cause, and all right, title, interest and estate of all the parties in this cause of, in and to the same and each and every part thereof, except as particularly reserved in and by the said decree of foreclosure and sale, by a good and sufficient deed therefor, which deed shall first be approved by this Court as to form if the said purchasers shall so require.

It is further ordered that upon presentation to John McNulta, the Receiver heretofore appointed in this cause, of the said Masters'
417 deed, the Receiver in this cause deliver to the grantee therein mentioned the railways, premises and property thereby conveyed.

It is further ordered that all the bonds and coupons received by the said Special Masters in payment of the said purchase price shall be stamped as follows: This bond is held as further assurance of the title derived under foreclosure and sale of the property covered by the mortgage therein mentioned and for no other purpose, and that such bonds be then delivered to the grantee in said Masters' deed mentioned, to be held as a muniment of title.

It is further ordered that upon payment out of the proceeds of said sale to the holder or holders of any of the bonds secured by the several mortgages foreclosed in this cause and not used as above provided in part payment of the purchase price of said railways, premises and property, of the cash dividend to which such bonds shall be entitled, the same shall be marked or stamped as hereinabove directed with regard to bonds so received by the Special Masters in part payment, and shall thereupon be delivered to the said grantee in said Masters' deed mentioned to be held as a muniment of title.

It is further ordered that the said Special Masters be, and they hereby are, authorized to receive payment of the residue of the said purchase price without the Northern District of Ohio.

It is further ordered that all questions in regard to the accounts of the Receiver in this cause and of the distribution of the fund arising from the said sale, including all question as to the amounts and payments of costs, counsel fees, allowances, and expenses be, and they hereby are, reserved.

W. Q. GRESHAM.

418 UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

I, Irvin Belford, Clerk of the Circuit Court of the United States within and for said district and division, do hereby certify that the foregoing contains a true and complete copy of an entry made in the therein entitled cause on May 16, 1889.

Witness my official signature and the seal of said Court at Toledo, in said district, this 2d day of June, A. D. 1896.

[SEAL.] IRVIN BELFORD, *Clerk*,
By J. W. WILSON,
Deputy Clerk.

EXHIBIT K (AGREED STATEMENT OF FACTS.)

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

At a stated Term of the Circuit Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the first Tuesday in June, being the fourth day of said month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the independence of the United States of America one hundred and thirteenth.

Present—The Honorable Howell Jackson, Circuit Judge of the Sixth Circuit, and Hon. Walter Q. Gresham, Circuit Judge for the Seventh District.

Among the proceedings then and there had were the following, to wit:

419 TUESDAY, *June* 18*th*, 1889.

In the Circuit Court of the United States, Southern District of Illinois, District of Indiana, Northern District of Ohio, Western Division. Chancery.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Order for a Deed and for Receiver to Deliver Possession of the Railroads and Properties Sold on May 15, 1889.

Now, on the seventeenth day of June, 1889, come the purchasing committee hereinafter mentioned, and file their petition for a master's deed for and the possession of the railroads and property formerly of the Wabash, St. Louis & Pacific Railway Company, now in possession of John McNulta, Receiver, appointed by this Court, together with the equipment thereto pertaining, purchased by them under the decree herein, and it appearing to the Court that, by its decree made March 23d, 1889, mortgages were foreclosed on
420 certain lines of railroad formerly of the Wabash, St. Louis & Pacific Railway Company, extending from Toledo, Ohio, through the States of Ohio, Indiana and Illinois to East St. Louis, in the State last mentioned, and to various other points in said State, as more particularly described in said decree; and it further appearing that, under and in pursuance of said decree, and on the 15th day of May, 1889, the properties therein described were sold by Bluford Wilson and A. J. Ricks, who were by said decree appointed special masters to execute and carry into effect its provisions, and that James F. Joy, Ossian D. Ashley, Thomas B. Hubbard and Edgar T. Welles, constituting a purchasing committee representing bondholders, were the highest bidders of said sale, and that the said property was struck off to them; and it further appearing that on said fifteenth day of June, 1889, the said special masters, in pursuance of said decree, filed in this Court the report of their proceedings, as by said decree directed, showing, among other things, that the said purchasers had deposited with said special masters, as a pledge that they would make good their bid, the sum of nine hundred thousand dollars ($900,000) in bonds, as provided by said decree; and it further appearing thereafter, on the fifteenth day of May, 1889, by order of this Court duly made, the bid of said purchasers was accepted and the said sale and the report of said special masters and their proceedings in regard to said sale, were in all things ratified, approved and confirmed; and it further appearing that by said decree of sale it was provided that the amounts bid at said sale were to be paid in cash and in outstanding bonds and funded debt bonds and scrip certificates secured by the several mortgages foreclosed, together with interest and overdue coupons thereto appertaining, as should be determined and required by the Court under said decree; and it further appearing

that the said purchasers have now on deposit with the Central Trust Company of New York, of the various bonds secured by mortgages foreclosed as aforesaid, the following bonds and scrip, ex-
421 clusive of interest due and to be computed thereon, to wit:

Toledo & Illinois:		
First Mortgage	$552,000 00	
Funded	32,000 00	
Scrip	43,000 00	
Total		$627,218 25
L. E., Wabash & St. Louis:		
First Mortgage	1,671,000 00	
Funded	140,500 00	
Scrip	120,571 88	
Total		1,932,071 88
Great Western:		
First Mortgage	1,697,332 40	
Funded	136,000 00	
Scrip	91,004 30	
Total		1,924,336 70
Decatur & East St. Louis:		
First Mortgage	1,705,000 00	
Funded	213,000 00	
Scrip	120,050 00	
Total		2,038,050 00
Illinois & Southern Iowa:		
First Mortgage	294,000 00	
Funded	41,500 00	
Scrip		
Total		335,500 00
Quincy & Toledo:		
First Mortgage	490,000 00	
Funded	41,000 00	
Scrip	45,975 00	
Total		576,975 00

422	Hannibal & Naples		434,000 00
	Wabash 7's of '79		1,599,000 00
	Toledo, Wabash & Western, Consolidated	$2,596,000 00	
	Funded	509,500 00	
	Scrip	122,555 00	
	Total		3,228,055 00
	Wabash & Western Second Mortgage	1,479,800 00	
	Funded	164,500 00	
	Scrip	93,925 00	
	Total		1,738,225 50
	Toledo & Wabash, Second Mortgage	977,750 00	
	Funded	105,000 00	
	Scrip	65,478 00	
	Total		1,148,228 00
	Great Western, Second Mortgage	2,449,000 00	
	Funded	284,500 00	
	Scrip	143,020 00	
	Total		2,876,520 00
	Aggregate		$24,744,180 33

And it further appearing that the said purchasers, by their said petition, offer to deposit at such time and in such amounts as the Court may direct, cash sufficient to pay the expenses that the Court may require to be paid, and to pay such sum on first-mortgage bonds and funded-debt bonds and scrip of first-mortgage bonds not deposited in said Trust Company, as the Court may direct to be paid in cash, and, as security for such payment, to deposit all or any part of the bonds held by said Trust Company as the Court may direct, and to substitute cash for bonds at such time and in such
423 amounts as the Court may require cash payments, and further to hold the said purchased property subject to be retaken by the Court in the event any cash payments directed by the Court shall not be made in pursuance of the Court's directions.

The Court thereupon, having duly considered the premises, does order, adjudge and decree that the prayer of said petition be granted; that the said purchasers shall forthwith transfer to the said special masters, Bluford Wilson and A. J. Ricks, the bonds deposited with the Central Trust Company of New York, and hereinbefore mentioned to be held and disposed of by said special masters as the

Court may direct. Notwithstanding such transfer of said bonds to said masters, said purchasing committee shall pay all such sums as may be required from them in carrying out their purchase, and in case of their failure to comply with any orders of the Court with respect thereto the Court may retake the property, and all of it, conveyed by said deed, and annul the title of the purchasing committee with respect thereto, and hold same for further disposition and as security for the rights of the bondholders under the various mortgages foreclosed. Upon such transfer, the said special masters shall forthwith make, execute and deliver to said purchasers a deed or deeds, conveying to them or their assigns all and singular the railways, premises and property described in and covered by the said several mortgages foreclosed and sold as aforesaid under the decree in this cause, and all the right, title, interest and estate of all the parties in said cause of, in and to the same, and each and every part thereof, except as particularly reserved in and by said decree of foreclosure and sale, by a good and sufficient deed therefor.

And the Court further orders, adjudges and decrees that the receiver, John McNulta, now in charge of said railroad, equipment and property so sold, on the presentation of said deed, and on the first day of July, 1889, or as soon thereafter as they shall be ready to receive the same, surrender, turn over and deliver to the said
424 purchasers, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the railways, premises and property, with equipment, purchased by them as aforesaid and conveyed by said deed, and that said Receiver thereafter proceed to close up the affairs of his receivership, and to complete his accounting thereof with all convenient dispatch. This order is made subject in all respects to the provisions of said decree of March 23, 1889.

Approved.

HOWELL E. JACKSON,
Circuit Judge.
W. Q. GRESHAM.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

At a Stated Term of the Circuit Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said district, on the first Tuesday in June, being the fourth day of said month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the independence of the United States of America the one hundred and thirteenth.

Present: The Honorable Howell E. Jackson, Circuit Judge for the Sixth Circuit, and the Honorable Walter Q. Gresham, Circuit Judge for the Seventh Circuit.

Among the proceedings then and there had were the following, to wit:

425 TUESDAY, *June* 18, 1889.

THOMAS B. ATKINS ET AL.
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Bill and Cross-Bill.

Whereas, an order has been made by this Court in the cause of James R. Jesup and others against the Wabash, St. Louis & Pacific Railway Company and others for the execution and delivery of a deed by Special Masters Bluford Wilson and A. J. Ricks, and for the surrender at a certain time of the possession of the railway property in controversy herein by John McNulta, Receiver thereof, to the purchasers at foreclosure sale, upon consideration thereof it is now herein ordered by the Court that, so far as applicable, said order stand, and be taken as the order of the Court in this cause, as well as in the cause of Jesup and others against the Wabash, St. Louis & Pacific Railway Company and others, the Court reserving full power in this cause to determine questions arising herein concerning expenses against the Receiver, or against the railway property, and concerning allowances to counsel or to parties, and full power also to charge upon said property any amounts at any time deemed proper to be charged upon it, and to resume possession of said property, if necessary, and resell the same for the purpose of securing payment of such amounts.

Approved.

HOWELL E. JACKSON,
Circuit Judge.
W. Q. GRESHAM.

426 EXHIBIT L (AGREED STATEMENT OF FACTS).

Agreement Between the General Mortgage and Collateral Trust Bondholders of the Wabash, St. Louis & Pacific Ry. Co. and the Purchasing Committee, Dated July 15, 1885.

Agreement.

Whereas, The Wabash, St. Louis and Pacific Railway Company, being insolvent and unable to pay the interest on its bonds, an early foreclosure and sale of the property of the company, and a reorganization of its most valuable lines into a new corporation is essential for the protection of its general mortgage and collateral trust bonds; and

Whereas, The railroads of the company have for some time past been in the hands of Receivers by whom considerable obligations have been incurred in carrying on the same, part of which is now represented by Receivers' certificates, and the company also owes a large amount of floating debt:

Therefore, to accomplish this end and to dispose of the whole property to the best advantage, this agreement between the undersigned General Mortgage Bondholders, parties of the first part, the undersigned Collateral Trust Bondholders, parties of the second part, and James F. Joy, of Detroit, O. D. Ashley and T. H. Hubbard, of New York, and Edgar T. Welles, of Hartford, who shall constitute
427 a Purchasing Committee, parties of the third part, has been made and entered into this the fifteenth day of July, A. D. 1885.

Witnesseth, that said first, second and third parties mutually agree with each other as follows:

First. That suits for the foreclosure of the said General and Collateral Trust Mortgages shall be prosecuted to a final decree or decrees of sale of all property covered by the said General and Collateral Trust Mortgages of every nature and kind whether real, personal, or other character, and the property shall be sold under such decree or decrees.

Second. That James F. Joy, O. D. Ashley, T. H. Hubbard and Edgar T. Welles shall constitute a Purchasing Committee, who shall be authorized to become the purchasers of the whole or any portion of such property at said sale for the benefit of the bondholders who shall join in this instrument, and under and subject to the provisions of this agreement.

Third. That when the said sale and purchase shall have been consummated, and the title to the property vested in the said Purchasing Committee, it shall cause to be formed a new corporation which shall cover and occupy the lines of the chief routes of the said Wabash, St. Louis and Pacific Railway Company, and whether by the formation of separate corporations to become one afterwards by consolidation in several States or otherwise the substantial main lines and those which may be best put and worked together, and all the equipment, rolling stock, cars, locomotives, and all personal property, choses in action, and all other assets which belong to the present company (except always such lines of roads and their equipment as on account of their encumbrances or for other reasons will become weights not easily carried by the corporation), shall be transferred and conveyed to such new organization and become its property as fully as it is now owned by the present company, and for which the new company shall pay the Purchasing Committee as follows, to wit:

(1) $30,000,000 of the bonds of the new company, hereinafter called Debenture Bonds, bearing interest at six per cent. per
428 annum, payable semi-annually and perpetual, but dependent upon income for the interest, which shall not be cumulative, and with voting powers at the rate of one vote for each one hundred dollars. Of the Debenture Bonds so issued $3,500,000 shall be preferred, so far as the interest is concerned, and shall have a prior first lien upon the earnings of the company, and so far take precedence of the remaining Debenture Bonds. All the said Debenture Bonds to bear date even with the date of the organization of the new company, and to be secured by mortgage, with such provisions as will

secure to the holders the right to the first net earnings of the company.

(2) Preferred stock in the new company, to the amount of about $23,100,000, and common stock to the amount of about $27,300,000.

Fourth. The $3,500,000 of bonds, preferred as to the interest, as above, shall be applied in payment of certain debts of the present company, known as the endorsed notes, and also a debt of $900,000, amounting together to $3,500,000, for which Collateral Trust Bonds are also pledged; $16,000,000 shall be paid to the holders of the present General Mortgage Bonds; $6,000,000 shall be paid to the holders of the remaining Collateral Trust Bonds, or such bonds of those respective classes as will be willing to accept the same in satisfaction of all claims under their bonds; about $4,000,000 shall be appropriated for the purposes of Articles 6 and 7 of this agreement, and the balance of about $500,000 shall remain in the treasury of the new company.

Fifth. The new company shall have the right to redeem, at par, the $3,500,000 of the aforesaid Preferred Debenture Bonds at any time within twenty years from the date of their issue, after five years from such date.

Sixth. In order to raise the requisite funds to pay off the Receiver's obligations (which the Purchasing Committee are requested and authorized to pay accordingly), it is agreed as follows:

(1) The bondholders (both General Mortgage and Collateral Trust) coming in under this agreement, shall contribute two
429 per cent. on the amount of their new bonds to be received in exchange for their existing bonds as aforesaid, the same to be payable at the time of such exchange, and for the amount so paid such bondholders shall be entitled to receive Debenture Bonds, dollar for dollar.

(2) The Purchasing Committee, on such conditions and limitations as to time or otherwise, as they may think fit, may offer to the stockholders (both preferred and common) of the present company an interest in the preferred and common stock of the new company, corresponding as nearly as may be to their holdings in the present company, on payment as to the preferred stock of eight dollars per share and the common stock of six dollars per share; Debenture Bonds for the amount so paid being given (dollar for dollar) in addition to the shares in the new company.

Seventh. In case any of the said stockholders should not elect to take the Stock and Debenture Bonds thus offered them, the said General Mortgage and Collateral Trust Bondholders shall take the same *pro rata* on the same terms as they were offered to the old stockholders, and subject to such conditions and limitations as shall from time to time be prescribed by the Purchasing Committee; provided, however, that the amount to be paid by such bondholders under this clause shall not exceed five per cent. on the par value of their bonds.

Eighth. All the property and lines of road owned by the present company which may be purchased by the said Purchasing Committee and not conveyed to the new company shall be held by the

Purchasing Committee, subject to the directions of the board of the new company, and be resold or organized into other corporations as such board may direct, and in the latter case the stock shall belong to the new company, whether held by it directly or by trustees for its benefit.

Ninth. No future mortgage shall be placed upon the property, which shall take precedence of the aforesaid mortgage to secure the interest of the said Debenture Bonds, but it is expressly understood and agreed for the purpose of providing for the underlying
430 bonds as they fall due, a consolidated mortgage having such precedence may be made upon the property to an equal amount with the aggregate of all underlying mortgage bonds, under which bonds may be issued from time to time to pay or replace the bonds falling due, and that such mortgage may provide for the issue thereunder of an additional amount of bonds, not exceeding $3,000,000; provided, however, that no bonds shall be issued beyond the amount of the underlying bonds, except by the unanimous vote of every member of the Board of Directors of the new company and with the sanction of two-thirds of the Debenture Bondholders.

Tenth. Holders of general mortgage and collateral trust bonds in England and a broad who may become parties to this agreement shall deposit their bonds and pay the money, as above provided, in and to the Railway Share Trust Company, Limited, of London, to the credit of the Purchasing Committee, and which company shall transmit the same to such Trust Company in New York as may be designated by the Purchasing Committee to the same credit. And holders of the same class of bonds in America who may become parties to this agreement shall deposit their bonds with the said designated Trust Company through the Purchasing Committee and pay the money which may be required, as herein provided, to the said Purchasing Committee, which said money shall be deposited in said Trust Company to the credit of said committee, and shall only be drawn on the acquisition of the property to be purchased by them, as herein provided, or for the expenses of reorganization, and then only on the joint check or checks of all the members of said committee.

Eleventh. This contract being for execution or for signatures in England as well as in the United States is prepared in duplicate, one for each country, and the signatures made upon either copy shall have the same force and effect as if they were attached to one copy, and both shall be taken to be and shall be only one and the same contract.

Twelfth. As there may be holders of bonds in amounts
431 so small that the two or five per cent. on their bonds will not make up the amount of a single debenture bond, in all such cases scrip or certificates for the amount will be given to the subscribers convertible into debenture bonds, subject to such conditions and restrictions as may from time to time be prescribed by the Purchasing Committee.

Thirteenth. In the reorganized Company the Board of Directors shall consist of such odd number, not exceeding fifteen, as shall be

fixed upon in the Articles of Association, and, of the highest even number of the said Board, one-half shall be nominated by the Debenture Bondholders, and the other half by the stockholders, and the parties so nominated shall agree upon the odd number to be elected to the Board, who shall be President of the Company; and they failing to agree, he shall be nominated by the Trustee of the Debenture Bond Mortgage, and the Directors so nominated shall constitute and be elected the Board of the new Company; and this Constitution of the Board shall be secured by the Articles of Association, if practicable, and, if not, then under such arrangement and agreement as shall be devised and advised by counsel and approved by the Purchasing Committee.

Fourteenth. Both the General and Collateral Trust Bondholders hereby unite in requesting the Trustee under the General Mortgage to present a memorial to the Court for an order appropriating so much money not exceeding $20,000, as may be absolutely necessary to pay such actual expenses as the said Purchasing Committee may incur in carrying out the provisions of this agreement.

Fifteenth. It is expressly understood and agreed that modifications may be made in this agreement or in the terms of reorganization by the London Committee of Bondholders and the Purchasing Committee by formal resolutions of such respective bodies to that effect; provided, however, that no additional liability shall be created against the bondholders. And the parties comprising the Purchasing Committee agree to act under the authority and power provided for in this agreement, and to execute and carry out the
432 duties and trusts herein provided for.

In witness whereof, the parties hereto have set their signatures the day and year above written, and affixed thereto the number of bonds held by the first and second parties respectively.

Amendments.

The following amendment to the foregoing agreement was made by joint resolution of the London Committee and the Purchasing Committee, and adopted January 13, 1887. Section third as amended to read as follows, to wit:

"Third. That when the said sale and purchase shall have been consummated, and the title to the property vested in the said Purchasing Committee, it shall cause to be formed a new corporation which shall cover and occupy any or all the lines of the chief routes of the said Wabash, St. Louis and Pacific Railway Company, and whether by the formation of separate corporations to become one afterwards by consolidation in several States or otherwise the substantial main lines and those which may be best put and worked together, and all the equipment, rolling stock, cars, locomotives, and all personal property, choses in action, and all other assets which belong to the present company (except always such lines of roads and their equipments as on acount of their encumbrances or for other reasons will become weights not easily carried by the corporation),

shall be transferred and conveyed to such new organization and become its property as fully as it is now owned by the present company, and for which the new company shall pay the Purchasing Committee as follows, to wit, &c."

And the following resolution adopted by said London Committee and Purchasing Committee:

Resolved, That in order to provide the supplementary funds which in the judgment of the Purchasing Committee may be necessary to complete the reorganization contemplated by the
433 agreement of July 15, 1885, said Committee is hereby authorized and empowered to sell any of the lines, not considered essential to the system of the new company, and any of the securities acquired by said committee, and to appropriate the proceeds of such sale or sales to the payment of Receiver's obligations, overdue coupons on the underlying mortgage, or legal expenses incurred in defense of the bondholders, parties to said agreement; provided, however, that any action under this resolution shall be invalid unless authorized by the unanimous vote of the said Purchasing Committee.

Agreement, made November 21st, 1887, between Henry K. McHarg, John T. Terry, Cyrus J. Lawrence and T. B. Atkins, representing holders of mortgage bonds of the Wabash, St. Louis and Pacific Railway Company, and called hereinafter for convenience the Bondholders' Committee; James F. Joy, O. D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the Purchasing Committee of the General Mortgage and Collateral Trust Bondholders of said Company, hereinafter called the Purchasing Committee; The Central Trust Company, of New York, and The Wabash Western Railway Company, hereinafter called the Railway Company:

Whereas, The outlines of a certain plan of re-organization have been agreed upon between the said Bondholders' Committee and said Purchasing Committee; and

Whereas, It is necessary to a clear understanding of the engagements undertaken by the respective parties to this agreement that the details of said plan should be plainly set forth, it is

Therefore, agreed, by and between the parties aforesaid, as follows:

The Purchasing Committee will invite by public advertisement all holders of mortgage bonds, funded debt bonds and scrip secured by liens upon the lines of the Wabash, St. Louis and Pacific Railway Company, east of the Mississippi River, to deposit their securities in the said Central Trust Company under the following conditions.

434 First. All holders of bonds and scrip secured by mortgage upon any of the said property, upon deposit of their securities, shall accept this plan of reorganization, and authorize the Purchasing Committee, as their agents, to foreclose their respective mortgages, and to buy in the property covered by said mortgages,

with the securities so deposited according to any practicable, legal method which may be prescribed in the decree or decrees of sale.

Upon the deposit of first mortgage bonds and funded debt bonds, and scrip pertaining to them as aforesaid, the said Trust Company agrees to advance to the depositors the interest on their respective bonds secured by said mortgages, except those of the Detroit Division, together with interest on overdue coupons at the rate of 6% per annum to November 1st, 1887, and also past due interest on said scrip to November 1st, 1887, with interest at 6% thereon to said date. The bonds and coupons and said scrip shall be held by the said Trust Company as security for advances, and said over-due coupons and said interest, as well as subsequently maturing coupons and interest shall be collected by said Trust Company from the Receiver who may be in possession of said lines, as said coupons and interest may be paid by order of the Court, until the transfers of the property under the contemplated foreclosure sales. All advances that may be made by said Trust Company hereunder shall be on account of The Wabash Western Railway Company, which hereby agrees to repay the same with interest, to the extent that the same may be unpaid upon the fulfillment of this plan.

Second. The Purchasing Committee on their part agree to foreclose the said mortgages, to the extent that foreclosure shall be necessary to carry out this plan, and to buy the property covered by the said mortgages as aforesaid. The said Committee have power to dispense with foreclosure when the purposes of this agreement may be accomplished without the foreclosure of any of such mortgages.

Third. Upon the foreclosure of the mortgages as aforesaid and upon acquisition of the title, as the agents of the mortgage
435 bondholders, parties to this agreement, the Purchasing Committee agree to organize at once one or more companies, and to convey to said company or companies the property so purchased, and the said Purchasing Committee also agree, and The Wabash Western Railway Company on its part hereby agrees, that when said new company is, or said companies are, organized and the property purchased as aforesaid shall have been conveyed to said company or companies, they will cause, so soon as they legally may be able, the lines of said The Wabash Western Railway Company to be consolidated with the lines of said company or companies, and the consolidated company so formed, as soon as possible thereafter, will create a first mortgage and a second mortgage upon the consolidated lines, as hereinafter specified.

Fourth. The First Mortgage shall cover all the consolidated lines east and west of the Mississippi River, subject only to the existing mortgages on the lines of The Wabash Western Railway Company, and shall be for the amount of $34,000,000, payable in fifty years from November 1, 1887, with interest payable semi-annually May 1st and November 1st, at the rate of 5 per cent. per annum, both principal and interest in gold of the present standard of weight and fineness. Of this mortgage $11,741,000 shall be reserved to meet

the same amount of Mortgage bonds on the lines of The Wabash Western Railway Company at or before maturity, at the option of the holders of said underlying bonds secured by the following mortgages:

North Missouri, First Mortgage	$6,000,000 00
St. Louis, Kansas City and Northern R. E. and Ry. Mortgage	3,000,000 00
St. Charles Bridge, First Mortgage	1,000,000 00
" " " Second "	388,500 00
Brunswick and Chillicothe	626,000 00
St. Louis, Council Bluffs and Omaha	304,500 00
St. Louis, Ottumwa and Cedar Rapids	322,000 00
Boone County and Booneville	100,000 00
	$11,741,000 00

436 The balance of said new first mortgage bonds, amounting to $22,259,000, shall be exchanged for first mortgage bonds deposited under this plan secured by the following mortgages and for other purposes as follows:

Toledo and Illinois, First Mortgage	$900,000 00
Lake Erie, Wabash and St. Louis, First Mortgage	2,500,000 00
Quincy and Toledo, First Mortgage	500,000 00
Great Western, First Mortgage	2,500,000 00
Illinois and Southern Iowa, First Mortgage	300,000 00
Hannibal and Naples, First Mortgage	500,000 00
Decatur and East St. Louis, First Mortgage	2,700,000 00
Funded Debt Bonds and Scrip of above First Mortgages	1,523,199 87
Chicago Division, First Mortgage	4,500,000 00
Detroit Division, First Mortgage	2,052,000 00
Detroit Terminal	1,000,000 00
Overdue coupons and interest on Second Mortgages, Funded Debt Bonds and Scrip of same, about	1,300,000 00
Overdue coupons of Consolidated Mortgage Bonds, Mortgage 7's of 1879, and on Funded Debt and Scrip of Consolidated Mortgage, about	940,000 00
Overdue coupons of Detroit Division, about	230,000 00
	$21,450,199 87
Leaving a surplus that may be issued to pay for the advances made by the said Trust Company on First Mortgage coupons, in the event that such advances shall not have been repaid upon the fulfillment of this plan from the other resources herein provided therefor	808,800 13
	$22,259,000 00

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437 It is further agreed that the bonds reserved for the Detroit Terminal, and to secure the Trust Company in all, $1,808,-800.13, if not used for the purposes specified above, may be issued only for the acquisition of other property, or railway lines at no more than $20,000 a mile, which shall be covered by the said first mortgage or by supplementary mortgage, if such lines or property cannot be included in the original mortgage when the same is executed.

2. That said mortgage amounting to the sum of $34,000,000 shall be extended over and shall be a first lien upon all the lines and property which may be conveyed to or owned by the New Consolidated Company at the time of consolidation, subject only to prior liens aforesaid upon the lines west of the Mississippi the existing, and including all terminals, leases and rolling stock in the possession of The Wabash Western Railway Company, the Receiver of the Wabash lines east of the Mississippi River, and the Purchasing Committee, except such rolling stock as may be owned by the New York and Pacific Car Trust Company, and except such lines of road now held by the said Purchasing Committee, as may be reserved and pledged by said Purchasing Committee, in accordance with this agreement, as hereinafter stated.

3. It is also agreed that the overdue coupons of bonds secured by first and second mortgages, together with the coupons of funded debt bonds and the interest on the scrip of same, as specified in the foregoing table, shall be entitled to interest at the rate of six per cent. per annum from the date of maturity thereof to November 1, 1887; on the First Mortgage bonds, funded debt bonds and scrip in cash, and on Second Mortgage bonds, funded debt bonds and scrip in new First Mortgage bonds, as above set forth.

Fifth. The second mortgage shall run for fifty years from February 1, 1888, and shall bear interest at 5 per cent. per annum, payable February 1st and August 1st, both principal and interest in gold of the present standard of weight and fineness, and shall cover all the lines of railway east of the Mississippi River held by
438 Receiver McNulta and the Purchasing Committee, except the lines to be reserved and pledged by said Committee, and shall include the Chicago and Detroit Divisions and all terminals, leases or property which may be conveyed to the New Company appertaining to lines east of the Mississippi River and shall include also by supplementary mortgage or otherwise, as may be most practicable, a first lien on the rolling stock now owned by the New York and Pacific Car Trust Company, provided said Car Trust Company shall accept the bonds reserved for the purpose in exchange for the certificates now held by said Car Trust Company, and shall contain proper provisions for keeping good the said equipment as delivered to the New Company.

The amount of said second mortgage, as above described, shall be $14,000,000. Into this the following bonds shall be convertible:

Toledo and Wabash Second Mortgage	.....	$1,000,000	00
Wabash and Western " "	.....	1,500,000	00
Great Western " "	.....	2,500,000	00

Consolidated Convertible Mortgage	2,610,000 00
Wabash Sevens of 1879	1,600,000 00
Funded Debt Bonds and Scrip of Second Mortgages and Consolidated, about	1,481,475 50
To be issued only for Car Trust Certificates	3,000,000 00
	$13,691,475 50
Leaving balance for use for New Company	308,524 50
	$14,000,000 00

It is also agreed that the second mortgage of the New Company, herein referred to, shall contain a clause under which foreclosure rights under said mortgage shall be waived until six months after continuous default in payment of two coupons, until three
439 consecutive years' interest shall have been paid upon the bonds secured by said mortgage, when said waiver shall cease to have force and effect.

Sixth. It is also agreed that the Purchasing Committee shall, at the earliest practicable date, pledge with the Central Trust Company the following unencumbered lines of railway, viz.:

The Des Moines and Nort-western	114.9	Miles.
" Des Moines and St. Louis	67.3	"
" St. L., Jerseyville and Springfield	71.4	"
" Springfield and Nort-western	44.1	"
" Peoria, Pekin and Jacksonville	75.2	"
" Attica, Covington and Southern	14.5	"
" Champaign and South Eastern	11.6	"
	399	Miles.

by declaration of trust or otherwise, as may be most convenient and satisfactory to said Trust Company, and shall also deposit with said Trust Company mortgage bonds of the Humeston and Shenandoah Railway Company, to the amount of $1,342,000, subject to the surrender of coupons on said bonds according to the existing agreement with the Chicago, Burlington and Quincy R. R. Co. These lines of railway and mortgage bonds shall be held in trust for the following purposes:

1. To provide for the repayment of any unpaid advances which may be made by said Trust Company under this agreement, and also to provide for interest on the certificates which may be issued by said Trust Company for bonds deposited under this agreement so far as the same may be necessary in consequence of possible delay in the reorganization or in consequence of inadequate means from the earnings of east lines while in possession of the Receiver.

2. For the payment of any debts existing, or which may be adjudged, against Receivers Humphreys and Tutt or their successors, the Purchasing Committee, not otherwise provided for, and also the expenses of this reorganization.

440 8. The proceeds of any of these lines or bonds, when sold after the payments provided for in the foregoing sections 1 and 2, shall be appropriated to the purchase and cancellation of first mortgage bonds, at not over 105, either by purchase or call.

It is also agreed that the sales of any of these lines or of the mortgage bonds pledged as herein provided, shall be at the discretion of the Purchasing Committee, and it shall not be obligatory upon that Committee to sell any of the lines they may conclude should be retained in the system of the New Company, unless required by the said Trust Company; but in case any such lines are retained, they shall remain pledged to secure the Trust Company for all advances hereunder until such advances are repaid.

Seventh. The Bondholders' Committee shall assist in carrying out this plan, in connection with the Purchasing Committee under this agreement; and to this Committee the new mortgages shall be submitted for approval by the counsel acting solely for the said Committee before execution thereof. The said mortgages shall contain the provisions herein agreed upon and only such additional clauses, conditions and provisions as are usual and proper to be inserted in such instruments. The new first and second consolidated mortgage bonds shall be delivered to the said Central Trust Company for exchange for its certificates issued on deposit of the old securities. Said Bondholders' Committee shall be allowed a sum in compensation for all services and disbursements, not to exceed in the aggregate $15,000 and actual expenses; and said sum may be apportioned by said Committee among its members according to their judgment of the services performed respectively by them.

Eighth. When any mortgage bonds are deposited in the said Trust Company under this agreement, the holders thereof shall receive from said Trust Company, in exchange for the same, temporary certificates until engraved certificates can be given therefor, when the temporary certificates may be exchanged for those engraved. All said
441 certificates, temporary or engraved, shall bear interest at the rate of 5 per cent. per annum, from November 1, 1887, payable semi-annually May 1st and November 1st, until the new bonds are issued and delivered to said Trust Company to be exchanged for the certificates. The holder of any such certificate, by accepting the same, adopts the provisions of this agreement and becomes bound thereby as a party to the same. Each issue of bonds shall have its own form of certificate.

Ninth. It is also agreed that all payments to be made under this agreement, whether for the advance of interest or for reorganization expenses, including the compensation provided for in Article 7, are to be paid from the funds provided by this agreement through the said Trust Company.

Tenth. A limit of time for the deposit of bonds under this agreement may be fixed in the invitation to the mortgage bondholders to be extended by public notice, as provided in Article 1, by the Purchasing Committee and Bondholders' Committee acting by a majority of each, who may, in their discretion, impose terms on

bondholders who may desire to make deposit after the expiration of such limit.

Eleventh. It is also understood and agreed that upon the consolidation of the lines east and west of the Mississippi River the said New Company shall make a mortgage over all its lines to secure debenture bonds, and shall make and issue debenture bonds for exchange with the holders of certificates of the Mercantile Trust Company and of the Purchasing Committee, entitling them to debenture mortgage bonds in strict accordance with the agreement of July 15, 1885, made between the holders of the General Mortgage and Collateral Trust Mortgage Bonds and the Purchasing Committee; said mortgage to be subject only to the mortgages created under this agreement for existing prior liens. Said New Company shall also issue its stock in accordance with said agreement of July 15, 1885.

Twelfth. The present Receiver, Gen. McNulta, or his suc-
442 cessor, shall remain in possession of the mortgaged property now in his charge for the protection of the bondholders, until he be directed by the Court to deliver possession to the purchaser of the property upon its sale.

Thirteenth. If the new first and second mortgage bonds are not delivered to the said Central Trust Company for exchange on or before July first, 1889, any holder of a certificate of said company for bonds deposited hereunder shall have the right to surrender his certificate and receive from the said company his bonds, coupons and scrip deposited, provided the same shall not have been used in the purchase of property under this agreement, and upon any re-exchange of original securities for certificates of deposit thereof a settlement shall be made between the said Trust Company and the holder of the certificate surrendered, on the basis of restoration of the bondholder to all the rights and securities possessed by the depositor at the time of deposit, and such cash payments with interest shall be made as are necessary to effect such settlement.

Fourteenth. A majority of the Bondholders' Committee may fill any vacancies therein occasioned by resignation or otherwise, except that the present vacancy shall be filled by the nominee of the Lawrence First Mortgage Bondholders' Committee.

Fifteenth. The Purchasing Committee at any time in its discretion may, and in the event that it becomes impossible to execute this plan, by reason of the purchase or foreclosure of any of the divisions of said property by others than the Purchasing Committee, or by reason of the failure to secure a majority of each of the divisional first mortgage bonds before July 1, 1888, shall, decline to proceed with the execution of this plan, in which event the holders of certificates of deposit shall be entitled to the return of the securities represented thereby from the Trust Company holding the same.

Sixteenth. In the discretion and with the unanimous consent of the members of the Purchasing Committee and Bondholders'
443 Committee any roads not deemed essential to the consolidation may be omitted therefrom if the same cannot be acquired under the terms of this agreement, and this plan may likewise be

modified in any matter of detail not affecting the substantial rights of the parties.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Clk.

EXHIBIT M (AGREED STATEMENT OF FACTS).

[1308.]

JAMES COMPTON
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others.

Proceedings before the District Court of the State of Ohio, in and for the County of Lucas and State of Ohio, at a term thereof begun and held at the Court house in the City of Toledo, in said county, on Monday, the twelfth day of March, in the year of our Lord one thousand eight hundred and eighty-three.

Present: Honorable E. T. Hamilton, Honorable G. M. Barber, Honorable J. E. Ingersoll, Judges.

Be it remembered, that heretofore, to wit: On the twenty-sixth day of April, 1882, the Clerk of the Court of Common Pleas filed, in said District Court, the original pleadings and papers filed in the above-entitled cause in said Court of Common Pleas, together with a certified transcript of the final decree, and all journal entries made in said cause by said last-named Court.

The original petition in said cause was filed in said Court
444 of Common Pleas on the third day of February, 1880, as appears by the endorsements thereon of the Clerk of said Court, which petition is in the words and figures as follows, to wit:

Petition.

(Filed February 3, 1880.)

STATE OF OHIO, *Lucas County:*

In the Court of Common Pleas.

JAMES COMPTON, Plaintiff,
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, as Trustee, Defendants.

Petition.

And now comes this plaintiff and brings this, his petition, against the Toledo, Wabash & Western Railway Company, the Wabash Rail-

way Company, the Wabash, St. Louis & Pacific Railway Company, James R. Jesup and Isaac H. Knox, as Trustees, and George I. Seney, as Trustee, who are the defendants above named, and alleges:

That on and prior to the first day of October, 1862, the Toledo & Wabash Railway Company was a corporation duly organized and existing under and by virtue of the laws of the States of Ohio and Indiana, and owning a line of railway extending from the city of Toledo, in the State of Ohio, and passing through the counties
445 of Lucas, Henry, Fulton, Defiance and Paulding, in said State; and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point in the west line of State Line City, in said last named county.

That the said Toledo & Wabash Railway Company was itself a consolidated railway company, and was formed by the consolidation of the Toledo & Wabash Railroad Company, a corporation existing within and by virtue of the laws of the State of Ohio, and organized to maintain and operate a railroad from Toledo to Harrison township, Paulding county, in the State of Ohio, and the Wabash & Western Railway Company, a corporation existing within and by virtue of the laws of the State of Indiana, and organized to maintain and operate a line of railroad from State Line, in Allen county, to State Line City, Warren county, in the State of Indiana.

That on or about the first day of October, 1862, the Board of Directors of the Toledo & Wabash Railway Company, in pursuance of the power and authority in them by law vested, resolved, that the president of said company be authorized and directed to cause to be prepared bonds of the said company to an amount not exceeding six hundred thousand (600,000) dollars, for the purpose of providing further equipment and satisfying other requirements of the said company; which bonds were to bear date November, 1862, and the principal thereof was to be payable to a trustee or the bearer, in the city of New York, on the first day of May, 1883, and to bear interest at seven per cent. payable semi-annually at the same place, which interest was to be represented by coupons; that the bonds so to be issued should be executed in the usual manner and under the corporate seal of said company, and should be convertible into the common stock of said company at par, at any time within five years from the date thereof, but should not be entitled to a dividend for any time on which the holder thereof should have received interest; and that the executive committee of said company be authorized
446 to issue, sell and dispose of the said bonds in such manner and upon such terms as they should deem to be for the best interest of said company.

All of which will more fully and at large appear by reference to a copy of said resolutions hereto annexed, marked "Exhibit A," and which this plaintiff prays may be taken and received as part of his complaint.

That on or about the first day of November, 1862, the said Toledo & Wabash Railway Company, by its president and secretary, duly authorized thereto and in accordance with said resolution, under its

corporate seal executed a series of bonds amounting altogether to the sum of six hundred thousand (600,000) dollars, known as equipment bonds, severally and consecutively numbered, and being all of the same tenor and purport, except the numbers thereof, and the sums thereby severally secured and payable, and that the following is a copy of one of said bonds in said series:

No. 17. $1,000.

UNITED STATES OF AMERICA,

States of Ohio and Indiana.

Toledo & Wabash Railway Company.

Issue of Equipment Bonds not to Exceed $600,000 in Amount.

The Toledo & Wabash Railway Company, a body corporate, acknowledges itself to be indebted to the bearer hereof, for money borrowed, in the sum of one thousand dollars, to be paid on the first day of May, 1883, with interest from and after the first day of May, 1863, at the rate of seven per centum per annum, payable semi-annually on the first day of May and the first of November in each year, on the surrender of the respective interest warrants
447 hereto appended, both principle and interest payable at the company's agency in the city of New York.

This bond is one of a series authorized to be issued under resolutions of the board of directors of said company, passed on the first day of October, 1862, to an amount not exceeding $600,000, and is convertible with the common stock of said company at par at any time within five years from the date hereof, but stock to be issued therefor shall not be entitled to a dividend for any time for which the interest may be paid on this bond, which is convertible.

In witness whereof, the said company has caused its corporate seal to be hereunto affixed, and its president and treasurer to subscribe their names hereto, the first day of November, 1862.

[L. S.] A. WOODS, *President.*
J. N. DRUMMOND, *Treasurer.*

[Revenue Stamp, 25 cents, cancelled.]

That annexed or attached to each of said several bonds was a series of interest warrants or coupons for each semi-annual installment of interest which would become due and payable on said bonds by the terms thereof until the principal of said bonds should become due and payable, and that all of said interest warrants or coupons were and are of the same tenor and purport, excepting the sums severally secured thereby, and the time when the same would become due and payable, and the numbers thereof; that said interest warrants or coupons were and are payable on the first days of May and November in each year; and that the following is a copy of one of said coupons or interest warrants.

448 Toledo & Wabash Railway Co.

Interest Warrant

For thirty-five dollars, payable in the City of New York, May 1, 1875, for six months' interest on Equipment Bond for $1,000. No. 17.

J. N. DRUMMOND, *Treas. L.*

That each of said several coupons was executed and signed by said Toledo & Wabash Railway Company by its treasurer duly authorized thereto.

That after said several bonds and the said several coupons or interest warrants thereunto annexed or attached had been duly executed as aforesaid by the said Toledo & Wabash Railway Company, cetain of said bonds, to wit: Numbers 12, 13, 17, 18, 19, 21, 22, 27, 28, 29, 30, 31, 52, 59, 61, 77, 80, 81, 82, 83, 85, 86, 87, 92, 105, 126, 133, 135, 137, 138, 139, 140, 150, 155, 156, 157, 165, 167, 176, 177, 181, 186, 189, 207, 208, 211, 212, 213, 214, 215, 219, 220, 237, 238, 239, 241, 245, 250, 251, 252, 253, 254, 255, 271, 272, 273, 274, 275, 279, 280, 281, 282, 283, 284, 285, 286, 287, 289, 291, 301, 304, 305, 312, 313, 316, 339, 350, 352, 356, 357, 362, 368, 388, 390, 391, 302, 393, 401, 403, 405, 408, 412, 423, 425, 428, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, of the denomination of $1,000 each; also numbers 503, 504, 505, 506, 507, 517, 519, 521, 522, 524, 531, 532, 533, 536, 550, 551, 552, 554, 561, 563, 564, 565, 566, 578, 579, 580, 588, 589, 590, 591, 592, 594, 595, 596, 598, 599, 601, 602, 608, 620, 621, 622, 625, 626, 627, 631, 634, 635, 637, 638, 649, 667, of the denomination of $500. Each were, long prior to the commencement of this action by said Toledo & Wabash Railway

449 Company, for value received, sold and delivered to *bona fide* purchasers thereof, who thereupon became the *bona fide* owners and holders thereof for value; and that prior to the commencement of this action the said plaintiff, for a valuable consideration and in good faith, purchased the said bonds hereinbefore particularly mentioned, and of which the numbers are hereinbefore specifically enumerated, including the coupons or interest warrants thereto annexed or attached hereinafter particularly mentioned, being all the said coupons or interest warrants attached or annexed to said bonds which fell due and became payable on and after the first day of May, 1875, except the coupons or interest warrants which became payable on each of said bonds, numbers 561, 563, 565 and 566, on the first day of May, 1875, from the *bona fide* holders of said bonds, and that the same were by said *bona fide* holders assigned, transferred and delivered to him, the said plaintiff, and that the said plaintiff is now the *bona fide* holder and owner for value of said last mentioned bonds and coupons, and of all the moneys due and to become due thereon.

That on or about the twenty-ninth day of May, 1865, by an agreement signed by its president and secretary, duly authorized

thereto, and sealed with its corporate seal, the said Toledo & Wabash Railway Company agree to consolidate its road, property and capital stock with the road, property and capital stock of the following named railroad corporations, duly organized and existing under and by virtue of the laws of the State of Illinois—viz., the Great Western Railway Company of 1859, the Quincy & Toledo Railroad Company; and the Illinois & Southern Iowa Railroad Company; and that the new corporation formed by such consolidation became and was known as the Toledo, Wabash & Western Railway Company.

That by the terms of said agreement for such consolidation, the said Toledo & Wabash Railway Company entered therein on the basis of three million four hundred thousand ($3,400,000) dollars first mortgage bonds; twenty-five hundred thousand ($2,500,000) dollars second mortgage bonds; six hundred thousand ($600,000) dollars convertible equipment bonds, being the equipment
450 bonds hereinbefore mentioned, and thirty-five hundred thousand ($3,500,000) dollars stock; and it was specially provided in said agreement, among other things, that all the rights, franchises, property, real and personal, debts, choses in action, of the respective companies, said parties to said agreement of consolidation, should vest in the said consolidated company, and that all bonds and other debts in said agreement specified, including the equipment bonds hereinbefore mentioned, should be protected by said consolidated company. That said agreement of consolidation was duly executed by the said the Great Western Railway Company of 1859, the Quincy & Toledo Railroad Company and the Illinois & Southern Iowa Railway Company by the President and Secretary of each of said companies respectively, duly authorized thereto, and under their corporate seals, and was ratified by the stockholders of said Toledo & Wabash Railway Company in due form of law on the twenty-eighth of June, 1865; by the stockholders of the said the Great Western Railway Company of 1859, and of the Quincy & Toledo Railroad Company on the thirtieth day of June, 1865, and by the stockholders of the Illinois and Southern Iowa Railroad Company on the first day of June, 1865, and was on or about the sixth day of July, 1865, filed in the office of the Secretary of State of the State of Ohio, and on the third day of July, 1865, was filed in the office of the Secretary of State of the State of Indiana, and on the thirtieth day of June, 1865, was filed in the office of Secretary of State of the State of Illinois; and the said Toledo, Wabash & Western Railway Company thereupon became a railroad corporation organized and existing under the laws of the States of Ohio, Indiana and Illinois, owning a line of railway consisting of the respective railroads of the companies named in said agreement of consolidation.

That all of the rights, franchises, property, real and personal, debts, choses in action, of the said Toledo & Wabash Railway Company, upon the consummation of said consolidation, passed to and became vested in the said Toledo, Wabash & Western Railway
451 Company upon the consideration stated, and that no other provision was made for the payment of the outstanding debts

of said Toledo & Wabash Railway Company, including the said equipment bonds, other than that contained in said agreement of consolidation.

The said Toledo, Wabash & Western Railway Company paid the coupons or interest warrants attached to said equipment bonds as they matured from and after the time of said consolidation up to and including that falling due on the first day of May, 1870.

That on or about the first day of February, 1867, the said Toledo, Wabash & Western Railway Company resolved to make and issue its bonds to the extent of fifteen million ($15,000,000) dollars, and to secure the same by a mortgage on its entire property, including the property which it derived from the said Toledo & Wabash Railway Company, which said mortgage became and has been known as its consolidated mortgage, and the bonds secured thereby as its consolidated bonds, and which said mortgage and bonds are hereinafter referred to as the consolidated mortgage and the consolidated bonds.

That the said Toledo, Wabash & Western Railway Company, on or about said last mentioned date, made and executed its certain mortgage or trust deed to the defendants Isaac H. Knox and James R. Jesup, as trustees in pursuance of said resolutions to secure the payment of said consolidated bonds, amounting in the aggregate to the sum of fifteen million ($15,000,000) dollars and no more, with interest at the times and in the manner therein mentioned and set forth as well as to secure the payment of a certain sinking fund as therein mentioned, which mortgage or trust deed was dated on said first day of February, 1867, and was duly sealed with the corporate or common seal of said company and was subscribed by the president and secretary of said company, duly authorized thereto, and was duly acknowledged, and on or about the said date was delivered by the said Toledo, Wabash & Western Railway Company to the said trustees therein named.

452 That in and by the said mortgage or trust deed the said Toledo, Wabash & Western Railway Company, the party of the first part thereto, for and in consideration of the sum of one dollar, paid to the said company by the said trustees, the parties thereto of the second part, granted, bargained, sold, transferred and set over unto the said Isaac H. Knox and James R. Jesup as Trustees, and their successors and assigns forever:

"All the right of way and railroad of the said company, extending from Toledo, in the State of Ohio, to and through the State of Indiana, and thence in the State of Illinois to Mendosia, with branch of said road to Naples; and from said Mendosia to Camp Point, in said State of Illinois; and also with branch of said road from Clayton in said State, to the east bank of the Mississippi River, at Hamilton, in said State, as now made, or as hereafter may be made, and, as now used, or as hereafter may be used; together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all other things, real and per-

"sonal, now owned or used, or that hereafter may be owned or used "by the parties of the first part in connection with the said rail- "road, and everything appertaining and appurtenant thereto; and "all the franchises, powers, privileges and chartered or other rights "of the said Toledo, Wabash & Western Railway Company; together "with all the property, real and personal, of said parties of the first "part now acquired, or to be hereafter acquired, at Quincy, in said "State of Illinois, as also a certain contract made between the said "company and the Chicago, Burlington & Quincy Railroad Com- "pany, dated October 26th, 1866, with all the rights and privileges "secured by said contracts to said parties of the first part, and all "other contracts." All of which, together with the full terms of said mortgage or trust deed, will fully and — large appear by reference to a copy of said mortgage or trust deed hereto annexed,
453 marked "Exhibit B," and which this plaintiff prays may be taken and received as part of this complaint.

That in said mortgage or trust deed it is recited that said Toledo, Wabash & Western Railway Company had been duly formed under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, by the consolidation of the stock, property, rights, franchises and interests of the several companies known as the Toledo & Wabash Railway Company, the Great Western Railway Company of 1859, the Quincy & Toledo Railway Company and the Illinois & Southern Iowa Railroad Company; and that at the time of each consolidation the property of said various companies was subject to certain bonded debts and mortgages created by said several companies, or by other companies which at the time of the creation of said debts and mortgages were then owners of the property so consolidated.

That in said mortgage or trust deed it is further recited that the funded debt of said Toledo, Wabash & Western Railway Company, including that secured by mortgage liens, as well as that not so secured, amounted in the aggregate to the sum of thirteen million three hundred thousand ($13,000,000) dollars, besides interest, and that said funded debt was represented and made up as follows—viz., first mortgage bonds of the Toledo & Illinois Railroad Company for the sum of nine hundred thousand ($900,000) dollars, secured by a first mortgage on that part of the road of said Toledo, Wabash & Western Railway Company, in the State of Ohio, running from Toledo to the westerly boundary of said State.

Bonds of the Toledo & Wabash Railroad Company for the sum of one million ($1,000,000) dollars, secured by a second mortgage on the same property last mentioned.

First mortgage bonds of the Lake Erie, Wabash & St. Louis Railroad Company for the sum of two million five hundred thousand ($2,500,000) dollars, secured by a first mortgage on that part
454 of the road of the said Toledo, Wabash & Western Railway Company lying in the State of Indiana.

Bonds of the Wabash & Western Railway Company for the sum of one million five hundred thousand ($1,500,000) dollars secured by a second mortgage on the same property last mentioned.

First Mortgage bonds of the Great Western Railway Company for the sum of one million ($1,000,000) dollars, secured by a first mortgage on that part of the property of the said Toledo, Wabash & Western Railway Company in the State of Illinois, extending from Decatur to the Illinois River at Naples.

Bonds of the last named company for the sum of one million three hundred and fifty thousand ($1,350,000) dollars secured by a mortgage on that part of the road of the said Toledo, Wabash & Western Railway Company in the State of Illinois, extending from the State line of Indiana to the Illinois River; there being then outstanding of said bonds the sum of twenty thousand ($20,000) dollars, the rest having been retired by a portion of the bonds next described.

First mortgage bonds of the Great Western Railroad Company of 1859, for the sum of two million five hundred thousand ($2,500,000) dollars, secured by a mortgage on that part of the road of the said Toledo, Wabash & Western Railroad Company in the State of Illinois, extending from Naples and Meredosia as its western termini to the boundary line between the States of Illinois and Indiana; the last named bonds having been created to retire the aforesaid one million ($1,000,000) dollars and one million three hundred and fifty thousand ($1,350,000) dollars of Great Western Railway Company bonds.

Bonds of the Great Western Railway Company of 1859, for the sum of two million five hundred thousand ($2,500,000) dollars, secured by a mortgage on the property last mentioned.

Bonds of the Illinois & Southern Iowa Railroad Company for the sum of three hundred thousand ($300,000) dollars, secured by a first mortgage on that part of the road of the said Toledo,
455 Wabash & Western Railway Company, extending from Clayton to Carthage in the State of Illinois.

Bonds of the Toledo & Wabash Railway Company for the sum of six hundred thousand ($600,000) dollars, known as equipment bonds.

Bonds of the Toledo, Wabash & Western Railway Company, for the sum of one million ($1,000,000) dollars, known as sinking fund bonds.

That in said mortgage or trust deed it is further recited it is deemed for the interests of the said Toledo, Wabash & Western Railway Company, as well as for the benefit of the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt upon equitable principles, and that of the bonds to be issued and made and secured by the said mortgage to the amount in the aggregate of the sum of fifteen million ($15,000,000) dollars, there should be retained thirteen million three hundred thousand ($13,300,000) dollars to retire in such manner and upon such terms as the directors of such company might from time to time prescribe, a like amount of the bonds of the various companies thereinbefore enumerated and described and representing the said funded debt, and that the balance of said bonds, to wit: One million seven hundred thousand ($1,700,000) dollars thereof should be used to obtain additional equipment and

improvements, and for such additional purposes as the directors might deem advisable.

That the said mortgage or trust deed was presently thereafter filed for record and was duly recorded in the manner required by law in the several offices in the counties in the States of Ohio, Indiana and Illinois, in which the property then owned by the said Toledo, Wabash & Western Railway Company, and which is covered by said mortgage, was then situated.

That said Toledo, Wabash & Western Railway Company made and issued its several bonds in the form and for the amounts mentioned in said mortgage or trust deed, and sealed the same with the corporate seal of said company and caused the names of its president
456 and treasurer to be thereto affixed, all of which bonds were equally secured by said mortgage to said trustees.

That interest warrants or coupons for the payment of the interest becoming due on said bonds according to the terms thereof, were annexed to each of said bonds.

A copy of one of said bonds is fully set forth in the mortgage, a copy of which is hereto annexed, marked Exhibit "B."

That the said Toledo, Wabash & Western Railway Company did make, execute and issue one million ($1,000,000) dollars of said consolidated bonds, secured by the said consolidated mortgage or trust deed, and did therewith retire a like amount of certain of the bonds previously issued by said company and then outstanding, and which bonds are enumerated and described in the said consolidated mortgage or trust deed as bonds of the Toledo, Wabash & Western Railway Company, known as sinking fund bonds, amounting in the aggregate to the said sum of one million ($1,000,000) dollars; and that said one million ($1,000,000) dollars of said consolidated bonds so issued are now outstanding, except as the same may have been purchased for the sinking fund mentioned and described in said consolidated mortgage or trust deed, and that there are now in the aggregate bonds of said issue outstanding amounting to the sum of two million six hundred and ten thousand ($2,610,000) dollars or thereabouts, which have come by transfer, sale and delivery into the possession of and are now held by a large number of individuals, partnerships and corporate bodies, who are the owners thereof and are entitled to the monies thereby agreed to be paid, but whose names are unknown to this plaintiff and are too numerous to be made parties to this action.

That afterwards, on or about the sixth day of October, 1868, the said Toledo, Wabash & Western Railway Company, by an agreement signed by its president and secretary duly authorized thereto, and sealed with its corporate seal in due form of law, agreed to
457 consolidate its road, property and capital stock with the road, property and capital stock of the Decatur & East St. Louis Railroad Company, a railroad company organized and existing under and by virtue of the laws of the State of Illinois.

That by the terms of said agreement for such last mentioned consolidation it was among other things provided that all the rights, franchises, privileges, property and appurtenances of every descrip-

tion, choses in action, debts, dues and demands of the said parties thereto should vest in the said consolidated company, and that the terms of the articles of consolidation hereinbefore mentioned, whereby the said Toledo, Wabash & Western Railway Company was formed, should be and remain in full force, and be binding upon the new consolidated company, so far as the same could be applicable, and so far as the same was not in conflict with the specific provisions therein, and that said consolidated company should retain the name of the said Toledo, Wabash & Western Railway Company and be known thereby.

That the provisions contained in said consolidation agreement entered into as aforesaid on the twenty-ninth day of May, 1865, to protect the bonds therein referred to, including said equipment bonds, was applicable so as to remain in full force and be binding upon said new consolidated company, and was not in conflict with the specific provisions of said consolidated agreement entered into as aforesaid on the sixth day of October, 1868.

That the said Decatur & East St. Louis Railroad Company, by its president and secretary, duly authorized thereto, duly executed under its corporate seal said last mentioned agreement of consolidation on the third day of June, 1869, and the same was on the seventh day of October, 1869, in due form of law ratified by the stockholders of the said Toledo, Wabash & Western Railway Company, and on the twenty-fifth day of August, 1869, was ratified in due form of law by the stockholders of the said Decatur & East St. Louis Railroad Company, and said last mentioned articles of consolidation were on or about the tenth day of August, 1870, filed in the office of the Secretary of State of the State of Ohio, and were on the eighth day of August, 1870, filed with the Secretary of State of the State of Indiana, and were on the ninth day of August, 1870, filed with the Secretary of State of the State of Illinois.

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That all the rights, franchises, property, real and personal, debts and choses in action of the said parties to said last mentioned agreement of consolidation including all the rights, franchises, property, real and personal, debts, choses in action of the Toledo & Wabash Railway Company hereinbefore mentioned, by virtue of such consolidation passed to and vested in said new company, which became the owner of the same subject to all liens and charges thereupon created by said Toledo, Wabash & Western Railway Company, and subject to the lien and charge thereupon of the outstanding indebtedness of the said Toledo & Wabash Railway Company, agreed to be paid in and by the terms of the agreement of consolidation hereinbefore set forth, to which the said Toledo & Wabash Railway Company was a part, including said equipment bonds, which said equipment bonds the said new company, under the provisions of said last mentioned consolidation agreement, became obligated and agreed to pay.

That said defendant the Toledo, Wabash & Western Railway Company, from and after the time of said last mentioned consolidation, paid the coupons or interest warrants on said equipment

bonds hereinbefore mentioned as the same matured, up to and including that falling due on the first day of November, 1874.

That on or about the first day of April, 1873, the said defendant the Toledo, Wabash & Western Railway Company, as parties of the first part, and the said defendants, Isaac H. Knox and James R. Jesup as trustees, named in the consolidated mortgage or trust deed hereinbefore mentioned, as parties of the second part, made and executed a certain indenture and deed of further assurance, wherein the said defendant the Toledo, Wabash and Western Railway
459 Company expressly covenanted and agreed with the said parties of the second part, and with all persons whom it might in any wise concern, that the said defendant the Toledo, Wabash & Western Railway Company would not make or issue, or attempt to make or issue, any of the then remaining twelve million, three hundred thousand ($12,300,000) dollars of the reserve bonds, secured by said consolidated mortgage theretofore executed to the said parties of the second part as trustees, except for the purpose of or simultaneously with the retiring of an equal amount of the balance then remaining of the funded debt enumerated in said consolidated mortgage or trust deed aforesaid, so that when all of the said reserve bonds should have been used the whole of the balance of said funded debt would be extinguished and discharged. And it is in said indenture and deed of further assurance further covenanted by and on the part of the party of the first part thereto with said trustees, and with all persons whom it might in any wise concern, that the covenants therein contained should be supplementary to said consolidated mortgage or trust deed, and constitute a part of said consolidated mortgage aforesaid, and be of the same effect to all intents and purposes as if they had been inserted therein.

That the said indenture and deed of further assurance was duly executed by said defendant the Toledo, Wabash & Western Railway Company, by its president and secretary duly authorized thereto, and was sealed with its corporate seal, and was duly signed and sealed by said trustees, and a copy thereof is hereunto annexed and marked "Exhibit C," and the plaintiff prays that the same may be taken and received as part of this complaint.

This plaintiff further says that the directors of the said Toledo & Wabash Railway Company have never yet prescribed the manner and terms in which the various classes of bonds enumerated and described in said consolidated mortgage or trust deed representing the funded debts by said consolidated mortgage especially se-
460 cured, including said equipment bonds, should be retired as in said mortgage required, but have wholly neglected and refused so to do, and have never issued said consolidated bonds to retire said equipment bonds outstanding or any of them, and that said plaintiff is ready and willing and has hitherto been ready and willing, and the persons from whom he purchased said equipments bonds owned by him as aforesaid have always been ready and willing, to accept said consolidated bonds in the place and stead of the said equipment bonds now held and owned by the plaintiff here-

inbefore specifically enumerated, and which he claims are secured by said consolidated mortgage hereinbefore set forth.

That the said defendant the Toledo, Wabash & Western Railway Company, from the time of its organization continued in the possession of, and to own and operate, the said line of railroad and property which passed to and vested in it at the time of its formation as hereinbefore set forth, including the property and railroad originally owned by the Toledo & Wabash Railway Company hereinbefore mentioned, lying in the States of Ohio and Indiana, and all the other property described in the said consolidated mortgage or trust deed until the foreclosure proceedings hereinafter set forth were instituted.

That on or about the twenty-second day of February, 1875, an action was instituted and a petition filed in the Court of Common Pleas of Lucas county, Ohio; that on or about the twenty-fourth day of February, 1875, an action was instituted and a complaint filed in the Cass county Circuit Court of the State of Indiana, and that on or about the twenty-fourth day of February, 1875, an action was instituted and a complaint filed in the Vermilion county Circuit Court of Illinois; that all of said actions were instituted at the suit of the Metropolitan National Bank in New York and others, complainants, against the said defendant the Toledo, Wabash & Western Railway Company and others, defendants; that in the said proceedings in all three of said States a cross bill or cross petition was filed by one Valentine Ketchum, praying that the property of
461 the said Toledo, Wabash & Western Railway Company, covered by a certain mortgage executed on or about the first day of February, 1873, by the said Toledo, Wabash & Western Railway Company, upon the entire line of railroads then belonging to it and other property, to the New York Guaranty and Indemnity Company, trustee, to secure the payment of five million dollars, and of which mortgage the said Ketchum was then trustee, might be sold to satisfy the amounts due to the holders of the bonds secured by the said last mentioned mortgage; that in said proceedings in the State of Ohio, on or about the fourteenth day of December, 1875, a decree was entered in the said Court of Common Pleas of Lucas county, Ohio, by which it was among other things ordered and decreed that the consolidated mortgage or trust deed hereinbefore set forth was duly and legally made and recorded in pursuance of the laws of the several States hereinbefore named; that it was a valid conveyance for the purpose therein mentioned, and as such was a lien upon the property therein described; that said consolidated mortgage or trust deed was the first and best lien upon the whole and consolidated lines of railway belonging to said Toledo, Wabash & Western Railway Company, excepting the branch extending from Decatur to East St. Louis, 108 5/10 miles in length, as to which said mortgage was not a lien; but which said consolidated mortgage was subordinate and inferior to several mortgage liens upon separate parts and subdivisions of said road which are more particularly described in said decree, excepting the road between Carthage and the Mississippi, viz., from Carthage to Evanston, 5 4/10 miles, completed

at the date of said decree, and from Evanston to the Mississippi River at Hamilton, a further distance of about seven miles, for which the right of way was owned by said Toledo, Wabash & Western Railway Company, and also excepting the road from Clayton to Camp Point, a distance of six miles, as to all of which the said consolidated mortgage was thereby found to be a first mortgage.

462 That in and by said decree it was further ordered and adjudged that to enforce the provisions of the mortgage or trust deed of which said Ketchum was trustee as aforesaid, the real property equipments and franchises as an entirety of said Toledo, Wabash & Western Railway Company should be sold by a special Master Commissioner therein named, subject, however, to the liens of all mortgages and trust deeds prior to the said mortgage of which said Ketchum was trustee, and particularly described in said decree, including said consolidated mortgage, and it was also ordered and adjudged that the sale of the said road, property, equipments and franchises under said decree was to be without prejudice to any claim which might be made by the holders of the aforesaid equipment bonds, and that all questions as to those bonds were to be left open.

That subsequently and in the February Term of the year A. D. 1876, of the Circuit Court of Cass county, Indiana, and of the Circuit Court of Vermilion county, Illinois, decrees were made in the actions hereinbefore mentioned, therein pending, in all particulars adopting the said decree of said Court of Common Pleas of Lucas County, Ohio, as the decree of said several courts respectively.

That in pursuance of said decree a sale was had of all the said property, effects, rights and franchises of the said Toledo, Wabash & Western Railway Company, on the tenth day of June, 1876, to John W. Ellis and others, and subsequently thereafter and on or about the first day of January, 1877, a proper deed of conveyance was made, executed and delivered to the said John W. Ellis and others by Jacob D. Cox, who had been appointed by said decree Special Master Commissioner to execute the same, and who had made the said sale, whereby was conveyed to the said John W. Ellis and others all and singular the railroad of the said Toledo, Wabash & Western Railway Company, extending from the city of Toledo, in the State of Ohio, southwesterly to and through the State of

463 Indiana, and to East St. Louis and to Hamilton on the Mississippi River, and to Naples and Camp Point in the State of Illinois, an aggregate length of six hundred and one miles, including the right of way, roadbed, and the superstructures of all sorts thereon; all repair and other shops and manufactories, with the fixed and movable machinery, tools and implements thereunto belonging; all engines, cars, rolling-stock and equipment of every kind and description; all supplies of timber, lumber, fuel, iron, steel and other supplies intended for use in running said road; all equities to any real or personal property, debts and demands due the said company, together with the franchises of said railway company and of the several original companies of which it is composed, and the right and franchise to be a corporation, together with all corporate franchises of said company, and of the said companies severally, in-

cluding the rights and franchises of said several companies to be and act as a corporation, to have and to hold the same, with the appurtenances, subject as aforesaid to the said John W. Ellis and others, as joint tenants, and not tenants in common, and to the survivors and survivor of the said parties, and to their assigns, and to the heirs of the last survivor of the said parties.

That the said defendant the Wabash Railway Company is a consolidated corporation existing under and by virtue of the laws of the States of Ohio, Indiana and Illinois, and was formed by the consolidation of the Wabash Railway Company of Ohio, the Wabash Railway Company of Indiana and the Wabash Railway Company of Illinois, corporations organized and existing on and prior to the sixth day of January, 1877, under the laws of said States respectively. That the said Wabash Railway Company of Ohio was on or about the twenty-eighth day of December, 1876, organized as a corporation under the laws of the State of Ohio by John W. Ellis, Alexander M. White, John T. Martin, George J. Seney, and Henry A. V. Post, who were designated in the articles of association as the purchasers at the judicial sale of the railroad and property of the Toledo,
464 Wabash & Western Railway Company hereinbefore mentioned under and by virtue of the aforesaid decrees, and in said articles of association it was recited that the same were entered into by the parties thereto for the purposes of forming a corporation under the laws of the State of Ohio, referring particularly to an act of the Legislature of the State of Ohio, passed May 7th, 1869, entitled "An act supplementary to an act entitled an act to authorize receivers of insolvent railroad companies to sell unfinished road-beds and franchises," passed May 14th, 1868.

That the said Wabash Railway Company of Indiana, and the said Wabash Railway Company of Illinois were organized under the laws of their respective States for the same purposes as those for which the said Wabash Railway Company of Ohio was organized, to wit, to take title to the property and succeed to the franchises of said defendant the Toledo, Wabash & Western Railway Company, under the laws of said States respectively.

That the said Wabash Railway Company of Ohio, the Wabash Railway Company of Indiana, and the Wabash Railway Company of Illinois, on or about the first day of January, 1877, duly entered into articles of consolidation in due form of law executed by each of said companies by their respective president and secretary duly authorized thereto and sealed with their corporate seals, which said articles of consolidation were duly filed in the office of the Secretary of the State of Ohio on or about the tenth day of January, 1877, and that the name of said consolidated company as designated in said articles of consolidation was "The Wabash Railway Company," and that the said corporation so formed is the defendant in this action, The Wabash Railway Company.

That on or about the twelfth day of January, 1877, said John W. Ellis and the others associated with him, as purchasers of the property, rights, franchises and railroad of the said defendant The Toledo, Wabash and Western Railway Company, at the judicial sale herein

before mentioned, executed and delivered to the said defend-
465 ant The Wabash Railway Company a deed of the aforesaid property conveyed to them by the said Jacob D. Cox as special master commissioner, subject to the payment of all liabilities charged upon said property by the aforesaid decrees and subject to the lien of said consolidated mortgage or trust deed hereinbefore mentioned and the rights of the holders of the bonds secured thereby. That said defendant The Wabash Railway Company forthwith entered into the possession of the property, rights, equipments and franchises conveyed to them as aforesaid and continued in possession thereof until its consolidation with the St. Louis, Kansas City & Northern Railroad Company hereinafter set forth as the owner and holder thereof, and in operating and running the said continuous line of railroad and exercising the franchises conveyed and transferred to them as aforesaid. That said property so conveyed to the defendant The Wabash Railway Company included all the property, railroad and franchises originally owned, possessed and exercised by the Toledo & Wabash Railway Company hereinbefore mentioned and owned by said Toledo & Wabash Railway Company at the time of the issue of said equipment bonds; and this plaintiff says that said defendant The Wabash Railway Company took said property and the whole thereof subject to the lien, equity and charge thereupon of such equipment bonds, including the said equipment bonds held and owned by this plaintiff aforesaid.

This plaintiff further says that said defendant the Wabash Railway Company was in fact and effect the said defendant the Toledo, Wabash & Western Railway Company in a reorganized form, and that the capital stock of said Wabash Railway Company, consisting of 160,000 shares, were subscribed for and issued to the stockholders of said defendant the Toledo, Wabash & Western Railway Company, except 800 shares, the same being issued to such stockholders at the rate of ten dollars for each share of stock of one hundred dollars par value.

That at the time of the said sale of the right, property
466 and franchises of the said defendant the Toledo, Wabash & Western Railway Company under the decrees hereinbefore mentioned, the said property, rights, franchises and various parts thereof, were in addition to said consolidated mortgage subject to the liens of various mortgages, issued to secure the payment of bonds then outstanding made, and executed by the various companies, out of which the Toledo, Wabash & Western Railway Company was formed, and by the Decatur & East St. Louis Railroad Company, and covering the separate properties of those companies or portions thereof owned by said companies at the times said mortgages were made and executed.

The following is a statement of such mortgage liens:

A first mortgage made by the Toledo & Illinois Railroad Company for the sum of nine hundred thousand ($900,000) dollars, securing first mortgage bonds of that company due as extended August 1st, 1890, for each sum.

A second mortgage made by the said Toledo & Wabash Railroad

Company for one million ($1,000,000) dollars, securing bonds of said company due November 1st, 1878, for that amount.

A first mortgage made by the Lake Erie, Wabash & St. Louis Railroad Company for two million five hundred thousand ($2,500,000) dollars, securing first mortgage bonds of that company due as extended August 1st, 1890.

A second mortgage made by the Wabash & Western Railway Company for the sum of one million five hundred thousand ($1,500,000) dollars, securing bonds of that company due November 1st, 1878.

A mortgage made by the Great Western Railway Company of 1859, for the sum of two million five hundred thousand ($2,500,000) dollars, securing bonds of that company due August 1st, 1888, for that amount.

A second mortgage made by the Great Western Railway Company of 1859 for the sum of two million five hundred thousand ($2,500,000) dollars, securing bonds of that company due May 1st, 1893, for that amount.

467 A mortgage made by the Illinois & Southern Iowa Railroad Company for the sum of three hundred thousand ($300,000) dollars, securing bonds of that company due August 1st, 1882, for that amount.

A mortgage made by the Quincy & Toledo Railroad Company for the sum of five hundred thousand dollars, securing bonds of that company for that amount.

Bonds of the Toledo & Wabash Railway Company due May 1st, 1883, for the sum of six hundred thousand ($600,000) dollars, being the above-mentioned equipment bonds.

A mortgage made by the Decatur & East St. Louis Railroad Company for the sum of two million seven hundred thousand ($2,700,000) dollars, securing bonds of that company for that amount.

Bonds issued under the aforesaid consolidated mortgage made and issued by the Toledo, Wabash & Western Railway Company, amounting to two million six hundred and ten thousand ($2,610,000) dollars or thereabouts.

That the said mortgages, with the exception of that executed by the Decatur & East St. Louis Railroad Company and said consolidated mortgage, are the same mortgages recited and described in the consolidated mortgage as hereinbefore set forth, and cover respectively the various railroad properties and franchises also described in said consolidated mortgage.

That on so much of the property of the said Toledo & Wabash Railway Company as was situate in the State of Ohio at the time that the same came into the possession and ownership of the said Toledo, Wabash & Western Railway Company as hereinbefore set forth, there were only the following mortgage liens thereon: The said mortgage executed by the Toledo & Illinois Railroad Company for the sum of nine hundred thousand ($900,000) dollars, securing bonds of that company to that amount due as extended August 1st, 1890; and the said mortgage executed by the Toledo & Wabash Railroad Company for the sum of one million ($1,000,000) dollars, securing bonds of that company to that amount due and payable November 1st, 1878;.

and that the property covered by said last-mentioned two
468 mortgages was, and is, the railroad property of the said Toledo & Wabash Railway Company, situate in the State of Ohio, and extending from the City of Toledo, and passing through the counties of Lucas, Henry, Fulton, Paulding and Defiance to the western boundary line of said State of Ohio, in Harrison township, in said county of Paulding. That on so much of the property of the said Toledo & Wabash Railway Company as was situate in the State of Indiana at the time that the same came into the possession and ownership of the said Toledo, Wabash & Western Railway Company there were the following mortgage liens thereon: The said mortgage made and executed by the Lake Erie, Wabash & St. Louis Railroad Company, made on or about the first day of August, 1853, to secure an issue of bonds to the amount of two million five hundred thousand ($2,500,000) dollars, due as extended on the first day of August, 1890; and said mortgage made and executed by the Wabash & Western Railway Company, on or about the fifteenth day of October, 1858, to secure an issue of bonds to the total amount of one million five hundred thousand ($1,500,000) dollars.

That at the time the consolidated mortgage hereinbefore mentioned was made and executed by the said Toledo, Wabash & Western Railway Company there were no other mortgage liens on the property and railroad of the said Toledo, Wabash & Western Railway Company, situated in the States of Ohio and Indiana being the property formerly owned by said Toledo & Wabash Railway Company, excepting the four mortgages last above set forth, and at the time said last-mentioned property, situated in the States of Ohio and Indiana, came into the possession of the said defendant the Wabash Railway Company there were no other mortgage liens thereon, excepting the said four mortgages last set forth, and such additional lien as may have been created and imposed thereupon by the execution and delivery of the aforesaid consolidated mortgage.

That on or about the thirteenth day of January, 1877, the
469 said defendant the Wabash Railway Company executed and delivered to one George I. Seney, as trustee, a certain mortgage on its railroad and property to secure certain promissory notes payable at various times, until January 1st, 1882, amounting in all to $1,026,555.42; that the said defendant the Wabash Railway Company made its certain promissory notes, amounting to said sum, and delivered the same to certain persons who now hold the same, and of whose names this plaintiff is ignorant; that said mortgage — duly recorded on or about the twenty-ninth day of January, in the year 1877.

The plaintiff further says that he is unable to state how much there is now outstanding and due and unpaid on said last mentioned mortgage, and this plaintiff charges and alleges that the holders of said notes secured by the last mentioned mortgage purchased and took such notes subject to the lien and equity of said bonds known as equipment bonds upon all of the property owned by said Toledo, Wabash & Western Railway Company, and all of the property which said Toledo, Wabash & Western Railway Company took and derived

at the time of its organization from the said Toledo & Wabash Railway Company, and that the holders of said promissory notes and George I. Seney, as such trustee, as aforesaid were and, are chargeable in equity with notice of such lien and equity of said equipment bonds.

And this plaintiff further states that in and by the terms of the said consolidated mortgage it was especially provided that in case there was default in the payment of the interest due upon the said bonds secured thereby, or in the payment of the installments payable into the sinking fund therein provided, or of the principal of the said bonds, then and in that case the trustees therein named should, upon the written request of the holder or holders of the majority of the then outstanding bonds cause the said mortgaged premises to be sold at public auction.

That the holders of a majority of the bonds secured under
470 the said consolidated mortgage and outstanding have hitherto consented to a so-called funding scheme proposed and carried into effect by said defendant the Wabash Railway Company, by which, for certain considerations, they have accepted scrip for then overdue coupons or interest warrants, so that it is impracticable that the holders of a majority of such bonds should make any such request for the sale of said mortgaged premises.

The *the* said consolidated mortgage or trust deed provided that the property thereby conveyed should be subject to the possession, control and management of said Toledo, Wabash & Western Railway Company, parties thereto of the first part, only so long as the said company should well and truly perform all and singular the stipulations of the said consolidated bonds and of the covenants contained in the said consolidated mortgage or trust deed.

The said plaintiff further alleges and says that on or about the fourteenth day of August, 1879, by an agreement signed by its president and secretary duly authorized thereto and sealed with its corporate seal, the said defendant the Wabash Railway Company agreed to consolidate its road, property, franchises and capital stock with the road, property, franchises and capital stock of the St. Louis, Kansas City & Northern Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri. That in said agreement of consolidation it is among other things recited that the railway of the party of the first part (the said defendant the Wabash Railway Company) extends from the city of Toledo in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia in the last-named State, with various branch lines in said agreement specified; that the railway of the party of the second part (the said St. Louis, Kansas City & Northern Railway Company) extends from St. Louis, in the State of Missouri, in a northwesterly direction to Kansas City, in the same State, with certain extensions and branch lines in said agree-
ment specifically stated; that said lines of railway would
471 when united, form one continuous line of railway in the same general direction from the waters of Lake Erie, at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri

River, and that it is considered for the advantage of both of said companies that the line of railway in said agreement described should be united and consolidated, and be owned and worked in common.

That it was in and by said agreement provided and agreed that upon the ratification of the said agreement by the shareholders of the corporation parties thereto, and the election of directors and other officers of the new corporation provided for in said agreement, all the property, rights and franchises of whatever name or nature, belonging to the said defendant the Wabash Railway Company, and the said St. Louis, Kansas City & Northern Railway Company, or either of them, should pass to and be vested in the said new corporation; and the two first-named corporations should thereupon cease and determine.

That it is further provided in and by said agreement that the name of the said new corporation should be "The Wabash, St. Louis & Pacific Railway Company."

That on or about the said fourteenth day of August, A. D. 1879, the said St. Louis, Kansas City & Northern Railway Company duly executed said agreement of consolidation on its part by its president and secretary, duly authorized thereto, and sealed the same with its corporate seal.

That said agreement of consolidation, together with a supplementary agreement entered into between the same companies on or about the tenth day of October, 1879, were, on or about the fourteenth day of October, 1879, ratified in due form of law by the stockholders of the said defendant the Wabash Railway Company, and were ratified and confirmed by a vote of more than two-thirds of the whole number of the shares of the capital stock of the said defendant the Wabash Railway Company, and were, on or about said fourteenth day of October, 1879, ratified and confirmed in due form of
472 law by the stockholders of the said St. Louis, Kansas City & Northern Railway Company. That said articles of consolidation were duly filed in the office of the Secretary of State of the State of Ohio, on the twenty-fifth day of October, A. D. 1879, and that the said corporation thereby formed the defendant in this action. The Wabash, St. Louis & Pacific Railway Company thereupon became a railroad corporation duly organized and existing under the laws of the various States of its creation, and all of the rights, franchises and property, real and personal, then owned and possessed by the said defendant, the Wabash Railway Company and the said St. Louis, Kansas City & Northern Railway Company passed to and became vested in the said new consolidated company, the said Wabash, St. Louis & Pacific Railway Company; and that said last-named company now owns, and is in possession of, all of the said rights, franchises and property, and owns and operates all the various lines of railway hereinbefore mentioned and set forth, including the property and railway originally owned by the Toledo & Wabash Railway Company hereinbefore mentioned, situated in the States of Ohio & Indiana, and by the defendant in this action the Toledo, Wabash & Western Railway Company.

That, prior to said consolidation of the said defendant the Wabash

Railway Company and the St. Louis, Kansas City & Northern Railway Company, the said Companies and the stockholders or shareholders of each of said companies were duly notified of the claim, lien and equity of the equipment bonds hereinbefore enumerated, owned by the plaintiff as aforesaid, on the property of the said Toledo & Wabash Railway Company, and of said Toledo, Wabash & Western Railway Company.

This plaintiff further says that the Toledo & Wabash Railway Company hereinbefore mentioned has not since the year 1865, when it was merged in the said Toledo, Wabash & Western Railway Company, maintained or continued its corporate organization, and
473 has not since that time exercised any of its corporate powers or franchises.

That said last-mentioned Company and said Toledo, Wabash & Western Railway Company own no property or assets of any kind whatever; and that all of the property, assets and franchises which they did own and possess have passed to and become vested in the said defendant the Wabash, St. Louis & Pacific Railway Company, as hereinbefore set forth, which now owns and is in possession of the same, subject to the lien in equity of the holders of said equipment bonds on the property originally owned by said Toledo & Wabash Railway Company, and upon the property of said Toledo, Wabash & Western Railway Company, covered by said consolidated mortgage.

The plaintiff further says that the interest warrants or coupons annexed or attached to all of said bonds, known as equipment bonds, hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of May, 1875, excepting the coupons or interest warrants annexed to said bonds, numbered, respectively, 563, 564, 565 and 566, which matured on said last mentioned date, have not, nor has any of them, been paid. That each of said coupons or interest warrants due and payable as aforesaid on the first day of May, 1875, bears the number of the bond to which it is attached and also a separate coupon number, to wit, the number 24.

That each of said coupons or interest warrants attached to the said bonds of the denomination of $1,000 is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on the first day of May, 1875, there are one hundred and twenty-four for the sum of thirty-five dollars each, and forty-eight for the sum of seventeen dollars and fifty cents each.

474 That the interest warrants or coupons annexed or attached to all of said bonds, known as equipment bonds, hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of November, 1875, have not, nor has any of them been paid. That each of said last mentioned coupons or interest warrants due and payable as aforesaid on the first day of November, 1875, bears the number of the bond to which it is attached, and also a separate coupon number, to-wit: the number

twenty-five. That each of said last mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of November, 1875, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached to all of said bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of May, 1876, have not nor has any of them been paid.

That each of said last-mentioned coupons or interest warrants due and payable as aforesaid on the first day of May, 1876, bears the number of the bond to which it is attached, and also a separate coupon number, to-wit: the number twenty-six. That each of said last-mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds hereinbe-
475 fore specifically mentioned and enumerated, which became due and payable on said first day of May, 1876, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached to all of said bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of November, 1876, have not nor has any of them been paid. That each of said last-mentioned coupons or interest warrants due and payable as aforesaid on *on* the first day of November, 1876, bears the number of the bond to which it is attached, and also a separate coupon number, to-wit: the number twenty-seven. That each of said last-mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of November, 1876, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached to all of said bonds known as equipment bonds hereinbefore specifically

mentioned and enumerated, which by their terms were due and payable on the first day of May, 1877, have not nor has any of them been paid. That each of said last-mentioned coupons or interest warrants due and payable as aforesaid on the first day of May, 1877, bears the number of the bond to which it is attached, and also a separate coupon number; to wit, the number twenty-eight. That each of said last-mentioned coupons or interest warrants attached to said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or
476 interest warrants attached to said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of May, 1877, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached to all of said bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which by their terms were due and payable as aforesaid on the first day of November, 1877, have not nor has any of them been paid. That each of said last-mentioned coupons or interest warrants due and payable as aforesaid on the first day of November, 1877, bears the number of the bond to which it is attached, and also a separate coupon number; to wit, the number twenty-nine. That each of said last-mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of November, 1877, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached to all of said bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of May, 1878, have not nor has any of them been paid. That each of said last-mentioned coupons or interest warrants due and payable as aforesaid on the first day of May,
477 1878, bears the number of the bond to which it is attached, and also a separate coupon number; to wit, the number thirty. That each of said last-mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars, is for the sum of thirty-five dollars, and each of said coupons or intere-t warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated,

which became due and payable on said first day of May, 1878, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached to all of the said bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of November, 1878, have not nor has any of them been paid.

That each of said last mentioned coupons or interest warrants due and payable as aforesaid on the first day of November, 1878, bears the number of the bond to which it is attached, and also a separate coupon number, to wit: the number thirty-one. That each of said last mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of November, 1878, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached
478 to all of said bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of May, 1879, have not nor has any of them been paid. That each of said last mentioned coupons or interest warrants due and payable as aforesaid on the first day of May, 1879, bears the number of bond to which it is attached, and also a separate coupon number, to wit: the number thirty-two.

That each of said last mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that of said coupon- or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which became due and payable on said first day of May, 1879, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty for the sum of seventeen dollars and fifty cents each.

That the interest warrants or coupons annexed or attached to all of said bonds known as equipment bonds hereinbefore specifically mentioned and enumerated, which by their terms were due and payable on the first day of November, 1879, have not nor has any of them been paid.

That each of said last mentioned coupons or interest warrants due and payable as aforesaid, on the first day of November, 1879,

bears the number of the bond to which it is attached, and also a separate coupon number, to wit: the number thirty-three. That each of said last mentioned coupons or interest warrants attached to the said bonds of the denomination of one thousand dollars is for the sum of thirty-five dollars, and each of said coupons or interest warrants attached to the said bonds of the denomination of five hundred dollars is for the sum of seventeen dollars and fifty cents; and that said coupons or interest warrants attached to the bonds hereinbefore specifically mentioned and enumerated, which
479 became due and payable on said first day of November, 1879, there are one hundred and twenty-four for the sum of thirty-five dollars each, and fifty-two for the sum of seventeen dollars and fifty cents each.

That no part of the interest falling due on said bonds, known as equipment bonds, hereinbefore particularly mentioned and enumerated, on and since the first day of May, 1875, according to the terms thereof, and of the said coupons or interest warrants thereto attached, has been paid, excepting the coupons or interest warrants on said bond numbers 563, 564, 565 and 566, which matured on the first day of May, 1875, though payment thereof has been duly demanded, and that all of said defendants which were obliged to pay the same have wholly failed to pay said interest which has fallen due on said equipment bonds since the date last mentioned, and which fell due on that day, and have refused to pay the same.

That the aggregate amount due and payable for interest as aforesaid upon said bonds, known as equipment bonds, hereinbefore particularly mentioned and enumerated, pursuant to the coupons or interest warrants hereinbefore particularly mentioned and now owned and held by this plaintiff, was, on the first day of May, 1875, the sum of five thousand one hundred and eighty dollars, and on the first day of November, 1875, the sum of five thousand two hundred and fifty dollars, and on the first day of May, 1876, the sum of five thousand two hundred and fifty dollars, and on the first day of November, 1876, the sum of five thousand two hundred and fifty dollars, and on the first day of May, 1877, the sum of five thousand two hundred and fifty dollars, and on the first day of November, 1877, the sum of five thousand two hundred and fifty dollars, and on the first day of May, 1878, the sum of five thousand two hundred and fifty dollars, and on the first day of November, 1878, the sum of five thousand two hundred and fifty dollars, and on the first day of May, 1879, the sum of five thousand two hundred and fifty dollars, and on the first day of November, 1879, the sum of five thousand two hundred and fifty dollars.

480 The said plaintiff further says that upon the transfer of the property and franchises of the said Toledo & Wabash Railway Company as hereinbefore set forth, part of the consideration for such transfer was the agreement on the part of said Toledo, Wabash & Western Railway Company to pay the said bonds known as equipment bonds, and that such transfer and agreement constituted said bonds known as equipment bonds, and all the moneys

to become due thereon a lien on the said property and franchises of said Toledo & Wabash Railway transferred by the last named company to the Toledo, Wabash & Western Railway Company in favor of the holders of such bonds. That thereafter and on the first day of February, 1867, said Toledo, Wabash & Western Railway Company recognized the lien of said bonds known as equipment bonds executed as hereinbefore set forth, the consolidated mortgage for the purpose of consolidating said equipment bonds and the other bonds recited in said consolidated mortgage into one and the same mortgage debt, and thereby secured to the holders of said equipment bonds not only a lien in equity upon the road and property of said Toledo & Wabash Railway Company, so transferred to said consolidated company for such unpaid purchase price thereof, but also the right in equity to have said bonds further secured by said consolidated mortgage upon all the property and franchises of said consolidated company on an equality with all other bonds issued under said mortgage.

Therefore, the said plaintiff prays that this Court will ascertain and determine the amount due on the said bonds known as equipment bonds, held and owned by the plaintiff herein; and will adjudge and determine the said bonds known as equipment bonds, and all the monies due and to become due thereon to be a charge and lien upon all of the property of said defendant the Wabash, St. Louis & Pacific Railway Company that is situated in the States of Ohio and Indiana, so far as the same was owned by the Toledo & Wabash Railway Company at the time the property and franchises of the company last named were transferred to the Toledo,
481 Wabash & Western Railway Company; and will adjudge that the lien of said bonds on the property last mentioned has priority over all liens of all kinds now existing upon the same, excepting the said mortgage executed by the Toledo & Illinois Railroad Company for the sum of $900,000, and the said mortgage executed by the Toledo & Wabash Railway Company for the sum of $1,000,000, which two mortgages are liens on the part of said property situated in the State of Ohio; and also excepting the said mortgage executed by the Lake Erie, Wabash & St. Louis Railroad Company for the sum of $2,500,000, and the said mortgage executed by the Wabash & Western Railroad Company for the sum of $1,500,000, which two last mortgages are liens on the part of said property situated in the State of Indiana.

And this plaintiff further prays that the defendant in this action, the Wabash, St. Louis & Pacific Railway Company, may be decreed to pay the amount due to the plaintiff upon the said bonds herein known as equipment bonds, which he holds and owns, by a short day, to be named by this Court, together with all proper costs and expenses, and in default thereof that the railroad and all the property, and the appurtenances thereto, originally owned by the Toledo & Wabash Railway Company situated in the States of Ohio and Indiana, and which is now in the possession of the said Wabash, St. Louis & Pacific Railway Company, may be ordered and decreed

to be sold for the payment of said indebtedness to this plaintiff, and the said bonds owned by him, subject, however, to the said mortgage liens thereupon which are prior to the lien of said plaintiff as the owner of said bonds known as equipment bonds, and that the money realized from such sale, after deducting just allowances for the disbursements and expenses of such sale, be distributed in accordance with the equities of the parties entitled thereto, and that the defendants above named, or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said premises so decreed to be sold.

482 The said plaintiff further prays that this Court will order, adjudge and decree that the said bonds known as equipment bonds, held and owned by the plaintiff, shall be considered secured by the said consolidated mortgage; that an account be taken of all the debts secured by said consolidated mortgage, and the amount thereof and the relative priorities; and the said Wabash, St. Louis & Pacific Railway Company may be decreed to pay to the plaintiff and others whose debts or bonds are secured by said consolidated mortgage, all arrears of interest now due or that may hereafter become due and payable, together with all costs and expenses in this behalf incurred; and in default thereof that all and singular the property covered by, and described in, said consolidated mortgage, with the appurtenances, rights and franchises in the said consolidated mortgage mentioned may be sold under a decree of this Court; that the proceeds of such sale, after deducting just allowances for all disbursements and expenses of said sale, may be applied and distributed in accordance with the equities of the parties entitled to the same as ascertained by this Court; and that the said defendants above named, and all persons claiming under them may be forever barred and foreclosed of and from all equity of redemption, claim of, in and to the said mortgaged premises.

The plaintiff further prays that an injunction may be issued according to the form of the statute in such case made and provided, directing, commanding and enjoining the said defendants, and each of them, from transferring, selling, incumbering, or in any way disposing of any of the property or franchises situated in the States of Ohio and Indiana, which was transferred by the said Toledo & Wabash Railway Company to the said Toledo, Wabash & Western Railway Company at the time of the consolidation of the former company in the year 1865, with the other railroad companies here-before specified, or any of the property mentioned in and covered by said consolidated mortgage.

483 And the said plaintiff prays that he may have such other and further relief in the premises as to the Court may seem meet and just and as is agreeable to equity.

SPRAGUE, MILBURN & SPRAGUE AND
R. P. RANNEY, *Att'ys for Plaintiff.*

STATE OF OHIO, *Cuyahoga County, ss:*

R. P. Ranney, being first duly sworn according to law, says that he is one of the attorneys of record for James Compton, the plaintiff in the above-entitled action; that he makes this affidavit for the reason that the said James Compton is not a resident of the county—and State of Ohio, and that the said James Compton is now absent therefrom; and the facts stated and the allegations of the foregoing petition of the said James Compton are, as he verily believes, true.

R. P. RANNEY.

Subscribed and sworn to before me, and signed in my presence, by said R. P. Ranney, this second day of February, 1880.

[NOTARIAL SEAL.] JAMES PARMELEE,
Notary Public in and for said Cuyahoga County.

484 *Precipe.*

THE STATE OF OHIO, *Lucas County, ss:*

In the Court of Common Pleas.

JAMES COMPTOM, Plaintiff,
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, as Trustee, Defendants.

To Clerk:

Issue summons in above action returnable according to law. Action for injunction and relief.

SPRAGUE, MILBURN & SPRAGUE AND
R. P. RANNEY, *Att'ys for Plaintiff.*

EXHIBIT "A" (COMPTON RECORD).

"*Resolved,* That for the purpose of providing further equipment "and satisfying other requirements of the company, the president "be authorized and directed to have prepared bonds of this com- "pany of denominations of one hundred, five hundred and one "thousand dollars each, or of such other denominations as may be "deemed advisable, to an amount not exceeding six hundred thou- "sand ($600,000) dollars. Said bonds to bear date November 1st, "1862, and the principal made payable to a trustee or bearer in the
"city of New York, on the first day of May, 1883, and bear
485 "interest at seven per cent., payable semi-annually at the
"same place, said interest to be represented by coupons, and "the bonds so to be issued shall be executed in the usual manner and

"under the corporate seal of the company, and they shall be con-
"vertible into the common stock of the company at par, at any time
"within five years from the date thereof, but shall not be entitled
"to a dividend for any time on which the holder thereof has received
"interest.

"*Resolved*, That the Executive Committee be authorized to issue,
"sell and dispose of the said bonds in such manner and upon such
"terms as they may deem for the best interest of the company."

EXHIBIT "B" (COMPTON RECORD).

Consolidated Mortgage.

This indenture, made the first day of February, in the year of our Lord one thousand eight hundred and sixty-seven, between the Toledo, Wabash & Western Railway Company, a corporation created and existing under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, and having continuous lines of railroad in said States, of the first part; and Isaac Knox and James R. Jesup, of the city, county and State of New York, of the second part:

Whereas, the said company has been duly formed under the laws and consolidation statutes of the said several States of Ohio, Indiana, and Illinois, by the consolidation of the stock, property, rights, franchises and interests of the several companies, known as the Toledo, Wabash & Western Railway Company, the Great Western Railway Company of 1859, the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company;

And, whereas, at the time of such consolidation, the property of said various companies was subject to certain bonded debts and mortgages, created by said several companies or by other rail-
486 road corporations, which, at the time of the creation of said debts and mortgages, were the then owners of the property so consolidated;

And, whereas, all the funded debt of said company, parties of the first part, including that secured by said mortgages, as well as that not secured by any mortgage, now amounts in the aggregate to the sum of thirteen millions three hundred thousand dollars, besides interest;

And, whereas, said funded debt, as it now exists, is represented and made up as follows, viz:

First mortgage bonds of the Toledo & Illinois Railroad Company, due as extended August 1, 1890, for the sum of nine hundred thousand dollars, secured by a first mortgage on the part of the road of the parties of the first part, running from Toledo to the westerly boundary of the State of Ohio, about seventy-five miles.

Bonds of the Toledo & Wabash Railroad Company, due November 1, 1878, for one million dollars, secured by a second mortgage on that portion of the road of the parties of the first part last above named.

First mortgage bonds of the Lake Erie, Wabash & St. Louis Railroad Company, due as extended August 1, 1890, for the sum of two million five hundred thousand dollars, secured by a first mortgage on the part of the road of the parties of the first part, running entirely through the State of Indiana, about one hundred and sixty-eight miles.

Bonds of the Wabash & Western Railway Company, due November 1, 1878, for one million five hundred thousand dollars, secured by a second mortgage on that portion of the road of the parties of the first part last named.

First mortgage bonds of the Great Western Railroad Company, due April 1, 1868, for the sum of one million of dollars, secured by a first mortgage on the part of the said road of the parties of the first part, running in the State of Illinois, from Decatur to the Illinois River at Naples, about one hundred miles.

487 Also bonds of the last named company, due August 1, 1865, for the sum of one million three hundred and fifty thousand dollars, secured by mortgage on the part of said road of the parties of the first part, running in the State of Illinois from the State line of Indiana on the west to the Illinois River, about one hundred and seventy-nine miles; there being at present outstanding of said bonds the sum of about twenty thousand dollars, the rest having been retired by a portion of the bonds next described.

First mortgage bonds of the Great Western Railroad Company of 1859, due August 1st, 1888, for the sum of two millions five hundred thousand dollars, secured by a mortgage on that part of the road of the parties of the first part extending in the State of Illinois from Naples and Meredosia, as its western termini, to the boundary line between the States of Illinois and Indiana, about one hundred and seventy-nine miles; the last named bonds having been created to retire the aforesaid $1,000,000 and $1,350,000 of Great Western Railroad Company bonds.

Bonds of the Great Western Railroad Company of 1859, due May 1, 1893, for two million five hundred thousand dollars, secured by mortgage on that part of the road of the parties of the first part last named, about one hundred and seventy-nine miles.

Bonds of the Illinois & Southern Iowa Railroad Company, due August 1, 1882, for three hundred thousand dollars, secured by a first mortgage on that part of the road of the parties of the first part extending from said Clayton to Carthage in said State of Illinois, about thirty miles.

Bonds of the Toledo & Wabash Railway Company, due May 1, 1883, for the sum of six hundred thousand dollars, and known as "Equipment Bonds."

Bonds of the Toledo, Wabash & Western Railway Company, due April 1, 1871, for the sum of one million of dollars, and known as "Sinking Fund Bonds;" the last two classes of bonds not being secured by any mortgage on any of the property of the parties of the first part.

488 And whereas, it has been deemed for the interest of the said parties of the first part, as well as for the benefit of the hold-

ers of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt, upon equitable principles;

And whereas, the increasing freight business of the road of the parties of the first part requires additional equipment to do the same;

And whereas, it has been deemed expedient for the preservation of the bridges on the line of said road, that the same should be covered, and that additional depot accommodations should be obtained, and that the road through its entire length should be fenced;

And whereas, the expenses to be incurred for the above should be provided for by the creation of new capital;

And whereas, for the purposes aforesaid, and for the objects herein stated, the said company, parties of the first part, has resolved to make and issue its bonds to the extent of fifteen millions of dollars, and to secure the payment of the same by a mortgage upon its entire property; and that of the amount of said bonds so to be made and issued, there should be retained thirteen millions three hundred thousand dollars to retire, in such manner and upon such terms as the directors of said company may from time to time prescribe, a like amount of the bonds hereinabove enumerated and described and representing the aforesaid funded debt; and that the balance of said bonds, to wit: one million seven hundred thousand dollars thereof, should be used to provide the said additional equipment and other improvements hereinbefore mentioned, and for such additional purposes as the said directors may deem advisable; and that all of said bonds should be for the sum of one thousand dollars each, except two hundred, which should be for the sum of five thousand dollars each, and that all should bear date on the first of February, A. D. 1867, and become due and payable in forty years from their date, with interest at the rate of seven per cent. per annum,
489 payable quarterly on the first days of May, August, November and February, in each year in the city of New York, and to be all convertible into the common stock of said company at par, at the option of the holder, at any time within ten years of their date;

And whereas, the said company has further resolved that a sinking fund of fifty thousand dollars per annum should be created, payable to commissioners at the times and in the manner hereinafter stated and agreed, and to be used by said commissioners for the purposes and in the manner as hereinafter directed by these presents;

And whereas, it is the intention of these presents, and it is hereby so declared, that all of the said bonds to be issued shall stand equally secured by these presents, without reference to the times of the actual issue of said bonds, and that said bonds shall be substantially in the form following, viz:

No. —. $—.

UNITED STATES OF AMERICA,

States of Ohio, Indiana, and Illinois.

Toledo, Wabash & Western Railway Co.

Consolidated Mortgage Sinking Fund, Convertible Bond.

Know all men by these presents that the Toledo, Wabash and Western Railway Company, a corporation created and existing under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, acknowledge themselves indebted to Isaac H. Knox and James R. Jesup, of the city of New York, or bearer, in the sum of —— dollars, lawful money of the United States of America, which sum the said company promises to pay to the said Isaac H. Knox and James R. Jesup, or the bearer hereof, on the first day of February, which will be in the year one thousand
490 nine hundred and seven, at their office or agency in the city of New York, with interest thereon at the rate of seven per centum per annum, payable quarter-yearly at their said office or agency in the city of New York, on the first days of May, August, November and February in each year, on the presentation and surrender of the coupons or interest warrants hereto annexed as they severally become due; and in case of the non-payment of any quarter-yearly installment of interest which shall have become payable, and shall have been demanded, if such default shall continue for the space of six months after the maturity and demand of the said installment, the principal of this bond shall become due in the manner and with the effect as provided in the deed of trust hereinafter mentioned, it is agreed between the said company and the holder of this bond, that in case of any default in the payment thereof, the said company hereby waives the benefit of any extension, stay or appraisement laws now existing, or that may hereafter exist. And the said company further agree, that on the surrender of this bond, together with all outstanding coupons for interest thereon and at any time within ten years from the date hereof the proprietor of this bond shall be entitled to the common stock of this company at par, for the face of this bond, in satisfaction thereof, and to a certificate of such stock entitled to draw *pro rata* dividends from the maturity of the last interest due on said bonds, at or immediately prior to the time of such conversion. And the said company further agree that they will pay the commissioners named in the said deed of trust, at the times and in the manner therein stated, the sum of fifty thousand dollars per year, for the purpose of being applied and used by such commissioners as a sinking fund for the payment and extinguishment of the principal of all the bonds issued under and secured by said deed of trust; and that this bond shall be entitled to all the benefits of said sinking fund as therein provided. This bond shall pass by delivery or by transfer on the books of the company in

the city of New York, after a registration of ownership cer-
491 tified hereon by the transfer agent of the company; no transfer, except on the books of the company, shall be valid unless the transfer be to bearer, which shall restore transferability by delivery; but this bond shall continue subject to the successive registrations and transfers to bearer as aforesaid at the option of each holder.

This bond is one of the series of fourteen thousand two hundred bonds, 14,000 of which, numbered consecutively from one to fourteen thousand, inclusive, are each for the sum of one thousand dollars; two hundred of which, numbered consecutively from fourteen thousand and one to fourteen thousand two hundred, inclusive, are each for the sum of five hundred dollars; and the whole series, amounting in the aggregate to fifteen millions of dollars and no more, are all of like tenor, and all dated February 1st, 1867, and are made and issued to retire all the various classes of bonds and securities now composing the funded debt of said company, and to provide means of additional equipment and for the special improvement of the property of said company; and the payment of all said bonds is secured by an indenture of mortgage or deed of trust, dated February 1st, 1867, made by said company to Isaac H. Knox and James R. Jesup, of the city, county and State of New York, trustees, conveying the railroad, equipment, franchises and property of said company, as therein described and stated, and subject only to such prior liens on any part of said property as therein stated.

This bond shall not become obligatory until it shall have been authenticated by a certificate indorsed thereon and duly signed by said trustees.

In witness whereof the said company have caused their corporate seal to be affixed hereto, and the same to be attested by the signatures of their president and secretary, this first day of February, one thousand eight hundred and sixty-seven.

[SEAL.] —— ——, *President.*
—— ——, *Secretary.*

492 [Endorsement of Bond.]

Payment of this bond, being one of a series of $15,000,000, is secured by a mortgage deed of trust, dated February 1st, 1867, made by the Toledo, Wabash & Western Railway Company to Isaac H. Knox and James R. Jesup, trustees, which is recorded in the States of Ohio, Indiana and Illinois.

—— ——,
—— ——,
Trustees.

Now, therefore, this indenture witnesseth, that the said parties of the first part, the better to secure the payment of the said bonds, amounting, in the aggregate, to the sum of $15,000,000, and no more, with interest at the times and in the manner therein mentioned and set forth, as well as to secure the payment of the sinking

fund as therein agreed; and for and in consideration of the sum of one dollar by the parties of the second part in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred and set over, and by these presents do grant, bargain, sell and set over, unto the said parties of the second part, their successors in the trust and assigns forever, all the right of way and railroad of the said parties of the first part, extending from Toledo in the State of Ohio to and through the State of Indiana, and thence in the State of Illinois to Meredosia, with branch of said road to Naples; and from said Meredosia to Camp Point in said State of Illinois; and also with branch of said road from Clayton in said State to the east bank of the Mississippi River at Hamilton in said State, as now made or as hereafter may be made, and as now used or as hereafter may be used, together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turn tables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all other things, real and personal now owned or used, or that hereafter may be owned or used, by the
493 parties of the first part in connection with the said railroad, and everything appertaining and appurtenant thereto; and all the franchises, powers, privileges and chartered or other rights of the said Toledo, Wabash & Western Railway Company, together with all the property, real and personal, of said parties of the first part now acquired or to be hereafter acquired at Quincy in said State of Illinois, as also a certain contract made between the said company and the Chicago, Burlington & Quincy Railroad Company, dated October 26th, 1866, with all the rights and privileges secured by said contracts, to said parties of the first part, and all other contracts.

To have and to hold all and singular the above granted and described premises, with the appurtenances thereunto belonging, unto the said parties of the second part, their successors in the trust and assigns forever.

In trust, nevertheless, for the person or persons, and the bodies politic or corporate, who now or shall become holders of the said bonds or any of them, subject to the terms and stipulations of said bonds and the laws of the said several States of Ohio, Indiana and Illinois, and also subject to the possession, control and management of the said company, parties of the first part, so long as the said company shall well and truly perform all and singular the stipulations of the bonds aforesaid, and the covenants contained in this indenture.

And the said parties of the first part hereby covenant with the said parties of the second part, and for the benefit of all those persons who shall become holders of said bonds or any of them, and their assigns, that the said parties of the first part will pay all of said bonds, principal and interest, in the manner as stated in said bonds, and that they will also pay to the persons herein appointed as commissioners the sum of fifty thousand dollars per year, for the purpose of being used and applied by said commissioners as a sinking fund for the payment and extinguishment of the principal of all

of said bonds so to be issued and secured by this mortgage or
494 deed of trust; and that said sum shall be paid to said commissioners in installments of twenty-five thousand dollars every six months, on the first days of February and August in every year, until and including the maturity of said bonds, and that the first payment of said installments shall be made on the first day of February, A. D. 1868. It being hereby understood and agreed that the said commissioners having the custody of said sinking fund shall be the president of said company, parties of the first part, and two members of the board of directors, one of which two members shall be changed every year.

And it is hereby understood and declared that it shall be the duty of the said commissioners above named, and their successors in the trust, in respect to all the moneys that shall be paid them on account of said sinking fund as hereinabove provided, as well as to all the accumulations thereof, to invest the same by purchasing the bonds secured by these presents on the best terms the same can be bought, but not at a rate exceeding the par value of said bonds and five per cent. additional, and that the bonds so purchased shall be held by said commissioners or deposited by them with some trust company or other safe depository, and be immediately registered, stamped or endorsed as belonging to the said sinking fund, but shall remain in force, and the interest thereon shall continue to be paid by the said parties of the first part, and the amount of such interest shall be added and applied as a part of the capital of the sinking fund hereby established, and be used in the same manner as the semi-annual payments of twenty-five thousand dollars herein provided for; and that preparatory to such purchase of bonds, said commissioners shall give twenty days' notice thereof in one or more of the daily papers published in the City of New York, and shall make *to* said purchase at the lowest price or prices at which the bonds may be offered pursuant to such notice, or at such lower price or prices as they may be able to obtain the same, but not exceeding the par of said bonds and five per cent. additional, and in case the said bonds cannot be
495 purchased at the above limit, within one month after said advertisement, then the said commissioners shall invest said money in any of the bonds of the various corporations, creating the funded debt of this company hereinbefore described; said last-named bonds to be purchased at the lowest market price, not exceeding the par of said bonds; and in case of inability to procure said bonds at that limit, the said commissioners shall invest said moneys in the bonds of the United States. The said commissioners, through the agency of the company, and such other assistants as they may find it necessary to employ, shall have regular books of account and registers kept of all their proceedings, which, with all the papers and documents held by them, shall at all times be open to the inspection of the directors of the company. The receipt of said moneys by said commissioners shall impose upon them the same duty to perform this trust as if they had formerly signed an agreement to execute the same in accordance with the above directions.

And the said company, parties of the first part, for themselves, their successors and assigns, do hereby further covenant and agree, to and with the said trustees, their successors and assigns, that in case default shall be made in any of the quarter-yearly installments of interest on any of the aforesaid bonds, at the times and in the manner in the coupons or interest warrants therewith provided and shall have been demanded, and such default shall continue for the period of six months after the maturity and demand for payment of the said installments, or in any case default shall be made in the payment to the said commissioners of the whole or any part of any semi-anuual installment of the sinking fund as herein provided, and such default shall continue for the period of six months, then, and in either of such cases, the principal of all bonds secured by these presents shall become immediately due at the option of the holder or holders of a majority in interest of said bonds then outstanding, to be expressed by them in writ-
496 ing to said trustees; and in either of such cases of default in the nonpayment of interest or nonpayment of the sinking fund, as well as in the case of nonpayment of the principal of said bonds when due, and such default in either of the three cases shall continue for said period of six months, upon the request in writing of the holder or holders of a majority in interest of said bonds outstanding, said trustees shall take actual possession of all and singular the property and effects mortgaged, and the agent or agents of said railway company actually in possession thereof are hereby ordered to give such possession to said trustees, parties of the second part; and the said trustees shall cause the said mortgaged premises, or so much thereof as shall be necessary to pay and discharge the entire principal and interest of all of said bonds as may be then outstanding and unpaid, together with all expenses of sale, to be sold at public auction in the city of New York, or in the city of Toledo in the State of Ohio, or in the city of Lafayette, in the State of Indiana, or in the city of Springfield, in the State of Illinois (as they may be directed by the holder or holders of a majority in interest of said bonds), giving at least sixty days' notice of the time, place and terms of sale, and of the specific property to be sold, by publishing the same in at least three newspapers of good circulation in said city of New York, and in one newspaper, at least, published in the cities of Toledo, Ohio; Lafayette, Indiana; and Springfield, Illinois; or to adjourn the said sale from time to time in the discretion of the trustees; and, if so adjourning to make the sale without further notice at the time and place to which the same may be adjourned, and execute to the purchaser or purchasers thereof on such sale a good and sufficient deed or deeds of conveyance in fee simple for the same, which shall be a bar against the parties of the first and second parts, their and each of their successors and assigns, and all persons claiming under them or either of them, of all right, title, interest, claim or demand in or to the said mortgaged premises or any part thereof;
497 and out of the proceeds of such sale and the income next mentioned, after deducting just allowances and expenses, to

pay, first the interest in arrear on the said bonds secured by these presents and then outstanding, and then to pay the principal thereof in full or ratably, so far as such proceeds and income shall suffice; and on and after such request to take possession, and until such sale, said trustees and their successors in the trust shall operate said road by such agents, receivers and superintendents as they may appoint; and said trustees shall receive and collect all the income, revenues and profits of the said railroad and mortgaged premises, and after defraying the necessary expenses of operating the same, and all needful repairs thereto, and the necessary taxes imposed thereon, shall apply the net income so received to the payment of the interest and principal of said bonds in the order above expressed; and for the charges and expenses of so conducting the road and its needful repairs and taxes, and the management of the said business, the said trustees shall be indemnified out of the proceeds of the sale of said road, if needful, as well as out of its receipts and income, and in case any surplus shall remain in the hands of the said trustees, or their successors, the same shall be paid to the said parties of the first part, their successors or assigns.

It being hereby expressly understood and agreed that in no case shall any claim or advantage be taken by the parties hereto of the first part, of any valuation, appraisement, stay or extension laws now existing, or that may hereafter exist, nor any injunction, or stay of proceedings, or any process to be applied for or obtained or used by or for them to prevent such entry or sale as aforesaid.

It is understood and further agreed that at any sale of the aforesaid property, or any part thereof, whether made by the power therein granted or by judicial authority, the trustees, at the request of the holder or holders of a majority in interest of the bonds then outstanding secured by this instrument, shall bid for and purchase, or cause to be bid for and purchased, the property so sold or any part thereof, on behalf of all the owners of the bonds secured by this instrument and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of such property be sold, or if all of it be sold, at a price not exceeding the whole amount of such bonds then outstanding, with the interest thereon and necessary expenses of such sale.

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And it is understood and hereby declared that this mortgage is intended and shall be a first lien on the portions of railroad and property of the parties of the first part, extending in the State of Illinois from Clayton to Camp Point, the distance of about six miles, more or less, and from Carthage to the east bank of the Mississippi River at Hamilton, as now built, and as hereafter may be built, but is subject as to the rest of said railroad and property to prior liens thereon by mortgage, amounting, in the aggregate, to the principal sum of eleven million seven hundred thousand dollars, the same being security for that amount of the funded debt of said company, as aforesaid described, and which is intended to be retired by the issue of a part of the bonds secured by these presents,

and whenever all of said eleven million seven hundred thousand dollars of bonds shall have been retired, these presents are intended to be and become a first lien on all the railroad and property of the parties of the first part.

It is further understood and agreed by and between the parties hereto that in case of the death or resignation of either of the trustees, or in the event of the incapacity of either of said trustees to act in the matter of the trust, the parties of the first part, by their board of directors and the surviving or remaining trustee (as the case may be), shall elect a new trustee to supply the vacancy thereby created, who shall, by such election, have all the powers of the trustee whose place he may take; and, in case of the death, resignation or incapacity to act of both of said trustees or their successors, the holder or holders of a majority in interest of the then outstanding bonds secured by these presents shall with the said company elect or appoint new trustees, who, on such election or appointment, shall be invested with all the powers herein granted to the parties of the second part. And upon the death, resignation or removal of the trustees herein appointed, or of either of them, or of their or either of their successors, all the estate, right, title and interest in any trustee so dying, resigning or being removed shall wholly cease and determine, and the trustee so resigning or being removed shall, upon the written request of the new trustee so appointed, execute and deliver a deed or deeds of conveyance to vest in such new trustee upon the trusts herein expressed all the property, rights and franchises which may be at the time held upon the said trusts.

And the parties of the first part do hereby covenant and agree to and with the said parties of the second part, their successors and assigns, for the benefit of those to whom shall be delivered and their assigns to make, execute and deliver to the said parties of the second part, their successors and assigns, and on their reasonable request, all such further assurances, conveyances and instruments in the law as counsel may reasonably devise and advise, the more effectually to vest in the said parties of the second part, their successors and assigns, all and singular the premises hereby conveyed or intended to be for the purposes thereinbefore for that purpose mentioned or intended, and that the said trustee shall be liable, responsible and accountable only for the exercise of reasonable diligence in the management of the trust and not one for the acts or negligences of the other, and not for the acts of the agent or agents by them or at any time appointed under these presents.

This conveyance is upon the express condition and limitation that, upon the payment and satisfaction of the principal and interest of each and every of said bonds and of the expenses and reasonable charges attending the execution of this trust, the estate hereby granted shall immediately be reinvested in law and in fact in said company, parties of the first part hereto, its successors and assigns, without any entry or other acts.

In witness whereof the said Toledo, Wabash & Western Rail-

way Company, the parties hereto of the first part, have the day and year first above written, caused their corporate seal to be hereto affixed, and the same to be attested by their secretary, and the name of their president to be signed to these presents. The parties of the second part hereto have also respectively signed and sealed the same the day and year first above written.

A. BOODY, *President.*

Sealed and delivered in the presence of
CHARLES NETTLETON.
C. H. PIERCE.

Attest:
[SEAL.]

J. N. DRUMMOND, *Secretary.*
ISAAC H. KNOX. [SEAL.]
JAMES R. JESUP. [SEAL.]

STATE OF NEW YORK, *City and County of New York, ss:*

Be it remembered, that on this twenty-third day of March, A. D. one thousand eight hundred and sixty-seven, before me, Charles Nettleton, a Notary Public of the State of New York, duly commissioned and sworn, and dwelling in said city and county of New York, personally appeared A. Boody, the President of the Toledo, Wabash & Western Railway Company, to me known to be the real person, as such president, who being by me duly sworn did depose and say, that he resided in the city, county and State of New York, that he was the President of the said Toledo,
501 Wabash & Western Railway Company, that he knows the corporate seal of the said company, that the seal affixed to the foregoing indenture or instrument was such corporate seal, that it was so affixed by order of the board of directors of said company, and that he signed his name thereto by the like order as president of said company; and the said A. Boody acknowledged to me that he had executed the said indenture or instrument, and signed, sealed and delivered the same as the free and voluntary act and deed of the said Toledo, Wabash & Western Railway Company for the uses and purposes therein expressed. And on this same day before me also personally appeared Isaac H. Knox and James R. Jesup, who are personally known to me to be the real persons whose names are subscribed to the foregoing indenture or instrument as trustees therein named, and severally acknowledged the signing and sealing of the foregoing indenture or instrument to be their voluntary act and deed, for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this twenty-third day of March, A. D. 1867.

[SEAL.] CHARLES NETTLETON,
Notary Public in and for the City and County of New York.

EXHIBIT "C" (COMPTON RECORD).

Deed of Further Assurance.

This indenture made the first day of April in the year one thousand eight hundred and seventy-three, between the Toledo, Wabash & Western Railway Company, a corporation created and existing under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, of the first part, and Isaac H.
502 . Knox and James R. Jesup of the city, county and State of New York, of the second part.

Whereas by certain indenture of a mortgage bearing date the first day of February, in the year one thousand eight hundred and sixty-seven, and made by and between the parties hereto, the said party of the first part*y* did mortgage all of its railroad extending from Toledo in the State of Ohio through the State of Indiana to Meredosia, in the State of Illinois, together with other premises in the said mortgage described, to the parties hereto of the second part as trustees, in order to secure the payment of certain consolidated mortgage sinking fund convertible bonds of the said party of the first part, to the amount altogether of fifteen millions of dollars, as by reference to the said indenture of mortgage will more fully and at large appear.

And, whereas, of the said bonds to be made and issued under and secured by the said indenture of mortgage, thirteen million three hundred thousand dollars in amount were reserved for the purpose of being used to retire a like amount of certain other bonds enumerated and described in the said indenture of mortgage, which were outstanding at the time said mortgage was given, and then constituted the funded debt of the said party of the first part.

And, whereas, of the said funded debt one million dollars in amount has since matured and been retired, and for that purpose an equal amount of the said reserved bonds have been used, leaving now unissued and reserved for the purpose of being used to retire the remainder of the said funded debt, the amount of twelve million three hundred thousand dollars of the said fifteen million dollars of bonds originally secured by the said indenture of mortgage.

And, whereas, it is the desire of the parties hereto, by more express and specific stipulations than are contained in the said indenture of mortgage, to give assurance to all persons whom it may in any wise concern, that the said reserved bonds shall not,
503 nor shall any or either of them be used for any other purpose than the retiring of the said *funded debt* or some part thereof.

Now, therefore, this indenture witnesseth, that the party of the first part for and in consideration of the premises and of the sum of one dollar lawful money of the United States to it duly paid at or before the ensealing and delivery of these presents by the parties of the second part, and for divers other good causes and considerations, hath covenanted and agreed, and by these presents doth covenant and agree with the parties of the second part, and with all persons

whom it may in anywise concern, that the said party of the first part will not make or issue or attempt to make or issue any of the remaining twelve million three hundred thousand dollars of reserved bonds secured by the said indenture of mortgage except for the purpose of, and subsequent to, or simultaneously with the retiring of an equal amount of the balance remaining of the said funded debt, so that when all of the said reserved bonds shall have been issued, the whole of the balance of the said funded debt will have been also extinguished and discharged, and that whenever the said party of the first part shall call upon or request the said parties of the second part, or their successors, to sign the trustees' certificate indorsed upon and of the said reserved bonds, the said party of the first part shall produce and exhibit to them at the same time, cancelled or for cancellation, an equal amount at least of the bonds constituting the balance of said funded debt, and that, without such production of the said last-mentioned bonds and the cancellation of the same, the parties of the second part shall not, nor shall either of them, nor the successor of either of them, sign the trustees' certificate upon either of said reserved bonds.

And the said parties of the second party do hereby each for himself covenant and agree that they will not sign the trustees' certificate upon either of said reserved bonds, except as hereinbefore provided.

And the party of the first part doth further covenant and agree with the parties of the second part and their successors, and with all persons whom it may in anywise concern, that the covenants
504 herein contained shall be supplementary to and constitute a part of the said indenture of mortgage, and be of the same effect to all intents and purposes, as if they were inserted therein.

In witness whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary; and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

TOLEDO, WABASH & WESTERN RAILWAY CO.,
By A. BOODY, *President.*
[SEAL.] JAMES R. JESUP.
ISAAC H. KNOX.

Attest:
WM. B. CORNEAU, *Secretary.*

Sealed and delivered in the presence of
ALEX. M. WHITE,
As to the Signature of A. Boody, President.
CHARLES NETTLETON,
Of James R. Jesup and Isaac H. Knox.

Thereupon the summons in said cause was issued by the Clerk of said Court of Common Pleas, which summons is in the words and figures as follows, to wit:

THE STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of Lucas County:

You are commanded to notify the Toledo, Wabash & Western Railway Company, The Wabash Railway Company, The Wabash, St. Louis & Pacific Railway Company, James R. Jesup and Isaac H. Knox, as trustees, and George I. Seney, as trustee, that they have been sued by James Compton in the Court of Common Pleas of Lucas County, and that unless they answer by the sixth day of March, 1888, the petition of said plaintiff against them filed in the clerk's office of the said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the sixteenth day of February, A. D. 1880.

505 Witness, M. J. Enright, Clerk of said Court, and the seal thereof, at Toledo, this third day of February, 1880.

[SEAL.] M. J. ENRIGHT, *Clerk,*
By E. HAMILTON,
Deputy Clerk.

Said summons was indorsed as follows, to wit:

No. 19,484. Lucas Common Pleas. James Compton *vs.* The Toledo, Wabash & Western Railway Company, *et al.* Returnable February 16, A. D. 1880. Summons in action for injunction and relief. Sprague, Milburn & Sprague, and R. P. Ranney, attorneys for plaintiff. Returned and filed, February 14, 1880.

On the 14th day of February, said summons was filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, with the sheriff's return thereon written in the words and figures as follows, to-wit:

THE STATE OF OHIO, *Lucas County, ss:*

Received this writ February 3, 1880, and pursuant to its command I served the same on the sixth day of February, 1880, as the within named defendants, to wit, The Toledo, Wabash & Western Railway Company; The Wabash Railway Company, and the Wabash, St. Louis & Pacific Railway Company, by delivering three copies of said writ personally to William B. Corneau, the secretary of said three respective corporations, that is to say, three copies of said writ in all, and one for each of said corporations, the president, chairman, president of the board of directors, and other chief officers of said corporation respectively not being found in said Lucas County. The other defendants within named were not found in Lucas County, Ohio.

ALBERT MOORE, *Sheriff,*
By WM. BABBINGTON, *Deputy.*

506 On the first day of June, 1880, defendants, the Toledo, Wabash & Western Railway Company, the Wabash Railway

Company, and the Wabash, St. Louis & Pacific Railway Company, by their attorneys filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, an Answer in the above-entitled cause, which Answer is in the words and figures as follows, to wit:

Court of Common Pleas, Lucas County.

JAMES COMPTON, Plaintiff,
against
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP, and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, as Trustee, Defendants.

These defendants, for answer, say:

First. They have no knowledge other than from the averments contained in the petition, that the plaintiff is the owner and holder of the bonds or coupons described in the petition, or any of them, and therefore denies the averments of the petition in that behalf.

Second. For a second answer these defendants say that it is not true, and they therefore deny, that the Wabash Railway Company held its property, or any portion of it, subject to the pretended liens,
or to any liens which the plaintiff claims to hold thereon, in
507 behalf of or on account of the bonds, coupons, or any of them,
which are described in his petition, and they deny that the Wabash, St. Louis & Pacific Railway Company holds its property, or any part thereof, subject to any such pretended lien.

Third. For a third answer defendants say that it is not true, and they therefore deny, that the Toledo, Wabash & Western Railway Company agreed to pay the equipment bonds of the Toledo & Wabash Railway Company as a part of the consideration for the purchase of the property of that company. They aver, on the contrary, that the Toledo & Wabash Railway Company did not, in fact, sell its property to the Toledo, Wabash & Western Railway Company; but, by reason of certain proceedings in consolidation, it became merged into that company, and as a separate corporation became thereby extinct, and the unsecured debts thereof became the unsecured debts of the Toledo, Wabash & Western Railway Company, and received no additional guaranty and underwent no change by reason of said merger.

Fourth. These defendants, for further answer, say that it is true, as alleged in the petition, that the directors of the Toledo, Wabash & Western Railway Company never prescribed terms of exchange of said bonds, and never issued any of the consolidated bonds in exchange for the equipment bonds.

But these defendants deny that said directors ever neglected or refused to prescribe any terms of exchange, or that said directors neglected or refused to do any other matter or thing which they were bound to do under said consolidated mortgage. On the contrary, these defendants aver that the said directors were never re-

quired or solicited by the holder or holders of said bonds to make an exchange for consolidated bonds, nor were they ever requested by any such holder or holders to prescribe any terms for an exchange of said bonds, nor were they ever notified by any holder of
508 equipment bonds that any exchange would be made upon any terms whatever. And they deny all the averments of the petition that the holders of said equipment bonds stood ready and were willing to exchange the same for said consolidated bonds.

Fifth. The Wabash, St. Louis & Pacific Railway Company, further answering, denies that the Wabash Railway Company is identical with the Toledo, Wabash & Western Railway Company. On the contrary, it was a new, distinct and separate organization, and that it was organized by virtue of the laws of Ohio, Indiana and Illinois, for the purpose of constructing and operating a railway in said several States, and became the owner of a roadway, rolling stock and property of the Toledo, Wabash & Western Railway Company by purchase at a judicial sale and by means of the conveyances recited in the petition; and it avers that the property so conveyed to it is subject to the liens and incumbrances which are described in said conveyances and no others; and it avers and charges that the pretended lien set up in plaintiff's petition is not one of said enumerated liens, and neither the said Wabash Railway Company nor this defendant had any notice thereof, nor was there any such lien upon said property, nor is there a lien now upon the same or any parts or portions thereof.

Sixth. These answering defendants further answer and say that it is not true, and they therefore deny, that the Toledo, Wabash & Western Railway Company, by virtue of the execution of the said consolidated mortgage, gave any lien or right or equity of any kind upon its property, or that it acknowledged such lien or secured to holders of equipment bonds any equitable right of payment either as an unpaid portion of purchase money or for any other reason or consideration whatever.

By W. SWAYNE,
Gen. Solicitor, and
J. R. OSBORN,
Att. for Defendants.

509 THE STATE OF OHIO, *Lucas County, ss:*

John R. Osborn, being sworn, says that he is attorney for the Wabash, St. Louis & Pacific Railway Company, and that the averments and statements which are contained in the foregoing answer are true as he believes.

JOHN R. OSBORN.

Sworn to before me and subscribed in my presence, this first day of June, A. D. 1880.

[SEAL.] SYLVESTER LAMB,
Notary Public, Lucas County.

On the seventh day of June, 1880, defendants Isaac H. Knox and James R. Jesup, trustees, by their attorneys, filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, an Answer in the above-entitled cause, which Answer is in the words and figures as follows, to wit:

Court of Common Pleas, Lucas County, Ohio.

JAMES COMPTON, Plaintiff,
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, as Trustees, Defendants.

Answer of Isaac H. Knox and James R. Jesup, as Trustees.

And now come the defendants above named and for answer say:
That as to all the claims and allegations in the petition setting
510 forth that plaintiff is owner of any of the bonds of the Toledo, Wabash & Western Railway Company, which are secured by trust estate conveyed to these defendants, they have neither knowledge nor information, save as derived from said petition, and therefore deny the same. These defendants admit and further set up and declare that, as alleged in said petition, the Toledo, Wabash & Western Railway Company on or about the first day of February, 1867, executed and delivered to these defendants a certain deed of conveyance in fee simple, and thereby conveyed to them, the said Isaac H. Knox and James R. Jesup, the following property, to wit: All the right of way and railroad of the said Toledo, Wabash & Western Railway Company, extending from Toledo in the State of Ohio, to and through the State of Indiana and thence into the State of Illinois to Meredosia, with branch of said road to Naples; and from said Meredosia to Camp Point in the State of Illinois, and also with branch of said road from Clayton in said State to the east bank of the Mississippi River at Hamilton in said State, as then made, or as thereafter should be made, and as then used or as thereafter should be used, together with all embankments, bridges, turnouts, side-tracks, structures, water-tanks and fixtures, shops, engine or other houses, depots, turn-tables, engines, cars, machinery, tools, rolling stock, lots, land, buildings, offices, and all other things real and personal then owned or used, or that thereafter should be owned or used by the parties of the first part in connection with said railroad, and everything appertaining and appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said Toledo, Wabash & Western Railway Company, together with all the property, real and personal, of said company, then acquired, or to be thereafter acquired at Quincy, in said State of Illinois, as also a certain contract made between the said company and the Chicago, Burlington &
Quincy Railroad Company, dated October 26, 1866, with all
511 the rights and privileges secured by said contracts, to said parties of the first part, and all other contracts.

In trust, nevertheless, for the uses and persons following, that is to say, the several lawful holders from time to time of certain interest bearing obligations about to be issued by said company, to wit: Fourteen thousand bonds of said company of the sum of one thousand dollars each, consecutively numbered from one to fourteen thousand and no more, and two hundred bonds of said company of the sum of five thousand dollars each, consecutively numbered from fourteen thousand and one to fourteen thousand and two hundred, all of said bonds bearing date on the first day of February, 1867, and becoming due and payable quarterly on the first day of May, August, November and February in each year, in the city of New York and to be all convertible into the common stock of said company at the option of the holder, at any time within ten years from their date. And the said company further agreed that they would pay the commissioners named in the said deed of trust at the times and in the manner therein stated, the sum of fifty thousand dollars per year, for the purpose of being applied and used by such commissioners as a sinking fund for the payment and extinguishment of the principal of all the bonds issued under and secured by said deed of trust.

And these defendants further answering say: that they forthwith accepted and entered upon said trust, that said deed was presently thereafter filed for record in the proper offices in the several States of Ohio, Indiana and Illinois, and duly recorded in the manner prescribed by the laws of said States respectively, and that bonds of said issue to the amount of two million six hundred and ten thousand dollars were thereupon disposed of by said company to divers persons in good faith and for full value, and who relied upon said trust for their security.

The conditions of said trust were, among others, that if the said above named corporation should well and truly pay the said
512 interest coupons and the principal sum of said bonds as the same should respectively fall due, and the said semi-annual installments of the sinking fund, then the said property so conveyed should be and remain in the undisturbed possession of said company; but if the said corporation should at any time make default for six months in the payment of the said interest coupons, or any of them, or principal of the said bonds or any of them, or of the said installments of a sinking fund, then, upon the request in writing of a majority in interest of the holders of said bonds outstanding upon which interest or principal should be unpaid as aforesaid, the said trustees might and should take actual possession of all and singular the property and effects as mortgaged above, and make all useful and necessary repairs thereto and should receive the income and profits of the said railroad and mortgaged premises for the security hereinbefore declared.

And if the interest and principal due on said bonds were not paid by the said company within six months or from the net proceeds of said road, then said trustees should further cause the said mortgaged premises or so much thereof as should be necessary to pay and discharge the entire principal and interest, whether due or not of all the said bonds then unpaid, together with all expenses of sale, to be

sold at public auction as in said deed further provided, and from the proceeds of said sale should pay the entire principal and interest remaining unpaid on said bonds; the residue, if any after making such payment, and payment of costs of such trustees, and of managing the property, to be by said trustees paid over to the corporation above named.

These defendants aver that the Toledo, Wabash and Western Railway Company on the first day of May, A. D. 1875, made default in the payment of said interest, and the installment which upon that date fell due remains unpaid, together with those which fell due semi-annually thereafter prior to the first day of May, 1877. Payment of the installment then maturing and those maturing
513 since has been paid by the Wabash Railway Company, defendants herein, to certain holders of said bonds, but these defendants do not know to what extent the same remain unpaid.

These defendants deny that the issue of bonds described in said petition as having been made by the Toledo & Wabash Railway Company on the first day of May, 1863, and known as the equipment bonds, are a lien upon said Wabash Railway or any part thereof as is alleged in said petition, and they deny the right of the holders of said equipment bonds to have the same exchanged for bonds of the Toledo, Wabash & Western Railroad Company of the date of February 1st, 1867, as alleged in said petition, or in any other way to become sharers with the holders of said bonds in the trust estate of these defendants.

And these defendants further state that in and by the said indenture it is stipulated that upon the default in payment of the interest upon the bonds secured thereby, or in the payment of the sinking fund, or in payment of the principal of the said bonds when due, and the continuance for six months of such default in either case, and upon written notice to these defendants, as trustees, from persons holding a majority of the outstanding bonds secured by their said lien, then these defendants, as trustees, should proceed to enforce the same; but that no demand was ever made by these defendants. And these defendants further state that at the time of said proceedings the belief was common to themselves and to the beneficiaries of their trust that a sale for money only of said railway and appurtenances and the application of the proceeds of such sale in payment of the liens upon said railway in the order of priority would realize a price less than sufficient to discharge the prior liens thereon, and would result in the total loss of all the interest in said railroad appurtenances of these defendants as trustees, and of the beneficiaries of said trust.

And since the sale complained of in said bills the Wabash Railway Company then holding the title through said sale has procured from the holders of first mortgage bonds consent to forbear the en-
514 forcement of their liens for their defaulted interest as found by said decree for a long period of years; and has obtained permission from the holders of the said first mortgage bonds to resume payment of the current interest due to the holders of the bonds secured by lien of these defendants as trustees, and to apply thereto

the revenues of the said Wabash Railway after payment of the current interest on said first mortgage bonds, and in advance of such defaulted interest: whereby said bonds again enjoy their interest bearing character and have also increased in value in the market.

These defendants further aver that prior to the commencement of this suit none of the holders of said bonds were asking of them as trustees enforcement of said lien, except some of the complainants in a certain suit pending in the United States Court of the district of Indiana, which suit was begun by the complainant David J. Tyson and others, without consultation with or demand made on these defendants as trustees. Nevertheless, these defendants are ready to proceed to faithfully enforce the legal rights of any holders of bonds made a lien upon said mortgage premises upon proof of interest in said trust estate. And these defendants further state that the just enforcement of the said lien requires also proceedings in some court of proper jurisdiction in Ohio, so that the said railway and appurtenances may, if sold, be offered as a whole, and inasmuch as the lien of the trust estate of these defendants covers also so much of the said Wabash, St. Louis & Pacific Railway as lies within said State, these defendants are prepared, if the plaintiff's right and ownership of bonds shall be established, to commence proceedings in Ohio to procure such sale.

Whereupon these defendants aver their belief that the course pursued by the plaintiff in seeking to enforce at this time the said equipment bonds as liens of equal right with those secured by the trust lien of these defendants is necessarily and willfully injurious to the trust estate of these defendants in the premises and to the common
515 interest of all holders of the bonds secured thereby. And these defendants so present that interest to the Court and pray that if in the event of sale and distribution made in these proceedings at complainant's instance, the proceeds be insufficient for full satisfaction of the bonds and interest secured to these defendants as trustees, they may have their costs and expenses in these proceedings including counsel fees, decreed to them against complainant as between complainant and the other holders of the bonds secured by the same lien. And these defendants further pray that they may have such other and further and different relief as may from time to time be right and needful to their equities herein.

By JOHN R. OSBORN,
Defendant's Att'y.

STATE OF OHIO, *Lucas County, ss:*

John R. Osborn, being sworn, says that he is attorney for the defendants above named. That said defendants are not residents of the County of Lucas and not now therein, and that the statements which are contained in the foregoing answer are true as he believes.

JOHN R. OSBORN.

Sworn to before me and subscribed in my presence this fifth day of June, A. D. 1880.

[SEAL.]

SYLVESTER LAMB,
Notary Public, Lucas County.

516 On the fourteenth day of January, 1881, plaintiff James Compton, by his attorney, filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, an Amended and Supplemental Petition in the above-entitled cause, which Amended and Supplemental Petition is in the words and figures as follows, to wit:

Court of Common Pleas, State of Ohio, Lucas County.

JAMES COMPTON, Plaintiff,
against
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, as Trustee; SOLON HUMPHREYS and DANIEL A. LINDLEY, as Trustees, Defendants.

And now comes the plaintiff herein, and by leave of the Court heretofore, to wit, On the twentieth day of December, 1880, obtained, alleges in addition to his original petition herein as an amendment and supplement thereto:

That on the fifteenth day of December, 1880, at the term of this Court, to wit, The Court of Common Pleas of Lucas County, commencing on the eighteenth day of October, 1880, the plaintiff herein recovered a judgment, which was duly rendered and given by this Court, against the defendant the Toledo, Wabash & Western
517 Railway Company for the sum of sixty-two thousand two hundred and fourteen 11/100 dollars in an action pending in said Court wherein this plaintiff was plaintiff, and the said Toledo, Wabash & Western Railway Company was defendant, which action was brought by the said plaintiff to recover the amount due with interest on the coupons or interest warrants attached to the bonds known as equipment bonds issued by the Toledo & Wabash Railway Company owned by the plaintiff, and particularly set forth and enumerated in the original petition herein, which matured and became due from and including the first day of May, 1875, to and including the first day of November, 1879, being the same coupons or interest warrants specifically mentioned and described in said petition on pages 33, 34, 35, 36, 37, 38, 39 and 40 thereof, and that on the same day said judgment was duly entered in the office of the Clerk of this Court in said County of Lucas.

That on the fifteenth day of December, 1880, an execution in due form was issued upon the said judgment against the personal and real property of said Toledo, Wabash & Western Railway Company to the sheriff of said Lucas County, that being the county in which the said Toledo, Wabash & Western Railway Company had its principal offices when it last transacted business, and in which part of the railroad which it owned and operated was situated.

That the said execution has been duly returned by the said sheriff wholly unsatisfied, and, in fact, the said company has no property on which a levy could be made.

That on or about the seventeenth day of May, 1879, the said defendant, the Wabash Railway Company, made and executed its certain mortgage or trust deed, conveying its entire railroad property and franchises to the defendants John Humphreys and Daniel A. Lindley, as Trustees, to secure the payment of an issue of bonds bearing the same date made and executed by said company, amounting in the aggregate to the sum of two millions of dollars, with interest at the times and in the manner therein mentioned and set forth.

That said mortgage or trust deed is dated on the said seven-
518 teenth day of May, 1879, and was duly sealed with the corporate or common seal of said company, and subscribed by the proper officers of said company, duly authorized thereto, and was duly acknowledged and delivered to said trustees.

That said mortgage was presently thereafter, to wit: on the eleventh day of August, 1879, filed for record in the recorder of deeds office of said Lucas County, and was duly recorded in the manner required by law in said recorder's office on the thirteenth day of August, 1879, in volume 76 of Mortgages, at page 281, and also in the several offices in the counties in the States of Ohio, Indiana and Illinois, in which the property owned by the said Wabash Railway Company, and which is covered by said mortgage was situated.

The bonds secured by said mortgage have been issued, but the amount thereof now outstanding is unknown to this plaintiff.

And this plaintiff charges and alleges that said last-mentioned mortgage is inferior and subject to the lien and equity of said bonds known as equipment bonds upon all of the property which was owned by the Toledo, Wabash & Western Railway Company, and upon all of the property which said Toledo, Wabash & Western Railway Company took and derived at the time of its organization from said Toledo & Wabash Railway Company; and that the holders of said bonds and the trustees named in said mortgage were and are chargeable in equity with notice of such lien and equity of said equipment bonds.

And the said plaintiff prays that the said Solon Humphreys and Daniel A. Lindley may be made parties defendant to this action, and that he may have the relief prayed in his original petition herein.

SPRAGUE, MILBURN & SPRAGUE AND
R. P. RANNEY,
Attorneys for the Plaintiff.

519 STATE OF OHIO, *Cuyahoga County, ss:*

R. P. Ranney, being duly sworn according to law, says: That he is one of the attorneys of record for James Compton, the plaintiff in the above-entitled action. That he makes this affidavit for the reason that the said James Compton is not a resident of the County of Lucas or Cuyahoga, and State of Ohio, and that the said James Compton is now absent therefrom; that the facts stated in the allegation of the foregoing amended and supplemental petition are as he verily believes true.

R. P. RANNEY.

Subscribed and sworn to before me and signed in my presence by the said R. P. Ranney this twentieth day of December, 1880.

JAMES PARMELEE,

[SEAL.] *Notary Public in and for said County.*

520 On the second day of February, 1881, defendants The Toledo, Wabash & Western Railway Company *et al.*, by their attorneys, filed in said Court of Common Pleas, as appears by the endorsement thereon of the Clerk of said Court, an Answer in the above entitled cause, which Answer is in the words and figures as follows, to wit:

In the Court of Common Pleas, Lucas County, Ohio.

JAMES COMPTON, Plaintiff,
against
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, as Trustee, Defendants.

Answer to Supplementary and Amended Petition.

And now comes the said defendant, the Wabash, St. Louis & Pacific Railway Company, and for answer to the amended and supplemental petition of plaintiff, filed herein, answers as follows: That it adopts and reaffirms each and every allegation contained in the former answer of said defendant filed to the original petition herein, and for further answer and as a sixth defense says: That it is true, as in said supplementary petition alleged, that plaintiff did on the fifteenth day of December, 1880, recover a judgment against the Toledo, Wabash & Western Railway Company, for the sum of sixty-two thousand two hundred fourteen dollars and fifteen cents ($62,214.15), but this defendant avers that the said judg-
521 ment was recovered by reason of and upon the production by said plaintiff of certain coupons formerly attached to and representing interest accruing upon the equipment bonds aforesaid, or some of them, in the original petition mentioned, and that said judgment was rendered upon no other cause of action whatever. And as to whether plaintiff was at the time of the commencement of this suit, or at any time the owner of said coupons or any of them, this defendant has no knowledge, and therefore denies the same.

Defendant further says, upon information and belief, that before the time said plaintiff so obtained possession and acquired title to said coupons, if he ever really did acquire said title, the said coupons were owned by other persons not parties to this cause. That from the time of the execution of said consolidated mortgage by the said Toledo, Wabash & Western Railway Company up to the time when the decree of foreclosure was rendered under which said property was sold, as mentioned in plaintiff's petition, the several persons holding and owning said coupons upon which

judgment has been rendered, in favor of plaintiff, did not set up or assert or claim to be entitled to any lien upon any of the property of the Toledo, Wabash & Western Railway Company by reason of the ownership of said coupons, but, on the contrary, said persons, up to July, 1874, continued to hold the said coupons as subsisting obligations and wholly neglected and failed to set up any right of lien whatever by virtue of the same. That during the said period the said Toledo, Wabash & Western Railway Company executed the mortgage which was foreclosed by said decree, and sold large amounts of bonds secured thereby, and that neither before nor at the time of the execution and recording of said mortgage, nor from thence until the foreclosing of the same, did any person or persons holding any of said equipment bonds or coupons set up or claim any lien upon the property of said last mentioned railway company because of such ownership.

And this defendant further avers that from the time
522 of the rendition of the decree of foreclosure aforesaid up to the time when plaintiff acquired possession of said coupons, the holders of the same did not in any way set up any claim to a lien upon said property, legal or equitable, by virtue of said ownership. That during the said last mentioned period, the Wabash Railway Company, which had acquired the property formerly owned by the Toledo, Wabash & Western Railway Company, through and under said foreclosure sale, executed on all of said property the said Seney mortgage and also a subsequent mortgage in which Solon Humphreys and Daniel A. Lindley were named as trustees. That said mortgages were executed to secure bonds and other obligations to a large amount, many of which are still outstanding and unsatisfied. That such bonds and obligations were sold and negotiated, and are now owned by many persons who are not parties to this case. That from the time of said foreclosure sale up to the time of the commencement of this suit, neither the plaintiff nor any former holder of any of the coupons placed in judgment as aforesaid, set up any lien upon any part of said property as security for said coupons, but, on the contrary, it avers that when said last mentioned mortgages were being executed and the bonds and obligations secured thereby sold, and while this defendant corporation was being formed by the consolidation of the said Toledo, Wabash & Western Railway Company with other companies, the holders of said coupons remained wholly quiescent and took no steps whatever to assert the lien which they now allege, although well knowing the execution of said mortgage and sale of said bonds.

And defendant further avers that the trustees named in the said several mortgages hereinbefore mentioned, and the several persons purchasing the bonds and obligations secured thereby, at the time when they severally acquired an interest under said mortgages, either as trustees or purchasers, had no notice of the said pretended lien now claimed by the plaintiff, but on the
523 contrary the said George I. Seney, trustee, and the said Humphreys and Lindley when they became trustees as aforesaid,

did so under the belief that, if the holders of the coupons so placed in judgment ever claimed any lien, said claim was not only wholly unfounded, but had been long before abandoned, and this defendant avers on information and belief that the then holders of the bonds which plaintiff now claims to own tacitly permitted the execution of said mortgages and sale of bonds secured thereby, raising no claim of lien although aware of such proceedings; and this defendant now and again denies that any such lien as the plaintiff now claims ever existed in law or in equity, and avers that, if any equities existed on the part of the holders of said coupons or the bonds to which they were attached, such equities have long since lapsed, and such holders and the plaintiff and all others claiming through or under them are by the facts aforesaid estopped from asserting such lien.

This defendant further avers upon information and belief that large amounts of its capital stock have been repeatedly sold and transferred to persons who relied upon the claim of said bonds to a lien upon the property of this defendant as abandoned, and who did not reckon the amount of said bonds among the liabilities of this defendant, many of such transfers being made within the knowledge of persons who then owned some of the bonds and coupons which plaintiff now claims to own, and that such transfers were made under circumstances in the conduct of such persons as induced such purchasers to remain under the impression that no lien in favor of said bonds would be thereafter asserted.

Defendant further avers that, if any such lien ever existed in law or in equity, in favor of the holders of the coupons now claimed by plaintiff, or upon the judgment so rendered, the same was subordinate to the several mortgage liens hereinbefore mentioned, as no mortgage or other instrument in writing, executing such supposed lien for security of said equipment bonds, or coupons,
524 was ever sealed, acknowledged or recorded as required by the laws of the State of Ohio to so operate as to create such lien.

THE WABASH, ST. LOUIS &
PACIFIC RAILWAY CO.,
By WAGER SWAYNE,
General Solicitor.

THE STATE OF OHIO, *Lucas County, ss:*

Wager Swayne, being duly sworn, says: That he is an officer of the Wabash, St. Louis & Pacific Railway Company, and is authorized to make this affidavit in its behalf, and that the statements of the foregoing answer are true as he believes.

WAGER SWAYNE.

Subscribed and sworn to before me this second day of February, 1881.

[SEAL.]

ARTHUR C. KENT,
Notary Public, Lucas County, Ohio.

525 On the fourth day of February, 1881, defendants Solon Humphreys and Daniel A. Lindley, by their attorneys, filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, an Answer in the above-entitled cause, which Answer is in the words and figures as follows, to wit:

Court of Common Pleas, Lucas County, Ohio.

JAMES COMPTON, Plaintiff,
against
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY AND OTHERS,
Defendants.

Answer of Solon Humphreys and Daniel A. Lindley, Trustees, Defendants.

And now come Solon Humphreys and Daniel A. Lindley, who in their capacities as trustees are made parties defendant to this suit, and for answer to the plaintiff's original petition and to his amended and supplemental petition filed herein, answering say:

First. They admit the execution and sale by the Toledo & Wabash Railway Company on or about the first day of October, 1862, of certain bonds, known as "Equipment Bonds," as alleged in plaintiff's original petition.

Second. They admit that plaintiff, on or about the fifteenth day of December, 1880, recovered a judgment against the Toledo, Wabash & Western Railway Company, as alleged in plaintiff's amended and supplemental petition.

526 Third. They aver that said judgment was recovered by reason of and upon the production in Court in the control and custody of plaintiff of certain coupons formerly attached to and representing interest accruing upon certain of the equipment bonds aforesaid, and upon no other cause of action whatever.

Fourth. These defendants have no certain information or belief that at the time of the commencement of this suit plaintiff was the real owner of any of said bonds or coupons, or that he is now, or at any time heretofore has been the owner of any of said bonds or coupons, or the real owner of said judgment, and they therefore deny the same.

Fifth. These answering defendants admits the execution and delivery to them of the mortgage described in the amended petition, that said mortgage was duly recorded in the recorder's office of Lucas County, Ohio, and in the offices of recorders of deeds in the several counties of Ohio, Indiana and Illinois, through which the road of the Wabash Railway was constructed. That said mortgage was intended to secure an issue of bonds amounting in the aggregate to the sum of two million- of dollars, and that said bonds have all been issued and disposed of by said Wabash Company, and are now all outstanding.

Sixth. These answering defendants further say, upon information

and belief, that the plaintiff, before the time he acquired his pretended title and possession of the said coupons, if he ever had any title or possession thereto, the said coupons were in fact owned by other persons not parties defendant in this action.

That from the time of the execution of said consolidated mortgage by said Toledo, Wabash & Western Railway Company up to the time when the decree of foreclosure was rendered, under which said property was sold, as mentioned in plaintiff's petition, the several persons holding and owning said coupons, upon
527 which judgment has been rendered in favor of the plaintiff, did not set up or assert or claim to be entitled to any lien upon any of the property of the Toledo, Wabash & Western Railway Company, by reason of the ownership of said coupons, but on the contrary said persons, up to July, 1874, continued to hold the said coupons as subsisting obligations, and wholly neglected and failed to set up any right of lien whatever by virtue of the same. That during the said period the Toledo, Wabash & Western Railway Company executed the mortgage which was foreclosed by said decree, and sold large amounts of bonds secured thereby, and that neither before nor at the time of the execution and recording said mortgage, nor from thence until the foreclosure of the same, did any person or persons holding said equipment bonds set up or claim any lien upon the property of said last-mentioned railway company, because of such ownership, nor did they notify either the trustees of said mortgage nor the holders of such bonds, that any claim of lien or incumbrance existed upon the part of the holders of said equipment bonds upon the property of said railway company.

These answering defendants further aver and say that from the time of the rendition of the decree of foreclosure aforesaid up to the time when plaintiff acquired possession of said coupons, the holders of the same did not in any way set up any claim to a lien upon said property, legal or equitable, by virtue of said ownership. That during the last-mentioned period the Wabash Railway Company, which had acquired the property of the Toledo, Wabash & Western Railway Company, through and under said foreclosure sale, executed on all of its property the said Seney Mortgage, and also the mortgage executed to these answering defendants as trustees. That said mortgages were executed to secure bonds and other obligations to a large amount, many of which are outstanding and unpaid. That said bonds and obligations are now owned by many persons who are not parties to this cause. That from the time of the said foreclosure sale up to the time of the commencement of this suit, neither the
528 plaintiff nor any former holder of the coupons placed in judgment as aforesaid, set up or made demand or gave notice of any lien, claim or demand upon any of the property described in said foreclosure proceedings as security for said coupons, but, on the contrary, these defendants aver that when said last-mentioned mortgages were being executed, and the bonds and obligations secured thereby sold, and while the corporations which succeeded to the rights, property and franchises of said preceding corporations were

being organized as well as by the consolidation of the Toledo, Wabash & Western Railway Company with sundry other corporations, as by the formation of the Wabash Railway Company and the Wabash, St. Louis & Pacific Railway Company, the plaintiff, as the former holders of the said coupons now put into said judgment, well knowing that the changes were being made, and that many holders of bonds and stock were becoming the owners of said property, remained wholly silent and quiescent, taking no steps to assert any rights, nor to give notice by proceedings to enforce their claims that there were any such liens and encumbrances as plaintiff now claims, although they well knew the execution of the mortgages and sale of bonds as hereinbefore set forth.

These answering defendants further say upon information and belief that neither the trustees of the several mortgages which are hereinbefore set forth, nor the purchasers of the bonds and obligations secured thereby at the time when they acquired their interests therein, either as trustees or purchasers, had notice of the pretended claim now set up by the plaintiff, but, on the contrary, these defendants for themselves aver and believe the said George I. Seney, as trustee, had reason to believe, and did believe, that said holders of the coupons which were so put into judgment had no claim, or if any such claim had been asserted that it was unfounded as against the property and rights which were covered by said mortgages; that any such claim had long before the mortgage made to these de-
529 fendants had been executed, was abandoned, and that the holders of said bonds and coupons now put into judgment and which plaintiff claims to own, knowingly and tacitly permitted the execution of said mortgages and sale of said bonds and obligations secured thereby without raising any claim of lien upon the property therein described. And these answering defendants deny that any such lien as the plaintiff now claims ever existed in law or equity, and avers that if any equities ever existed on the part of the holders of any of the bonds or coupons attached thereto, such equities on the part of such holders and of the plaintiff have long since lapsed, and the plaintiff and others claiming by, through or under them, are by the facts estopped from asserting such lien.

These answering defendants further say and aver that if any lien ever existed in law or equity in favor of the holders of the bonds or coupons now claimed by the plaintiff or upon his judgment obtained thereon, the same is subordinate to the mortgage executed to these answering defendants and to the several other mortgages which have been executed to trustees, covering the same property and franchises, because they aver that no mortgage creating any such lien or other instruments in writing asserting a lien for said bonds and coupons was ever sealed, acknowledged or recorded, as is provided by the laws of the State of Ohio, to so operate as to create such lien.

WAGER SWAYNE,
General Solicitor,
By J. R. OSBORN,
Defendant's Att'y.

STATE OF OHIO, *Lucas County, ss:*

Wager Swayne, being sworn, says that he is attorney of the above-named defendants, that said defendants are not residents of the State of Ohio, and not now therein, and that the statements
530 contained in the foregoing answer are true as he believes.

WAGER SWAYNE.

Sworn to before me and subscribed in my presence this third day of February, 1881.

NOAH H. SWAYNE, JR.,
[SEAL.] *Notary Public, Lucas County, Ohio.*

On this fifth day of February, 1881, plaintiff James Compton, by his attorneys filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, a Reply to Answer in the above-entitled cause, which Reply to Answer is in the words and figures as follows, to wit:

In the Court of Common Pleas, Lucas County, Ohio.

JAMES COMPTON, Plaintiff,
against
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY and Others, Defendants.

Reply of the plaintiff to the answer of the defendant the Wabash, St. Louis & Pacific Railway Company, to the supplemental petition and the amendments of the petition of the plaintiff.

This plaintiff for reply to said answer denies that he has knowledge or information sufficient to form a belief concerning, and
531 therefore denies the allegations contained in said answer in respect to the acts, neglects, omissions, motion, knowledge, belief or conduct in any respect of any of the holders, other than the plaintiff, of the bonds or coupons or any of them, now owned or held by this plaintiff; and also the allegations of said answer touching the belief of Seney, Humphreys and Lindley, trustees, or either of them alleged in said answer, and also each and all of the allegations of said answer touching or concerning sales to or purchases by purchasers of the capital stock of the said defendant, or touching or concerning said purchasers, or the knowledge of persons owning bonds or coupons as alleged in said answer, and also the allegations as to the circumstances under which transfers of the stock of said defendant were made.

And upon information and belief this plaintiff denies the allegation that the trustees named in the several mortgages mentioned in said answer, and the several persons purchasing the bonds and obligations secured thereby, at the times in that behalf mentioned in said answer, had no notice of the lien now claimed by this plaintiff, and he further denies upon information and belief that any equities

have lapsed or that any estoppel exists as is alleged in said answer, or that the lien in that behalf mentioned in said answer was or is subordinate to the mortgage liens therein mentioned for the reason set forth in said answer or for any other reason.

SPRAGUE, MILBURN & SPRAGUE AND
R. P. RANNEY, *Attorneys for Plaintiff.*

STATE OF OHIO, *Lucas County, ss:*

John G. Milburn, being duly sworn, says that he is one of the attorneys of the above-mentioned plaintiff, who is not a resident of or in the State of Ohio, and that the statements contained in
532 the foregoing answer *is* true as he believes.

JOHN G. MILBURN.

Sworn to before me and subscribed in my presence this fifth day of January, 1881.

SYLVESTER LAMB,
[SEAL.] *Notary Public, Lucas County, Ohio.*

On the fifth day of February, 1881, plaintiff, James Compton, by his attorneys filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, a Reply to the Answer of Solon Humphrey and Daniel A. Lindley, in the above entitled cause, which Reply is in the words and figures as follows, to wit:

Court of Common Pleas, Lucas County, Ohio.

JAMES COMPTON, Plaintiff,
against
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY and Others,
Defendants.

The plaintiff for his reply to said answer denies that he has any knowledge or information sufficient to form a belief concerning any of the acts, omissions, neglects, knowledge, belief or conduct in any respect of any of the persons other than this plaintiff holding
533 or owning any of the bonds or coupons owned, held or possessed by this plaintiff, or upon which judgment has been obtained before they came to the possession of or were held by this plaintiff, or at any other time, and he therefore denies each and all of the allegations of said answer in respect to said persons and said matters, excepting that he admits that said coupons and bonds were held by other persons before they came to the possession of this plaintiff, as subsisting obligations, and he denies that with knowledge that the changes mentioned in said answer were being made, and that many holders of bonds and stock were becoming the owners of the property mentioned in said answer, this plaintiff remained wholly silent and acquiescent, taking no steps to assert any rights or give notice as alleged in said answer, or that he knew of the execution of the mortgages or sale of the bonds as set forth in said answer.

And this plaintiff denies upon information and belief the allegations of the said answer that at the times mentioned in said answer neither the trustees nor purchasers therein mentioned had notice of the claim now set up by this plaintiff; also the allegations that the defendant Seney had reason to believe, or did believe, as is in said answer alleged; also the allegation that the equities of the holders of the bonds or coupons in said answer have lapsed, or that there is any estoppel created or existing as is alleged in said answer; also the allegation that the lien in that behalf mentioned in said answer was or is subordinate to the mortgages therein mentioned, or any of them, for the reason mentioned in said answer, or for any other reason.

SPRAGUE, MILBURN & SPRAGUE AND
R. P. RANNEY, *Plaintiff's Attorneys.*

534 STATE OF OHIO, *Lucas County, ss:*

John G. Milburn, being duly sworn, says that he is one of the attorneys for the plaintiff in this action; that said plaintiff is not a resident of or within the State of Ohio, and that the statements contained in the foregoing reply are true as he verily believes.

JOHN G. MILBURN.

Sworn to before me and subscribed in my presence this fifth day of January, 1881.

[SEAL.]

SYLVESTER LAMB,
Notary Public.

Journal Entries.

Common Pleas Court.

The Court of Common Pleas, Lucas County, Ohio.

THE STATE OF OHIO, *Lucas County:*

At term of the above-named Court, begun and held before the Hon. William F. Lockwood, Hon. Reuben C. Lemmon and Hon. Birdseye W. Rouse, presiding judges, on the third day of May, A. D. 1880, among other proceedings had by and before said Court on the third day of May, A. D. 1880, being the first day of said term, as appears by its Journal of that day, were the following, viz:

19484.

JAMES COMPTON
vs.
THE TOLEDO, WABASH AND WESTERN RAILWAY CO. AND AL.

On motion to the Court, leave is given to file answer in this cause by June 1st, 1880.

535 On the twentieth day of December, 1880, being the forty-second day of October term, 1880, an order in said Court was made, an entry of which appears upon the Journal of said Court in the words and figures following, to wit:

19484. *Mo.* 290.

JAMES COMPTON
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees, and GEORGE I. SENEY, as Trustee.

On motion of the plaintiff herein and the defendants appearing by this counsel, it is now ordered that the plaintiff herein has leave to file a supplement to his petition in this suit now on file in this Court, setting up the judgment recovered by him in an action brought by him against the Toledo, Wabash & Western Railway Company on the coupons attached to the bonds enumerated in his petition maturing from and including the first day of May, 1875, to and including the first day of November, 1879, in this Court against said defendant the Toledo, Wabash & Western Railway Company, the issue of an execution on said judgment to the sheriff of the county of Lucas and the return of such execution.

It is hereby further ordered that said plaintiff has leave to file an amendment to his said petition setting up the execution and delivery by the Wabash Railway Company to Solon Humphrey and Daniel A. Lindley of a mortgage on the railroad property and franchises of said company, dated the seventeenth day of May, 1879, to
536 secure the payment of bond of said company to the amount of two millions of dollars, and the time and place of the record of said mortgage. And the said plaintiff is hereby further given leave to make said Solon Humphreys and Daniel A. Lindley parties defendants to this suit.

On the 10th day of March, 1882, being the fifty-seventh day of January term, 1882, a decree in said cause was rendered, an entry of which appears upon the Journal of said Court in the words and figures following, to wit:

19484.

JAMES COMPTON
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY, THE WABASH RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES R. JESUP and ISAAC H. KNOX, as Trustees; GEORGE I. SENEY, as Trustee, and SOLON HUMPHREYS and DANIEL A. LINDLEY, as Trustees.

This cause having come on to be heard upon the pleadings thereon on file, to wit, the petition of the plaintiff filed February 3rd, 1880,

the amended and supplemental petition of the plaintiff filed January 14th, 1881, the answer of the defendants the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, and the Wabash, St. Louis & Pacific Railway Company, filed June 1st, 1880, the answer of the defendants Knox and Jesup, as trustees, filed June 7th, 1880, the answer of the Wabash, St. Louis & Pacific Railway Company to the plaintiff's supplemental and amended peti-
537 tion, filed February 2nd, 1881, the answer of the defendants Solon Humphreys and Daniel A. Lindley, as trustees, filed February 4th, 1881, and the replies of the plaintiff to the answers of the defendants the Wabash, St. Louis & Pacific Railway Company and Solon Humphreys and Daniel A. Lindley, as trustees, filed February 5th, 1881, and upon the proofs, exhibits and testimony taken herein, and it having been shown that all the defendants herein have been served with the summons herein or that they have entered their appearance herein. And the attorneys for the respective parties herein been duly heard and the premises considered, the Court now finds, declares, adjudges and decrees:

1. That the Toledo & Wabash Railway Company was on the first day of November, 1862, a corporation duly organized and existing under and by virtue of the laws of the States of Ohio and Indiana, especially the consolidation statutes of those States, and owned a line of railway extending from the city of Toledo, in the State of Ohio, and passing through the counties of Lucas, Henry, Fulton, Defiance and Paulding, in said State, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point on the west line of the State Line City in said last-named county. That said Toledo & Wabash Railway Company was a consolidated company, and that the railroad companies which were consolidated to form it were the Toledo & Wabash Railroad Company, a corporation organized under the laws of the State of Ohio, and the Wabash & Western Railroad Company, a corporation organized under the laws of the State of Indiana, and that the said Toledo & Wabash Railroad Company owned and operated a railroad extending from the City of Toledo to Harrison Township, Paulding County, in the State of Ohio, and the said Wabash & Western Rail-
road Company owned and operated a railroad extending from
538 the State line in Allen County to State Line City, Warren County, in the State of Indiana.

2. That on the first day of November, 1862, the said Toledo & Wabash Railway Company by its president and secretary duly authorized thereto executed under its corporate seal and issued a series of bonds, severally and consecutively numbered, amounting altogether to the sum of six hundred thousand dollars, known as equipment bonds. That the principal of said bonds is due on the first day of May, 1883, and they bear interest at the rate of seven per cent. per annum payable semi-annually on the surrender of the respective interest warrants thereto appended, in the city of New York, from and after May 1st, 1863, and that there is a series of interest warrants for each semi-annual installment of interest which would become due

and payable on said bonds attached to each of said bonds. That said bonds were duly put upon the market by said Toledo & Wabash Railway Company at the time of their issue and were sold.

3. That the plaintiff is the owner as alleged in his said petition of one hundred and twenty-four of said bonds of the denomination of $1,000 each, and fifty-two of said bonds of the denomination of $500 each the total par value of the bonds so owned by the plaintiff being the sum of $150,000, and that the said bonds so owned by the plaintiff are the same bonds specially mentioned and enumerated in the plaintiff's said petition. That no part of the interest due on said bonds, on and since the first day of May, 1875, excepting the interest warrants on bonds numbers 563, 564, 565 and 566, among those owned by the plaintiff, which matured on the first day of May, 1875, has been paid though payment thereof was duly demanded.

That there is now due and payable as and for interest on said bonds so owned by the plaintiff, pursuant to the terms thereof, and the interest warrants thereto attached the sum of $5,180, with interest thereon from May 1st, 1875, amounting to $2,418.34, the sum
539 of $250, with interest thereon from November 1st, 1875, amounting to $2,267.26, the sum of $5,250, with interest thereon from May 1st, 1876, amounting to $2,083.51, the sum of $5,250, with interest thereon from November 1st, 1876, amounting to $1,899.76, the sum of $5,250, with interest thereon from May 1st, 1877, amounting to $1,716.01, the sum of $5,250, with interest thereon from November 1st, 1877, amounting to $1,532.26, the sum of $5,250, with interest thereon from May 1st, 1878, amounting to $1,348.51, the sum of $5,250, with interest thereon from November 1st, 1878, amounting to $1,164.76, the sum of $5,250, with interest thereon from May 1st, 1879, amounting to $981.01, the sum of $5,250, with interest thereon from November 1st, 1879, amounting to $797.26, the sum of $5,250, with interest thereon from May 1st, 1880, amounting to $613.51, the sum of $5,250, with interest thereon from November 1st, 1880, amounting to $429.76, the sum of $5,250, with interest thereon from May 1st, 1881, amounting to $246.01, and the sum of $5,250, with interest thereon from November 1st, 1881, amounting to $62.26, making in the aggregate due and payable on said bonds owned by the plaintiff on the third day of January, 1882, the day of the commencement of this term, the sum of $90,990.22. That there is yet to grow due on said bonds owned by the plaintiff, the principal thereof amounting to the sum of $150,000, which will become due on the first day of May, 1883, and three installments of $5,250 each, which will become due respectively on the first day of May, 1882, the first day of November, 1882, and the first of May, 1883.

4. That said Toledo & Wabash Railway Company continued a separate corporation until the year 1865, when it was consolidated with various other railroad companies, to wit: The Great Western Railway Company of 1859, the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company to form the Toledo, Wabash & Western Railway Company, as alleged in the

plaintiff's petition. The agreement providing for said con-
540 solidation was dated the twenty-ninth day of May, 1865, was duly executed by such various companies and duly ratified by their stockholders; and was filed in the office of the Secretary of State of the State of Ohio, on the sixth day of July, 1865, and thereby all the rights, franchises, property real and personal, and its appurtenances of the said Toledo & Wabash Railway Company, passed to and become vested in said Toledo, Wabash & Western Railway Company.

That through various mesne conveyances, foreclosure proceedings and consolidations as alleged in the plaintiff's petition, all of said rights, franchises, railroad property, real and personal and its appurtenances, which belonged to and were owned by the said Toledo & Wabash Railway Company at the time of such consolidation has passed to and become vested in the defendants the Wabash, St. Louis & Pacific Railway Company, which now owns and is in possession of the same.

5. That upon the confirmation of such consolidation, said bonds issued as aforesaid by the Toledo & Wabash Railway Company, known as equipment bonds, and all moneys due and to grow due thereon, and among them such of said bonds are now owned as aforesaid by the plaintiff, and the moneys due and to grow due thereon, became an equitable lien upon all of said railroad and real property, and the structures thereupon, and the fixtures and appurtenances thereto appertaining, which were owned by said Toledo & Wabash Railway Company at the time of said consolidation, and which through such consolidation passed to and vested in the said Toledo, Wabash & Western Railway Company and which has since passed to and vested in the defendant the Wabash, St. Louis & Pacific Railway Company, which last named company in now in possession of the same, being all of its railroad and property connected therewith, commencing in the city of Toledo, in the State of Ohio, and extending therefrom through the counties of Lucas, Henry, Fulton, Defiance and Paulding in said State, and through the counties
541 of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren in the State of Indiana, to and terminating at a point in the west line of State Line City in said last-named county, and that said bonds are now [a lien on] such line, and the plaintiff is entitled to enforce the same. That the said lien of said bonds is prior and superior to the rights, interests, estates, claims and liens of the defendants in this action and each of them in and upon said railroad and property upon which said lien is hereby declared, but as to all that part of said railroad which is situated within the State of Ohio, such line is inferior and subject to the two mortgages mentioned in the petition herein, one of which was executed by the Toledo & Illinois Railroad Company to the Farmers' Loan and Trust Company, on the eighth day of September, 1853, for the security of the bonds of that company amounting to $900,000 due as extended August 1st, 1890, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first day of February and August in each year, and the other of which wes executed by the

Toledo & Wabash Railroad Company to Edwin D. Morgan, trustee, on the fifth day of October, 1858, for the security of the bonds amounting to $1,000,000 due on the first day of November, 1878, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first day of May and November in each year, and that the indebtedness secured by the first mentioned mortgage at the date of this decree amounts to the sum of $900,000 with interest thereon at seven per cent. from the first day of February, 1882, and the indebtedness secured by the second mentioned mortgage amounts at the date of this decree to the sum of $1,000,000 with interest thereon from the first day of November, 1881.

6. That the said defendants or any of them pay to said plaintiff the said sum of $90,990.22 now due on said bonds owned by the plaintiff as aforesaid with interest thereon to the day of payment to the plaintiff, within ten days from the day of the rising of
542 this Court, and if default shall be made in such payment, that an order of sale be issued by the Clerk of this Court directed to Frederick L. Geddes, Special Master Commissioner appointed to carry this decree into execution, commanding said Special Master Commissioner to proceed and sell as upon executions at law, all of said railroad and real property together with the structures thereupon, and the fixtures and appurtenances thereto appertaining, upon which the lien of said bonds known as equipment bonds is hereby declared to exist, which is situated within the State of Ohio, and the jurisdiction of this Court, subject, however, to the lien of the two mortgages hereinbefore mentioned as executed by the Toledo & Illinois Railroad Company to the Farmers' Loan and Trust Company, and the Toledo & Wabash Railroad Company to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages, and that from the proceeds of such sale the said Special Master Commissioner pay the costs of this action to be taxed, and bring the residue of such proceeds into this Court to abide its further order herein.

That before offering the said property hereby directed to be sold, for sale, the said special Master Commissioner shall cause the same to be appraised according to law by three disinterested freeholders of either or any of the counties in which the same is situated, and such appraisal shall be of the value of said property, subject to the incumbrance and lien of the two mortgages hereinbefore mentioned, as executed respectively by the Toledo & Illinois Railroad Company, and the Toledo & Wabash Railroad Company, subject to which it is directed to be sold and over and above the lien of such mortgages, according to the amount of the indebtedness secured thereby as hereinbefore found, with interest computed to the time of sale.

Each of the defendants in the action gives notice of its and his intention to appeal this case to the next term of the District Court for the county of Lucas, and the Court fixes the amount of
543 the appeal bond of the Wabash, St. Louis & Pacific Railway Company at $300, and that of each of the other defendants at the sum of $200.

No other judgments or decrees were rendered, or orders or journal entries made in said cause, as appears by the Journal of said Court.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at Toledo, this 26th day of April, 1882.

R. C. QUIGGLE, *Clerk*,
[SEAL.] By N. HADNETT, *Deputy*.

On the twenty-sixth day of April, 1882, there was filed in said Court of Common Pleas, as appears by the endorsement thereon of the Clerk of said Court, an appeal bond of the Wabash Railway Company, which appeal bond is in the words and figures as follows, to wit:

THE STATE OF OHIO, *Lucas County, ss:*

Know all men by these presents, that we, The Wabash Railway Company as principal, and Charles Knox and John R. Osborn, as sureties, are held and firmly bound unto James Compton in the penal sum of two hundred dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this twenty-sixth day of April, A. D. 1882.

The condition of the above obligation is such that, whereas the said Wabash Railway Company has taken an appeal from a certain judgment rendered against it and in favor of the said James Compton in the Court of Common Pleas, within and for the county of Lucas, at the January term thereof, A. D. 1882, finding
544 the sum of $90,998.72 to be a lien upon the railroad and property of the Wabash, St. Louis & Pacific Railway Company in the State of Ohio and costs, taxed as plaintiff's costs of suit, and costs of defendant to the District Court, within and for said county of Lucas:

Now, if the said Wabash Railway Company shall abide and perform the order and judgment of the said District Court, and shall pay all moneys, costs and damages which may be required of, or awarded against, the said Wabash Railway Company by the said District Court, then this obligation shall be void; otherwise, it shall remain in full force and virtue in law.

CHAS. KNOX. [SEAL.]
J. R. OSBORN. [SEAL.]

Approved April 26, 1882.

R. C. QUIGGLE, *Clerk*.

On the twenty-sixth day of April, 1882, there was filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, an appeal bond of Humphreys and Lindley, trustees, which appeal bond is in the words and figures as follows, to wit:

STATE OF OHIO, *Lucas County, ss:*

Know all men by these presents, that we, Solon Humphreys and Daniel A. Lindley, as trustees, principals, and Sheldon C. Reynolds, as surety, are held and firmly bound unto James Compton in the penal sum of two hundred dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this thirteenth day of April, A. D. 1882.

545 The condition of the above obligation is such that, whereas the said Solon Humphreys and Daniel A. Lindley, as trustees, have taken an appeal from a certain judgment rendered against them and in favor of the said James Compton in the Court of Common Pleas within and for the county of Lucas, at the January term thereof, A. D. 1882, binding the sum of $90,998.72 to be a lien upon the railroad and property of the Wabash, St. Louis & Pacific Railway Company in the State of Ohio, and costs taxed as plaintiff's costs of suit, and costs of defendants to the District Court within and for said county of Lucas.

Now, if the said Solon Humphreys and Daniel A. Lindley, trustees, shall abide and perform the order and judgment of the said District Court, and shall pay all moneys, costs and damages which may be required of, or awarded against, the said Solon Humphreys and Daniel A. Lindley, as trustees, by the said District Court, then this obligation shall be void; otherwise it shall remain in full force and virtue in law.

SOLON HUMPHREYS. [SEAL.]
D. A. LINDLEY. [SEAL.]
S. C. REYNOLDS. [SEAL.]

Approved April 26, 1862.

R. C. QUIGGLE, *Clerk.*

On the twenty-sixth day of April, 1882, there was filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, an appeal bond of the Toledo, Wabash & Western Railway Company, which appeal bond is in the words and figures as follows, to wit:

STATE OF OHIO, *Lucas County, ss:*

Know all men by these presents, that we the Toledo, Wa-
546 bash & Western Railway Company, principal, and Charles Knox and John R. Osborn, as sureties, are held and firmly bound unto James Compton in the penal sum of two hundred (200.00) dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this twenty-sixth day of April, A. D. 1882.

The condition of the above obligation is such that whereas the said Toledo, Wabash & Western Railway Company has taken an appeal from a certain judgment rendered against it and in favor of the said James Compton in the Court of Common Pleas, within and for the county of Lucas, at the January term thereof, A. D. 1882, finding the sum of $90,908.72 to be a lien upon the railroad and property of the Wabash, St. Louis and Pacific Railway Company in the State of Ohio, and costs taxed as plaintiff's cost of suit, and costs of defendant to the District Court, within and for said county of Lucas.

Now, if the said Toledo, Wabash & Western Railway Company shall abide and perform the order and judgment of the said District Court, and shall pay all moneys, costs and damages which may be required of, or awarded against, the said Toledo, Wabash & Western Railway Company by the said District Court, then this obligation shall be void; otherwise it shall remain in full force and virtue in law.

CHAS. KNOX. [SEAL.]
J. R. OSBORN. [SEAL.]

Approved April 26th, 1882.

R. C. QUIGGLE, *Clerk.*

547 On the twenty-sixth day of April, 1882, there was filed in said Court of Common Pleas as appears by the endorsement thereon of the Clerk of said Court an appeal bond of George I. Seney, which appeal bond is — the words and figures as follows, to wit:

THE STATE OF OHIO, *Lucas County, ss:*

Know all men by these presents, that we, George I. Seney, as trustee, as principal, and Charles Knox and John R. Osborn, as sureties, are held and firmly bound unto James Compton in the penal sum of two hundred (200) dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this — day of April, A. D. 1882.

The condition of the above obligation is such that, whereas the said George I. Seney, as trustee, has taken an appeal from a certain judgment rendered against him and in favor of the said James Compton in the Court of Common Pleas within and for the county of Lucas, at the January term thereof, A. D. 1882, finding the sum of $90,998.72 to be a lien upon the railroad and property of the Wabash, St. Louis & Pacific Railway Company, in the State of Ohio, and costs, taxed as plaintiff's costs of suit, and costs of defendant, to the District Court within and for said county of Lucas:

Now, if the said George I. Seney, trustee, shall abide and perform the order and judgment of the said District Court, and shall pay all moneys, costs and damages which may be required of, or awarded against, the said George I. Seney, as trustee, by the said District

Court, then this obligation shall be void; otherwise, it shall remain in full force and virtue in law.

CHAS. KNOX. [SEAL.]
JOHN R. OSBORN. [SEAL.]

Approved, April 26, 1882.

R. C. QUIGGLE, *Clerk.*

548 On the twenty-sixth day of April, 1882, there was filed in said Court of Common Pleas, as appears by the endorsement thereon of the Clerk of said Court an appeal bond of James R. Jesup and Isaac H. Knox, which appeal bond is in the words and figures as follows, to wit:

THE STATE OF OHIO, *Lucas County, ss:*

Know all men by these presents that we, James R. Jesup and Isaac H. Knox, as trustees, are held and firmly bound unto James Compton in the penal sum of two hundred dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this thirteenth day of April, A. D. 1882.

The condition of the above obligation is such that, whereas the said James R. Jesup and Isaac H. Knox, trustees, have taken an appeal from a certain judgment rendered against them and in favor of the said James Compton in the Court of Common Pleas within and for the county of Lucas, at the January term thereof, A. D. 1882, finding the sum of $96,998.72 to be a lien upon the railroad and property of the Wabash, St. Louis & Pacific Railway Company in the State of Ohio in favor of said Compton, and costs taxed as plaintiff's costs of suit, and costs of defendant, to the District Court within and for said county of Lucas.

Now, if the said James R. Jesup and Isaac H. Knox, trustees, shall abide and perform the order and judgment of the said District Court, and shall pay all moneys, costs and damages which may be required of, or awarded against, the said James R. Jesup and Isaac H. Knox, as trustees, by the said District Court, then this
549 obligation to be void; otherwise, it shall remain in full force and virtue in law.

JAMES R. JESUP. [SEAL.]
ISAAC H. KNOX. [SEAL.]
CHAS. KNOX. [SEAL.]

Approved April 26, 1882.

R. C. QUIGGLE, *Clerk.*

On the twenty-sixth day of April, 1882, there was filed in said Court of Common Pleas, as appears by the indorsement thereon of the Clerk of said Court, an appeal bond of the Wabash, St. Louis & Pacific Railway Company, which appeal bond is in the words and figures as follows, to wit:

THE STATE OF OHIO, *Lucas County, ss:*

Know all men by these presents, that we, the Wabash, St. Louis & Pacific Railway Company, by A. L. Hopkins, first vice-president, principal, A. L. Hopkins and Sheldon C. Reynolds, sureties, are held and firmly bound unto James Compton in the penal sum of three hundred dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our successors and assigns.

Sealed with our seals and dated this thirteenth day of April, A. D. 1882.

The condition of the above obligation is such that, whereas the said Wabash, St. Louis & Pacific Railway Company has taken an appeal from a certain judgment rendered against it, and in favor of said James Compton, in the Court of Common Pleas within and for the county of Lucas, at the January term thereof, A. D. 1882, finding the sum of $90,998.72 to be a lien upon the railroad and property of the Wabash, St. Louis & Pacific Railway Company in the State of Ohio, in favor of said Compton, and costs taxed
550 as plaintiff's costs of suit, and costs of defendant to the District Court, within and for said county of Lucas:

Now, if the said Wabash, St. Louis & Pacific Railway Company shall abide and perform the order and judgment of the said District Court, and shall pay all moneys, costs and damages which may be required of, or awarded against, the said Wabash, St. Louis & Pacific Railway Company by the said District Court, then this obligation shall be void; otherwise, it shall remain in full force and virtue in law.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY,
By A. L. HOPKINS, [SEAL.]
First Vice President.
A. L. HOPKINS. [SEAL.]
S. C. REYNOLDS. [SEAL.]

Approved April 26, 1882.

R. C. QUIGGLE, *Clerk.*

On the twelfth day of April, 1883, there was filed in said District Court a motion in the above-entitled cause, which motion is in the words and figures following, to wit:

District Court of Lucas County, Ohio.

JAMES COMPTON, Plaintiff,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendant-.

Motion.

551 The Adelbert College of Western Reserve University, a body corporate under the laws of Ohio, now comes and moves the Court for leave to be made a party defendant herein, and to file answer herein, and for ground of such motion alleges:

That it is the owner and holder of two certain bonds of five hundred dollars each, of the series of bonds known and in the petition set forth as equipment bonds issued by the Toledo & Wabash Railway Company, and upon which there are due and unpaid to this applicant herein sixteen coupons or interest warrants on each of said bonds, the sum of seventeen and 50/100 dollars falling due on the first day of May and November in each of the years 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882; and that the principal of each of said bonds will become due to this applicant on the first day of May, 1883, and that the whole amount of principal and interest of said two bonds is a lien upon the same property and interests alleged in the petition of plaintiff herein to be under a lien for the payment of the whole amount of said six hundred thousand dollars of equipment bonds so called.

LEE, BROWN & LEE,
Attorneys for Applicant.

THE STATE OF OHIO, *Lucas County, ss:*

J. C. Lee, being first duly sworn, says that he believes the facts contained in the foregoing motion and application are true, and that he makes this affidavit because he is one of the attorneys of this applicant in this action and all the officers of this applicant are now absent from Lucas County, O.

JOHN C. LEE.

Sworn to and subscribed before me this twelfth day of April, 1883.

R. W. BARTON,
Notary Public, Lucas County.

552 On the 12th day of April, 1883, being the twenty-fifth day of the March term of said District Court, an order in said cause was made, an entry of which appears on the Journal of said Court in the words and figures as follows, to wit:

Journal Entry.

JAMES COMPTON
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY ET AL.

This day came the parties by their attorneys and thereupon this cause came on to be heard on the motion to make new parties, and was argued by counsel, and the Court being fully advised in the premises do overrule said motion.

On the twelfth day of April, 1883, being the twenty-fifth day of the March term, 1883, of said District Court, an order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to wit. (For entry see above.)

553 On the 12th day of April, 1883, there was filed in said District Court an Agreed Statement of Facts in the above-entitled cause, which statement is in the words and figures as follows, to wit:

District Court of Lucas County, Ohio, Term of 1883.

Agreed Statement of Facts.

On the first day of November, 1862, the Toledo & Wabash Railway Company executed and issued a series of bonds, amounting altogether to the sum of six hundred thousand dollars, which were styled equipment bonds. The principal of these bonds is due the last day of May, 1883, and they bear interest at the rate of seven per cent. per annum, payable semi-annually in New York city, from and after the first day of May, 1863. A series of interest coupons are attached to each bond. They were put upon the market at the time of their issue and sold; and the plaintiff was at the commencement of this suit and is now the *bona fide* holder for value of bonds of this series having a par value of one hundred and fifty thousand dollars, upon which no interest has been paid since November 1st, 1874, and also of the coupons payable on the said bonds since said last-mentioned date. The numbers of the bonds owned by plaintiff are correctly stated in the petition.

The Toledo & Wabash Railway Company which issued these bonds was a corporation organized under the laws of the States of Ohio and Indiana, especially the consolidation statutes of those States, and owned a line of railway extending from the city of Toledo to State Line City, of Indiana, which railway is now a part of the main line of the Wabash, St. Louis & Pacific system.

The railroad companies which were united to form this Toledo & Wabash Railway Company were the Toledo & Wabash Rail-
554 road Company, an Ohio corporation, and the Wabash & Western Railroad Company, an Indiana corporation. The line of the former company extended from Toledo to Harrison township,

Paulding county, Ohio, and that of the latter company from the State line in Allen county to State Line City, in Warren county, in Indiana.

The Toledo & Wabash Railway Company continued a separate corporation until the year 1865, when it was consolidated with various other companies to form the Toledo, Wabash & Western Railway Company. The consolidation agreement is dated the twenty-ninth day of May, 1865. Under this agreement the following companies were consolidated: The Toledo & Wabash Railway Company, the Great Western Railway Company of 1859, the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company. The agreement of consolidation was duly executed and ratified by the stockholders of the various companies, and was filed in the office of the Secretary of State of Ohio on the sixth day of July, 1865. It contains the following provisions:

"Now, therefore, the said companies, by their respective directors, agree to consolidate their roads, property and capital stock into one company, upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads to the stockholders thereof for ratification, to wit: The Toledo & Wabash Railway Company enters into said consolidation on the following basis, viz.:

The capital is	$10,000,000
Composed as follows:	
First mortgage bonds	3,400,000
Second mortgage bonds	2,500,000
Convertible equipment bonds	600,000
Convertible preferred stock	1,000,000
Common stock	2,500,000"

The contract required the Great Western Railway Company to make a cash payment to the consolidated company, so as
555 to place that road "in equal condition with the Toledo & Wabash Railway Company, as estimated on the thirteenth of March last by Messrs. Tillon & Colburn, appraisers appointed for that purpose."

The agreement especially provided that all the rights, franchises, property, debts and choses in action of the respective companies should vest in the consolidated company, and it also contains the following clause:

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereon, as the same shall respectively fall due, be protected by the said consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The convertible equipment bonds referred to in this agreement are the bonds referred to as having been issued by the Toledo & Wabash Railway Company, and as to a part of which this suit is brought.

There is no other provision in the consolidation agreement relating to these bonds than those just quoted.

The line of railway of the company thus created extended from Toledo, in the State of Ohio, to and through the State of Indiana, and thence in the State of Illinois to Meredosia, together with certain branch lines.

The new company, the Toledo, Wabash & Western Railway Company, from this time on had possession of the railroad properties of the various pre-existing companies, and operated them as a single system of railroads.

On the first day of February, 1867, the Toledo, Wabash & Western Railway Company resolved to make and issue its bonds to the extent of fifteen million dollars, and to secure the same by a mortgage on its entire property, and this mortgage was then made, the trustees for the bondholders named therein being the defendants Knox
556 and Jesup. This mortgage and the accompanying bonds are known as the consolidated mortgage and the consolidated bonds. It is dated the first day of February, 1867, and was delivered to the trustees therein named and was forthwith duly recorded.

The bonds are also duly made and executed, and a copy of one is found in the mortgage.

The scheme contemplated by the execution of this mortgage was the funding into a single mortgage indebtedness all of the bonds of the pre-existing companies mentioned, whether such bonds were secured by mortgage or not.

It is recited in the mortgage that the property of each of the various companies, out of which the Toledo, Wabash & Western Railway Company was formed, was subject to certain bonded debts and mortgages created by them, amounting in the aggregate to thirteen million three hundred thousand dollars, and that it was "deemed for the interest of the company, as well as for the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt upon equitable principles."

And further:

"For the purposes aforesaid, and for the objects herein stated, the said company, parties of the first part, has resolved to make and issue its bonds to the extent of fifteen million dollars, and to secure the payment of the same by a mortgage upon its entire property; and that of the amount of said bonds so to be made and issued, there should be retained thirteen million three hundred thousand dollars to retire, in such manner and upon such terms as the directors of said company may from time prescribe, a like amount of the bonds of the various companies hereinabove enumerated and described, and representing the aforesaid funded debt; and that the balance of said bonds, to wit: one million seven hundred thousand dollars thereof, should be used to provide the said additional equipment and other improvements hereinabove mentioned, and for such additional pur-
557 poses as the said directors may deem advisable; and that all of said bonds should be for the sum of one thousand dollars, except two hundred, which should be for the sum of five thousand

dollars each; and that all should bear date on the first of February, A. D. 1867, and become due and payable in forty years from their date, with interest at the rate of seven per cent. per annum, payable quarterly, on the first days of May, August, November and February in each year, in the city of New York, and to be all convertible into the common stock of said company at par, at the option of the holders, at any time within ten years from their date."

The various classes of bonds referred to are specified in the recitals of the mortgage, and among them are the equipment bonds in question.

Consolidated bonds to the amount of two million six hundred and ten thousand dollars, or thereabouts, were thereafter issued by the company, and no more.

On the sixth day of October, 1868, the Toledo, Wabash & Western Railway Company entered into an agreement of consolidation with the Decatur & East St. Louis Railroad Company, an Illinois corporation. This agreement was duly executed and ratified by the stockholders of the companies, and was filed in the office of the Secretary of State of the State of Ohio, on the tenth of August, 1870. By this means the Toledo, Wabash & Western Railway Company acquired the railroad property and franchises of the Decatur & East St. Louis Company. After this last consolidation, the company continued its corporate name of the Toledo, Wabash & Western Railway Company.

It was provided in this agreement that all the rights, franchises, privileges, property, &c., of the said companies should vest in the consolidated company, and that the terms of the articles of consolidation which created the Toledo, Wabash & Western Railway Company, and which have been already set out, should be and remain in full force and be binding upon the new consolidated company so far as the same could be made applicable, and so far as they were
558 not in conflict with the specific provisions of the agreement of 1868. There is nothing in the last agreement of consolidation conflicting with the provisions in the previous agreement relating to the protection of the bonds therein referred to, including the equipment bonds.

On the first day of April, 1873, the Toledo, Wabash & Western Railway Company, and Knox and Jesup, the trustees under the consolidated mortgage, entered into a further indenture and deed of further assurance, as it was called in these proceedings.

In this deed of further assurance, the consolidated mortgage, and the purposes for which it was executed, are recited, and it is expressly agreed by the Toledo, Wabash & Western Railway Company with said trustees, "and with all persons whom it may in anywise concern," that the company would not make or issue, or attempt to make or issue, any of the then remaining twelve million three hundred thousand dollars of consolidated bonds, which it is stated remained unissued and reserved, except for the purpose of simultaneously retiring an equal amount of the balance then remaining of the funded debt enumerated in the consolidated mortgage, so that when all of the said reserved bonds should have been used, the whole of the balance of the funded debt would be extinguished; and further, that

the covenants therein contained should be supplementary to the consolidated mortgage, and constitute a part thereof, and be of the same effect as if they had been inserted therein, and the trustees bound themselves not to sign the trustees' certificate of any of said reserved bonds except as therein provided.

The object of this deed of further assurance is stated in it to be the desire of the parties, "by more express and specific stipulations than are contained in the said indenture of mortgage, to give assurance to all persons whom it may in any wise concern, that the said reserved bonds shall not, nor shall any or either of them, be used for any other purpose than the retiring of the said funded debt or some part thereof." This indenture was duly executed by the company and the trustees.

In February, 1875, proceedings were commenced in the
559 Court of Common Pleas of Lucas county, Ohio, and in the proper Indiana & Illinois courts, to foreclose a mortgage commonly known as the Gold mortgage, executed by the Toledo, Wabash & Western Railway Company in February, 1873, to secure the payment of five million dollars of bonds, and a receiver was appointed of the road. This Gold mortgage was executed and recorded prior to the deed of further assurance already mentioned.

In December, 1875, a decree was rendered in the suit in the Ohio Court for the foreclosure of the last-named mortgage, whereby all the property and franchises of the Toledo, Wabash & Western Railway Company were ordered to be sold at a judicial sale. Confirmatory decrees were made by the Indiana and Illinois courts.

The property was ordered to be sold subject to the lien of all mortgages and trust deeds prior to the Gold mortgage, including the consolidated mortgage. In the principal decree of foreclosure it was found and stated that the consolidated mortgage was duly and legally made and recorded; that it was a valid conveyance for the purposes therein stated, and as such was a lien upon the property therein described; that it was the first and best lien upon the consolidated lines of railway belonging to the Toledo, Wabash & Western Railway Company, excepting the branch extending from Decatur to East St. Louis, but inferior to several liens upon separate parts of the road, being the mortgage and liens created by the pre-existing companies, and the same enumerated in the consolidated mortgage, but did not determine the amount or extent of such lien.

The property was sold under the decree by a special master commissioner on the tenth day of June, 1876, to John W. Ellis and others, a purchasing committee of the gold bondholders, and the property sold for an amount less than the amount found due by the decree. This sale was confirmed by this Court, and a deed made to the purchasers on the first day of January, 1877, to carry it into effect.

The foreclosure decree made by this Court, under which the
560 property was sold, contained the following condition:

"And that the sale of said road, property, equipment and franchises be made, subject to the priority and continuance of said

several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds called equipment bonds, referred to in the petition, as to which all questions arising are left open."

After the sale of the property and franchises of the Toledo, Wabash & Western Railway Company, it was reorganized, and became the Wabash Railway Company. Ellis and others, committee, who purchased at the sale, organized a company in each of the States of Ohio, Indiana and Illinois, and then those companies were consolidated into one, called the Wabash Railway Company, the articles of consolidation being filed on the tenth day of January, 1877.

On the twelfth day of January, 1877, the said Ellis and his associates transferred the property purchased by them at such foreclosure sale to the Wabash Railway Company. Both the special master commissioner's deed to the purchasers and that of the purchasers to the Wabash Railway Company refer to the decree of foreclosure, and are made subject to the payment of the liabilities charged upon the property by the decree of foreclosure and to the lien of the consolidated mortgage.

The Wabash Railway Company then took possession of this railroad property, and operated until its consolidation with the St. Louis, Kansas City & Northern Railway Company, a corporation organized under the laws of the State of Missouri, and operating a railroad from St. Louis, in the State of Missouri, to Kansas City, in the same State, with certain extension and branch lines.

The articles of this consolidation are dated the fourteenth day of August, 1879, and they provide amongst other things, that upon the ratification of the agreement by the shareholders of both corporations, all the property, rights and franchises belonging to
561 each of the companies should pass to and be vested in the new corporation, whose name should be the Wabash, St. Louis & Pacific Railway Company. Supplementary articles were entered into by the companies on the tenth day of October, 1879. The consolidation was duly approved by the stockholders of each of the companies, and the articles were filed in the office of the Secretary of State of the State of Ohio, on the twenty-fifth day of October, 1879.

This last company has since that time owned and operated all of the said railroad property and the franchises of the pre-existing companies.

The Toledo, Wabash & Western Railway Company paid the interest on the equipment bonds as the same matured, up to and including the first day of November, 1874, having thus paid the interest thereon from the year 1865.

The directors of the Toledo, Wabash & Western Railway Company have never prescribed the manner and terms for the exchange of the equipment bonds for the consolidated bonds, and have never issued consolidated bonds for that purpose, refusing to do this after demand was made upon them; but no demand was ever made by the holder, or holders, of said equipment bonds, or any of them, until the twenty-ninth day of June, 1875, upon said directors, to prescribe such terms, or to exchange the equipment bonds for those secured by

such mortgage; that such demand was not made until after the commencement of said foreclosure suit and the appointment of a receiver therein.

Neither the Toledo & Wabash Railway Company, nor the Toledo, Wabash & Western Railway Company, own any property, or have any assets; and all of the property, franchises and assets which they did own have, through the various proceedings herein set out, passed to and become vested in the Wabash, St. Louis & Pacific Railway Company.

At the time of the execution of the consolidation agreement of 1865, and of the consolidated mortgage, there were two mortgages upon the property of the Toledo & Wabash Railway Company
562 situated in the State of Ohio, one for nine hundred thousand dollars and one for one million dollars.

In January, 1877, the Wabash Railway Company executed a mortgage on all its property to one George I. Seney, to secure certain promissory notes, amounting in all to one million two hundred and sixty thousand five hundred and fifty-five dollars and forty-two cents. Some of the promissory notes have been paid, and the plaintiff charges and alleges that the holders of said notes, secured by the Seney mortgage, are chargeable in equity with notice of the lien and equity of the equipment bonds.

In May, 1879, the Wabash Railway Company executed another mortgage on all its property to Solon Humphreys and Daniel A. Lindley, trustees, for the sum of two million dollars. This mortgage was recorded in August, 1879. The plaintiff charges that it is inferior and subject to the lien of the equipment bonds, and that the holders of the bonds which it secures, and the mortgage trustees, are chargeable with notice of the lien or equity of the equipment bonds.

There is unpaid on the equipment bonds owned by the plaintiff the coupons that have fallen due since and including the first day of May, 1875.

A suit was commenced in this Court by the plaintiff herein against the Toledo, Wabash & Western Railway Company, to recover a judgment at law on so many of these coupons as matured on and prior to the first day of November, 1879. The defendant appeared, and on the fifteenth day of December, 1880, this Court rendered judgment against the said defendant for the sum of $64,236.16. On the same day the judgment was entered and execution issued to the sheriff of Lucas county, which has been returned wholly unsatisfied.

The Wabash Railway Company and the Wabash, St. Louis & Pacific Railway Company have refused payment of these equipment bonds, though retaining the property of the company which issued them.

An application was made to the Supreme Court of this State at its December term, 1876, by Benj. F. Ham *et al.*, for a man-
563 damus to compel the Toledo, Wabash & Western Railway Company to issue in exchange for certain of these equipment bonds, the bonds mentioned in the mortgage of February 1, 1867, known as the consolidated mortgage, which application was refused by the Court.

Annexed hereto in consecutive order are certain of the documents and papers referred to in the foregoing Agreed Statement of Facts, which are made parts thereof:

1st. The Petition and Exhibits for the foreclosure of the Gold Bond Mortgage, and order appointing Receiver, marked "No. 1."

2nd. The decree of foreclosure in Ohio of the Gold Bond Mortgage, marked "No. 2."

3rd. The Consolidation Agreement of 1865, forming The Toledo, Wabash & Western Railway Company, marked "No. 3."

The resolution authorizing the issue of the Equipment Bonds, and also the Consolidated Mortgage and deed of further assurance, executed by The Toledo, Wabash & Western Railway Company, are annexed to the petition herein as Exhibit- "A," "B" and "C," respectively.

Dated April 22, 1883.

R. P. RANNEY AND
SPRAGUE, MILBURN & SPRAGUE,
Attorneys for Plaintiffs.

WAGER SWAYNE,
A. P. HENDRICKS &
H. S. GREEN,
J. R. OSBORN,
For Defendants.

564 No. 1.

Petition and Exhibits for the Foreclosure of the Gold Bond Mortgage and Order Appointing Receiver.

Court of Common Pleas in and for said County.

THE STATE OF OHIO, *Lucas County, ss:*

Petition.

THE METROPOLITAN NATIONAL BANK, of the City of New York; THE NASSAU NATIONAL BANK, of the City of Brooklyn; THE UNION NATIONAL BANK, of the City of New York; JOHN R. KENNADAY, CHARLES PERKINS, EDWARD LIVINGSTON, and HENRY A. V. POST, Who are Partners by the Name of Perkins, Livingston, Post & Co., and JAMES F. D. LANIER, Plaintiffs,

against

THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY; THE FARMERS' LOAN AND TRUST COMPANY, Trustee; EDWIN D. MORGAN, Trustee; GEORGE GRISWOLD, ALEXANDER M. WHITE and HENRY H. WARDEN, Trustees; SOLON HUMPHREYS and JAMES R. JESUP, Trustees; JOHN N. A. GRISWOLD, JAMES R. JESUP and LUCIEN TILTON, Trustees; ISAAC H. KNOX, Trustee; ABRAM B. BAYLIS, Trustee; NEW YORK GUARANTEE AND INDEMNITY COMPANY, Trustee, Defendants.

Petition.

565 The plaintiffs who are above named complain of defendants above named, and say, the said, The Metropolitan National Bank of the City of New York, the Nassau National

Bank of the City of Brooklyn, the Union National Bank of the City of New York, that they and each of them are banking associations incorporated by virtue of the laws of the United States, and having their places of business in the city and State of New York, and the said John R. Kennedy, and Charles Perkins, Edward Livingston and Henry A. V. Post, and James F. D. Lanier, that they are citizens and residents of the State of New York, doing business in the city of New York.

That they and each of them are creditors of the Toledo, Wabash & Western Railway Company, and hold certain claims, obligations and securities issued by said Toledo, Wabash and Western Railway Company, that is to say:

The said Metropolitan National Bank holds in its possession, ownership and control a certain claim against said Toledo, Wabash & Western Railway Company for the sum of $325,000, evidenced by five notes of said company, a copy whereof is hereto attached, marked "D," and dated July 3rd, for $75,000; September 20th, for $50,000; November 18th, for $75,000; February 2nd, for $75,000; July 6th, for $50,000; which is secured, to wit: By a deposit of bonds known as gold bonds, heretofore issued by said railway company, each of the denomination of one thousand dollars, a copy whereof, except as to number, is included in a mortgage executed by said company to the defendant the New York Guaranty and Indemnity Company, of the city of New York, a copy whereof is hereto attached, marked "B."

The said Nassau National Bank is the owner and possessor of a claim against said railway company for the sum of $30,000, as evidenced by notes of said railway company, of which Exhibit "D," dated August 1st, 1874, on demand, is a copy, secured in like manner by a deposit of bonds, viz.: Seventy-five of said so-called gold bonds.

That said Union National Bank is the owner and possessor
566 of a certain claim to amount of one hundred and twenty-five thousand dollars, evidenced by three notes each of $25,000, dated October 6th, November 18th, December 6th, 1874, payable four months after date; and one note of $50,000, payable January 7th, 1875, of said tenor as Exhibit "D," and secured by the assignment and transfer of 312 of said gold bonds.

That John R. Kennaday holds in his possession and control a claim against said railway company to the amount of $50,000, evidenced by a note dated November 2nd, 1874, of same kind and tenor as Exhibit "D," which is secured by an assignment and deposit of 150 bonds, numbered — of said so-called gold bonds.

That said firm of Perkins, Livingston, Post & Co. are the owners of a claim to the amount of eight thousand dollars, evidenced by a note payable on demand dated November 2nd, 1874, of said kind and tenor as Exhibit "D," which claim is secured by an assignment and deposit of twenty bonds of said so-called gold bonds.

That said James F. D. Lanier is the owner and holder of a certain claim to the amount of thirty-three thousand dollars, evidenced by a note dated November 2nd, 1874, payable on demand, of same tenor

and description as Exhibit "D," which claim is secured by an assignment and deposit of eighty bonds numbered — of said so-called gold bonds.

Plaintiffs say that each and all of said claims are due and past due, and plaintiffs have demanded payment thereof from said Toledo, Wabash & Western Railway Company, and said company has refused and neglected to pay the same, and avers its inability to meet the demands due and soon to become due against it, and that it is in fact wholly insolvent as hereinafter more particularly is set forth.

That by reason of such neglect and default of payment the plaintiffs have become entitled to enforce payment of said bonds and enforce the rights accruing to them under the mortgage given to secure the same; but plaintiffs say that, as more particularly set forth hereafter, the property and franchises of said company are en-
567 cumbered by a variety of mortgages, liens, debts and obligations. That the business and resources of said railway company have so fallen off and diminished that it is at this time unable to discharge its numerous obligations, and in consequence of its present embarrassed and impoverished condition plaintiffs are in great and immediate peril of losing their debts and the mortgage securities which they now hold to protect and cover the same. They therefore file this petition for themselves and for and in behalf of all other creditors who occupy the same relation to said company, and who are willing to come forward and take part of the expense and labor of this proceeding. They say:

1. That the defendant the Toledo, Wabash & Western Railway Company is a corporation duly incorporated, existing in and by virtue of the laws of the States of Ohio, Indiana and Illinois and for the purpose of maintaining and operating a railroad or railroads leading from Toledo, in the State of Ohio, through the States of Indiana and Illinois to East St. Louis, and also East Hannibal, Quincy and Hamilton on the Mississippi River, in said State of Illinois.

2. That said railway company is a consolidated company by virtue of the laws of said several States, and is composed of the following named railroad corporations and companies; that is to say:

The Toledo & Wabash Railway Company, organized to maintain and operate a railroad from Toledo to the west line of State Line City, in Indiana.

The Great Western Railroad Company of 1859, a corporation organized to maintain and operate a railroad from State Line City to Meredosia, in Illinois.

The Quincy & Toledo Railroad Company, a corporation organized to maintain and operate a railroad from Meredosia to Camp Point, in Illinois.

The Illinois & Southern Iowa Railroad Company, a corporation organized to maintain and operate a railroad from Clayton, Illinois, to Carthage, in same State.

And the Decatur & East St. Louis Railroad Company,
568 a corporation organized to maintain and operate a railroad from Decatur, Illinois, to East St. Louis, in the same State.

3. That the said Toledo & Wabash Railway Company, one of the aforesaid railroad companies, was itself a consolidated railroad company, and was formed by the consolidation of the Toledo & Wabash Railroad Company, a corporation existing within and by virtue of the laws of Ohio, to maintain and operate a railroad from Toledo to Harrison township, Paulding county, Ohio, and the Wabash & Western Railway Company, a corporation within and by virtue of the laws of the State of Indiana, to maintain and operate a line of railroad from State line in Allen county, to State Line City, Warren county, Indiana. All the residue of the railroad companies above enumerated and described were formed within and under the laws of the State of Illinois.

4. That the following named and enumerated railroads were incorporated by and under the laws of the State of Illinois, and are still in existence as corporations for operating and maintaining railroads, that is to say:

The Hannibal & Naples Railroad Company, from Naples in Illinois, to East Hannibal in the same State, with its branch to Pittsfield, Illinois; the Pekin, Lincoln & Decatur Railroad Company; the Lafayette, Bloomington and Mississippi Railway Company, from Indiana State line to Bloomington, Illinois, and the following company under the laws of the State of Indiana, viz.: The Lafayette, Muncie & Bloomington Railroad Company, from Lafayette to the Illinois State line, and that each and all of said companies have been leased to said Toledo, Wabash & Western Railway Company by long leases, and as plaintiffs are informed, for ninety-nine years, renewable forever.

5. That all of said original railroad companies, entering into and forming said Toledo, Wabash & Western Railway Company, and all of said last named companies, which have so become leased lines of said railway company, had prior to said consolidation, and prior to the execution of any of the leases to said railway
569 company, become, and were largely indebted by means of their bonds and obligations issued under authority of their respective charters, and of the laws which authorized their incorporation; which bonds of different dates and amounts have all been secured upon different divisions and sections of the present road of said railway company and on the real estate, buildings, machinery, rolling stock, personal property of all kinds, fixtures and corporate franchises of each of the several companies, and which bonds and mortgages are as follows, viz.:

(*a.*) An issue of bonds by the Toledo & Illinois Railroad Company to the amount of $900,000, with interest at 7 per cent., payable semi-annually in New York, and which becomes due on the first day of August, 1890, secured by a first mortgage, executed to the Farmers' Loan and Trust Company of the city of New York, upon the road, property and fixtures of said railway company, situate within the State of Ohio, about seventy-five miles, and which is a prior lien upon that part of the property of said company.

(*b.*) An issue of bonds by the Toledo & Wabash Railroad Com-

pany to the amount of $1,000,000, with interest at the rate of 7 per cent. per annum, payable semi-annually in the city of New York, and which becomes due on the first day of November, 1878, which bonds are secured by a second mortgage executed to Edwin D. Morgan, as trustee, upon the road, property and fixtures of said company, lying and being in the State of Ohio, and which second mortgage is the next lien upon said part of the company's road lying in the State of Ohio, as last above stated.

(*c.*) An issue of bonds by the Lake Erie, Wabash & St. Louis Railroad Company, to the amount of $2,500,000 with interest at 7 per cent. per annum, payable in the city of New York, and which becomes due on the first day of August, 1890, secured by a first mortgage executed to the Farmers' Loan and Trust Company, of the City of New York, upon the road, property and fixtures of said company's lines, which are within the State of Indiana,
570 about 168 miles, and which constitutes the first and prior lien upon that part of the road.

(*d.*) An issue of bonds by the Wabash & Western Railway Company, to the amount of $1,500,000, with interest at 7 per cent. per annum, payable semi-annually in the city of New York, and which becomes due November 1st, 1878, secured by a second mortgage executed to Edwin D. Morgan, trustee, on the company's road, property and fixtures in the State of Indiana, about 168 miles, and is the second lien upon that part of the road.

(*e.*) An issue of bonds by "The Great Western Railroad Company of 1859," on which there is now outstanding $2,495,000, with interest, payable in the city of New York on the first day of August, 1888, with interest at 7 per cent. per annum, payable semi-annually, and which are secured by a mortgage executed to George Griswold, Alexander M. White and Henry H. Worden, of the city of New York, as trustees, and which is the first and best lien upon said line of road built and owned by said Great Western Railroad Company of 1859, and extending from the Indiana State Line to Meredosia, in Illinois, 179 miles.

(*f.*) An issue of bonds to the amount of $2,500,000 by the said Great Western Railroad Company of 1859, due May 1st, 1893, with interest, payable in the city of New York, semi-annually, at the rate of 7 per cent. per annum, and secured by a second mortgage to Solon Humphreys and James R. Jesup, of the city of New York, as trustees, and which is the second lien upon that part of the said road last above described.

(*g.*) An issue of bonds to the amount of $300,000 by the Illinois & Southern Iowa Railroad Company, with interest at 7 per cent. per annum, payable semi-annually, and which becomes due August 1st, 1888, secured by a prior mortgage on the part of the said railroad extending from the town of Clayton to Carthage, in said State of Illinois, about 30 miles, executed to John N. A. Griswold, James R. Jesup, of said city of New York, and Lucien
571 Tilton, of the city of Chicago, as trustees, and which is a prior lien on said part of said railway company's road.

(*h.*) An issue of bonds by the Quincy & Toledo Railroad Company, to the amount of $500,000, with interest at the rate of 7 per cent. per annum, payable in the city of New York, and which are due November 1st, 1890, secured by a first mortgage executed to John T. Terry, of New York, as trustee, and which is the first and best lien upon the part of said railway company's road lying between the west bank of the Illinois River opposite Meredosia, and Clayton in Illinois, about 34 miles.

(*i.*) An issue of bonds by the Toledo & Wabash Railway Company, to the amount of $600,000 known as Equipment Bonds and are due and payable on the first day of May, 1883, with interest at the rate of 7 per cent. per annum, payable semi-annually, but which are not secured by mortgage on any part of the property of the company.

(*j.*) An issue of bonds to the amount of $2,700,000, by the Decatur & East St. Louis Railroad Company which became due on the 1st day of August, 1889, with interest at the rate of 7 per cent. per annum, payable semi-annually, and secured by a first mortgage by said company on the part of said road lying between Decatur and East St. Louis in the State of Illinois, a distance of about 108 miles, and which is the first and best lien on that part of said road.

(*k.*) An issue of bonds by the Hannibal & Naples Railroad Company to the amount of $675,000, payable on the first day of November, 1888, with interest payable semi-annually at the rate of 7 per cent. per annum, secured by a first mortgage to Abram B. Baylis, of New York, trustee, on the line of its road between East Hannibal and Naples, about 63 miles, and which is the first and best lien on that road which has become leased to said Toledo, Wabash & Western Railway Company.

(*l.*) An issue of bonds to the amount of $225,000, payable on the first day of July, 1890, with like interest as above, and
572 secured by a second mortgage on said road, executed to said Baylis, as trustee, and which is the second lien on said leased line of railroad.

(*m.*) An issue of bonds by the Pekin, Lincoln & Decatur Railroad Company, to the amount of $1,076,000, and due on the first day of February, 1900, with interest at 7 per cent. per annum, payable in the city of New York, secured by a mortgage executed on the road lying between Pekin and Decatur, in the State of Illinois, about 67 miles, made to the said Abram B. Baylis, as trustee, and is the first and best lien on said line of road, which has been leased to the said railway company.

(*n.*) An issue of bonds to the amount of $666,000 by the Lafayette, Muncie & Bloomington Railroad Company, which become due on the first of August, 1901, with interest at the rate of 7 per cent. per annum, payable semi-annually in the city of New York, and secured by a mortgage executed to said Abram *E.* Baylis, on its line of road between the city of Lafayette and the eastern line of the State of Illinois, a distance of about 37 miles, which line

has been leased to said Toledo, Wabash & Western Railway Company, and is the first lien on said line aforesaid.

(*o.*) An issue of bonds to the amount of $1,300,000 by the Lafayette, Bloomington & Mississippi Railroad Company, with interest at the rate of 7 per cent. per annum, payable semi-annually, and which are secured by a mortgage executed to said Abram B. Baylis, trustee, on its line of road, since leased to said Toledo, Wabash & Western Railway Company, extending from the Indiana State Line of Illinois to Bloomington, a distance of 80 miles, and is the first and best lien thereon.

(*p.*) An authorized issue of bonds to the amount of $15,000,000, known as Consolidated Bonds, and issued by the Toledo, Wabash & Western Railway Company on or about the first day of February, 1867, payable on the first day of February, 1907, and secured by a mortgage on the whole line of the road and property of all kinds and franchise then owned, possessed and enjoyed by said company. Said mortgage was executed to Isaac H.
573 Knox and James R. Jesup, of New York City, trustees, a copy of which is hereto attached, marked "A." That by the issue of said bonds and mortgage it was intended to retire all of the previous bonds issued by said several companies, and which were liens upon the various roads and parts of roads entering into and forming the consolidated company. But, in fact, none or very few of said previous bonds were surrendered, and only $2,700,000 were ever issued under said last named mortgage, and of that number there is now outstanding only $2,610,000.

(5.) An issue of bonds to the amount of $5,000,000 dated February 1, 1873, and payable February 1, 1893, with interest at the rate of 7 per cent. per annum, payable in gold, in the city of New York, semi-annually, and known as Gold Bonds, secured by a mortgage on all the property, real, personal and mixed, and the franchises of the company then owned, possessed and enjoyed by it, from Toledo through said States of Indiana and Illinois. Said mortgage was executed and delivered to the New York Guaranty and Indemnity Company, defendant, as trustee, and defendant has accepted and entered upon the trust thereby created. A copy of said mortgage is hereto attached and is marked "B," and made part of this petition.

That all of the interest accruing upon the bonds which are hereinbefore described, and the principal of the same at the maturity thereof, has been asumed by the said Toledo, Wabash & Western Railway Company, and said interest has, up to the first of February last been paid as the same became due.

A tabular statement, showing the kind and description of said bonds, date of same and interest, where payable, with dates of mortgages and names of trustees, is hereto attached and made part of this petition as Exhibit marked "C."

6. That, beside the above mentioned leased lines, the said Toledo, Wabash & Western Railway Company has leased the track or portions thereof under certain contracts, that is to say, a part of the

tracks of the Chicago, Burlington & Quincy Railroad Com-
574 pany, for the annual rent of $40,000, and the Toledo, Peoria & Warsaw Railroad Company, at an annual rent of $10,000; that — is a lessee in the Hannibal Bridge Company, and a guarantor to the amount of $835,000, on which it pays annual rent at the rate of 10 per cent. per annum, amounting to $83,500; and owes the Wabash Equipment Company for the purchase of cars, the sum of $700,000, payable at the rate of $200,000 per annum; in the purchase of cars of said Equipment Company, and to pay equal to 10 per cent. per annum on the balance due, as rent, for the use of said cars to be purchased of said company.

7. That the total amount of bonded indebtedness of said Toledo, Wabash & Western Railway Company and of said leased lines secured on the tracks, grounds, property and franchises of said several companies, is at the present time about $30,000,000, and the entire amount of yearly interest due and payable thereon, including rents and yearly payments of said Equipment Company, is in the gross about two millions of dollars.

8. That on the first day of February, 1875, in the city of New York, there was due for interest on the several bonds, which appear then to have their installment of semi-annual interest payable, including the bonds held by plaintiff as heretofore set forth, the sum of five hundred and fifty-one thousand and nine-hundred and eigthy-five dollars ($551,985). That said interest was not paid, nor any part thereof, upon any of said bonds; nor was any coupon or interest warrant then maturing and payable, paid at all. That the President of said company, then being in the city of New York, by public circular addressed to the holders of said company's bonds, gave notice that the company had no means of paying said installment of interest, and that the same would be in default.

9. The plaintiff further says, upon information and belief, that said company is largely indebted to laborers, operatives, employees and agents, many of whom have not been paid their wages for
575 a period of three or four months; that it is also largely indebted for materials purchased and supplied by various parties for the necessary running and operating of said road, such as wood, fuel, ties, timber, lumber, tools, hardware, and other necessary articles for the operation of said road, some of which debts are due in open account, others by notes, or bills, or by judgments rendered against said company, and many of which have been due more than a year last past.

10. That said company is also indebted to sundry banks and individuals for temporary loans of money, borrowed to pay debts due, and past due, by said company in the operation and management of its business, and which its current receipts were not sufficient to pay and discharge.

That said debts herein last described, and which are known as unfunded or floating debts, are due in almost every county upon the whole line of its road, from Toledo to the Mississippi river, and as plaintiff is advised and believes, and, therefore, charges to be true,

amount in the aggregate to a sum of about one million of dollars, beside the debt due to plaintiffs.

That the amount of said February installment of interest, and said unfunded or floating debt, will aggregate something over the sum of two and one-half millions of dollars ($2,500,000).

11. Plaintiff alleges that the net earnings of said consolidated railroad company for the past twelve months, and for a long time previous, have been inadequate to meet and discharge the accruing obligations of interest upon said bonded indebtedness, and the interest accruing upon the bonds of its leased lines, which, by the terms of its said leases, said company is bound to pay, and that there is every probable prospect that there will be for a considerable period of time yet to come such continued depression in the transportation business of the country, and throughout the lines of this road, as to render it entirely improbable that said road can, from its earnings, meet its necessary running expenses and repairs, and provide
576 for its accruing obligation to its lienholders and also provide for its past due obligations and its floating indebtedness, as the same may be demanded or enforced against it. That the President of the said Toledo, Wabash & Western Railway Company, fully comprehending the situation of said company, and that the same could not be operated much longer without some common agreement on the part of its different lien holders, and the holders of the unsecured indebtedness of said company, about the first of February last proposed a scheme for the settlement and payment in the future of said past due indebtedness, as well as of the interest to accrue for some time to come, which, if assented to by said several classes of creditors, would have enabled said company to continue the operations of said road with a reasonable prospect of ultimately discharging all its obligations; but said proposition failed to receive the assent of several classes of creditors, and said creditors now stand upon their several rights as they may exist at law, or in equity; and large numbers of them having become uneasy and distrustful as to the payment of said demands, threaten legal or equitable proceedings against the property of the company to enforce their respective demands; and a multiplicity of suits, judgments and levies upon the property of said company, and under which the further operation of said railroad will be greatly obstructed and its said property sacrificed, is now imminent. Plaintiffs charge that not only would the operation of said railroad be obstructed and hindered by such suits, but unjust and inequitable preferences would thereby be obtained by creditors so enforcing their demands, and the equities of the lien holders of said road would be displaced and defeated. Plaintiffs charge that with the best possible intentions and disposition that may exist on the part of the President and managers of said railway company to continue the operation of said railroad, and to apply its inadequate receipts as far as its emergencies may permit ratably or equitably to its several creditors, yet it will not be in the power of said President and managers to avert said threatened danger
577 to the property of said company, or to ward off the same for any great length of time.

12. Plaintiff charges that the interests of the stockholders of said railroad company as well as of its lien holders and general creditors requires that said road, with its consolidated lines, and leased lines, should continue to be operated as one entire property, and under one management—that only by so maintaining and managing said property can it be made to subserve the best interests of its people and country for which it was designed to afford transportation facilities, and at the same time to secure the ultimate local interests of its stockholders and creditors. And plaintiffs aver that to secure these objects and preserve the further beneficial use of said railroad line, as well as to protect your plaintiffs in their just rights and equities, the interposition of the equitable powers of this Court in the premises, and the appointment of a receiver is demanded.

13. To the end, therefore, that the railroad of said Toledo, Wabash & Western Railway Company, and of the several leased companies, and their roads and property, and all of the personal property, rolling stock and machinery, may be kept and preserved in its most beneficial and valuable condition, and the said road be made to earn the largest amount for the benefit of the various classes to whom it has become indebted.

And to the end that litigation, cost, expense and waste of property may be prevented, plaintiff prays the Court to appoint some suitable person as receiver of its railroad in this State, and all the real and personal property of every kind and description, belonging to said company, in this State or elsewhere; that said receiver may be authorized to take such steps and proceedings as may enable him to operate and manage the railroads of said company, from Toledo to the said Mississippi river, and all the lease lines and branches thereof, by the order, authority or permission of the proper authorities in said States of Indiana and Illinois; that the Court will make such suitable order commanding all persons in this
578 State having possession or control of the road, property or appurtenances, of said company, to deliver the same over to said receiver, and that he is fully authorized to bring, in his name as receiver, all proper suits and actions for the safety and preservation of the property, moneys and income of said company in this State, and to defend all suits that may be prosecuted against said company, or touching any of the property thereof.

14. Plaintiff prays the said receiver may have control of the revenues of said railway in this State and elsewhere, and operate and carry on the business thereof to the best interest of all parties connected therewith.

And plaintiffs pray that an account may be taken of the sums due to them respectively, so secured to them as aforesaid, and of the securities so held by them as aforesaid, and that an order may be rendered requiring the said Toledo, Wabash & Western Railway Company to redeem, within some reasonable time, the said securities, or to pay the accrued or accruing interest thereon as the Court may deem proper; and in default of such redemption or provision for the payment of the interest upon said bonds so held by them

as aforesaid, a decree may be rendered upon which account may be taken of all the aforesaid liens, and of all other incumbrances upon the said railroad property, and upon each portion, division and section thereof, according to their several and respective priorities; and that a decree of foreclosure and sale of the said property may be rendered, with such provisions in said decree for the ascertainment of the priorities of the respective incumbrances, and of the due application of the proceeds of said sale, according to the respective priorities of said parties in interest under said incumbrances, as to the Court may seem meet and proper; and for such other and general relief as shall be equitable in the premises.

WAGER SWAYNE,
E. D. POTTER, JR.,
Plaintiff's Attorneys.

579 Wager Swayne, being sworn, says: That he is one of the attorneys for the petitioners named in the foregoing entitled action, wherein the Metropolitan National Bank, of the city of New York, and others are plaintiffs, and the Toledo, Wabash & Western Railway Company and others are defendants: that all of said plaintiffs are non-residents of the State of Ohio, and for that reason he makes this affidavit thereto; he further says that all the allegations and statements in the foregoing petition contained, so far as the same are stated to be from the information of others, he believes to be true, and all of the other statements and allegations therein contained are true in substance and in fact.

W. SWAYNE.

Sworn to before me, and subscribed in my presence, this twenty-second day of February, A. D. 1875.

[SEAL.] EDWARD H. SMITH,
Notary Public, Lucas County, Ohio.

EXHIBIT "A" (GOLD BOND MORTGAGE FORECLOSURE RECORD).

to the foregoing petition is the Consolidated Mortgage attached to the petition in this action as Exhibit "B," on page 52 of this Record.

EXHIBIT "B" (GOLD BOND MORTGAGE FORECLOSURE RECORD)

Gold Bond Mortgage.

This indenture made the first day of February, A. D. 1873, at Toledo, in the State of Ohio, by the Toledo, Wabash & Western Railway Company, a corporation created by and existing under the laws of the States of Ohio, Indiana and Illinois, and having a continuous line of railroad in said several States, party of the first part, and the New York Guaranty and Indemnity Company, of the city of New York, a corporation existing in and by virtue of the laws of the State of New York, party of the second part,

580 Witnesseth: That, whereas, the Board of Directors of said Toledo, Wabash & Western Railway Company, at a session held by them on the twentieth day of January, A. D. 1873, did by resolution of that date declare that it was indispensably necessary to procure steel rails for its main track, to provide additional equipment, side tracks, and make other permanent improvements upon the line of its railway, and to this end did then and thereby direct the issue of the bonds of said railway company, to the amount of five millions of dollars, and no more, to bear date of the first day of February, A. D. 1873, the principal sum thereof to be payable in gold coin at the city of New York, on the first day of February, A. D. 1893, and to bear interest at the rate of seven per cent. per annum, payable in gold coin on the first days of February and August in each year, in the city of New York; said interest to be represented by coupons or interest warrants attached to said bonds, respectively and properly numbered, dated and executed.

All of said bonds to be of the denomination of one thousand dollars, consecutively numbered from one to five thousand inclusive, to be executed by the proper officers of the railway company and under the corporate seal of the railway company.

And whereas, said bonds to be executed and issued under the foregoing resolution are to be of the form following, that is to say:

No. —. $1,000.

UNITED STATES OF AMERICA.

States of Ohio, Indiana and Illinois.

Toledo, Wabash & Western Railway Co. Seven Per Cent. Mortgage Bonds.

Principal and Interest Payable in Gold Coin.

Know all men by these presents, that the Toledo, Wabash & Western Railway Company, a corporation duly created and
581 existing under the laws of the several States of Ohio, Indiana and Illinois, acknowledges themselves indebted to the New York Guaranty and Indemnity Company, or bearer, in the sum of one thousand dollars lawful gold coin of the United States of America, which sum the said company promises to pay in like gold coin to the said New York Guaranty and Indemnity Company, or to the bearer hereof, on the first day of February, which will be in the year one thousand eight hundred and ninety-three, at their office or agency in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable semi-annually in gold coin as aforesaid, at their said office or agency in the city of New York, on the first days of February and August in each year, on the presentation and surrender of the coupons or interest warrants hereto annexed, as they severally become due, and in cause of the nonpayment of any semi-annual installment of interest, which shall have become payable and shall have been demanded, if such default shall continue for the space of six months after the maturity and demand of said installment, the principal of this bond shall become due in the manner and with the effect as provided in the deed of trust hereinafter mentioned. It is agreed between the said railway

company and the holder of this bond, that in case of any default in the payment thereof, the said railway company hereby waives the benefit of any extension, stay or appraisement laws now existing or that may hereafter exist.

This bond is one of a series of five thousand bonds, each of which is for the sum of one thousand dollars, numbered consecutively from one to five thousand inclusive, and amounting in the aggregate to five millions of dollars, all of like tenor and date, and the payment of all of said bonds is secured by an indenture of mortgage or deed of trust dated February 1st, 1873, made by said company to the New York Guaranty and Indemnity Company, of New York, trustee, conveying the railroad, equipment, franchises and property
582 of said company, as in said indenture of mortgage or deed trust described.

This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed hereon and duly signed by said trustee.

In witness whereof, the said railway company have caused their corporate seal to be affixed hereto and the same to be attested by the signature of their president and secretary, this first day of February, one thousand eight hundred and seventy-three.

[SEAL.] —— ——, *President.*
—— ——, *Secretary.*

[*Coupon.*]

The Toledo, Wabash & Western Railway Company will pay the bearer, at their office or agency in the city of New York, thirty-five dollars in U. S. gold coin, on the first day of February, , for six months' interest on bond No. —. —— ——, *Secretary.*

[*Trustee's Certificate.*]

The New York Guaranty and Indemnity Company hereby certifies that the within bond is one of a series of five thousand bonds of $1,000 each, secured by an Indenture of Mortgage or Deed of Trust, dated February 1st, A. D. 1873, executed by the Toledo, Wabash & Western Railway Company, to said New York Guaranty and Indemnity Company, and duly recorded.

—— ——, *Trustee,*
By —— ——, *President.*

And whereas, the directors of the Toledo, Wabash & Western Railway Company, by the resolution hereinbefore referred to, authorized and directed the proper officers of said railway Company to
583 execute a mortgage upon all of the property, real and personal, at present existing or to be hereafter acquired, belonging to said railway company, and upon the franchises of said railway company, to the trustee of said bonds, party of the second part, for the purpose of fully and completely securing each and every of the holders of said bonds, for the payment of the principal and the installments of interest as may be specified in each and all of the bonds so to be issued.

Now, therefore, be it known that the Toledo, Wabash & Western

Railway Company, party of the first part, in consideration of the premises, and in order to the security of said bonds, hereinbefore described, to the extent of five millions of dollars, and no more, and for the further consideration of the sum of one dollar by the said second party duly paid, the receipt whereof is hereby acknowledged, has this day granted, bargained, sold, transferred, mortgaged and set over; and by these presents does bargain, sell, assign, transfer and set over unto the said New York Guaranty and Indemnity Company, party of the second part, its successors in said trust and assigns forever, all the railroad, roadbed and right of way of the party of the first part, extending from the city of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples, and from Meredosia to Camp Point in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton in said State, and with branch of said road leading from Decatur in said State to East St. Louis in the same State, together with all the embankments, bridges, turn-outs, side tracks, buildings and structures, water tanks and fixtures, shops, engines and other houses, depots, turn tables, engine machinery, cars, tools, rolling stock, lots, lands, buildings and offices and other things, real and personal, now owned or used, or that may hereafter be owned or used by the party of the first part, in connection with the said railroad and every appurtenant thereto, and all the powers, privileges, franchises
584 and chartered or other rights of the said Toledo, Wabash & Western Railway Company, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and all reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all contracts, leases and rights now existing, or that may hereafter be acquired by said railroad company with other corporations, companies or individuals, and all the estate, right, title, interest and demand, as well at law as in equity, of the said railway company in and to the same and every part thereof, with the said appurtenances, but subject to the prior mortgages, which said party of the first part has caused to be executed and delivered heretofore.

To have and to hold the said premises and every part thereof unto the said party of the second part, its successors in said trust and assigns, to the only proper use and behoof of it, the said party of the second part, and its successors in the trust and assigns, but nevertheless subject to the mortgage liens now subsisting on said property to and upon the trusts for the purposes of protecting and securing the holders of said bonds and upon each and every of them, and upon the conditions following, that is to say:

If the said Toledo, Wabash & Western Railway Company and its successors and assigns shall well and truly pay or cause to be paid, the several sums of money specified in the several bonds hereinbefore described, as well the principal as the installments of interest according to the tenor and effect of said bonds, and of each and every of them, and of the laws of the several States of Ohio, Indiana and Illinois; or if said bonds and the interest payable thereon become, in anywise, paid or satisfied, then, and in such case, the estate, right,

title, interest and demand of said party of the second part, its successors in said trust and assigns, shall cease, determine and become void; otherwise to be and remain in full force and virtue in law, and for the benefit and security of the holders of said bonds and each of them.

Until default be made in the payment of the principal or
585 interest of said bonds, or of some or any of them, the said railway company shall be permitted to possess, operate, manage and enjoy said railroad, with its appurtenances, and to take and use the rents, incomes, tolls, issues and profits thereof, in the same manner and with the same effect as if this deed had not been executed.

In case default shall be made in the payment of any installment of interest accruing on said bonds or any of them, and such default shall continue for a period of six months after the maturity thereof, it shall be lawful for said party of the second part, or the successor in said trust, by its officers, agents or attorneys, to enter upon, take possession of, manage, operate and control the railroad and property hereby conveyed, owned or held by lease, contract or otherwise, by superintendents, receivers and managers thereof, making, from time to time, all needful repairs, replacements, and such alterations, additions and improvements as may seem to be judicious and proper, and to collect and receive all rents, tolls, incomes, issues and profits thereof, and after deducting the expenses of operating said railroad, and property and leasehold interests, and all costs of improvements, and any taxes that may have accrued thereon, as well as just and reasonable compensation for its own work and labor in and about the premises, to apply the moneys arising therefrom to the payment of interest in the order in which it becomes due, and ratably to the persons entitled thereto, and when said interest so in default and any installment of interest subsequently maturing shall be fully paid up, then said party of the second part shall restore the possession of said railroad to the said party of the first part.

If default shall occur in the payment of any installment of interest, and such default continue for the space of six months after maturity and demand therefor, then, if a majority in value of the holders of the bonds then outstanding and secured by this mortgage shall determine and notify said trustee that they require that the
principal of all of said bonds become at once due and pay-
586 able, said bonds shall thereby become due and payable, notwithstanding any clause contained therein to the contrary, and if said principal sum shall become due and not paid by said first party, according to the tenor of said bonds, and upon written notice by the holders of a majority of the bonds issued and outstanding, under the authority hereinbefore mentioned, the said trustee shall have the power to enter upon and take possession of said railroad with the appurtenances and all and singular the property and franchises hereby mortgaged; and the agents of the said railway company are hereby authorized and required to deliver up the same; and said trustee shall cause said mortgaged premises to be sold at public auction at the city of New York; or at the city of Toledo, Ohio; Lafayette, Indiana; or Springfield, Illinois; as may be di-

rected by the holders in interest of a majority of said bonds, giving at least sixty days' notice of the time and place and terms of sale, and of the specific property to be sold, by publishing the same in two daily newspapers in said city of New York, and one in the said cities of Toledo, Lafayette, and Springfield, to adjourn said sale from time to time if necessary in its opinion, and if the same shall be adjourned, to sell without further notice of the time and place of sale, and to execute to the purchaser or purchasers a good and sufficient deed in fee simple for the same, which shall be a bar against the party of the first part and all persons claiming by, through or under it, of all right, title, claim or demand, in and to the mortgaged premises or any part thereof, and out of the proceeds of such sale and the income that may have been received for the use, operation, and management of said road, while in possession of such trustee, after deducting just allowances and expenses as in the preceding article mentioned, to pay first the interest, and second the principal of said bonds ratably, and as far as said proceeds will go for that purpose; and in case any surplus should remain to pay the same over to the party of the first part. But in case it shall not be deemed proper or expedient in all or any of the States in which the mortgaged premises are found, to seize and sell the same
587 in pursuance of the power herein granted, then it shall be the duty of said trustee to proceed in any proper tribunal, to foreclose said mortgage, according to the usual and established principles of law and equity: but it is expressly understood and agreed between the parties, that in no case whatever shall the party of the first part claim any right or advantage by reason of any valuation, appraisement, stay or extension laws, that now exist or may hereafter be enacted in any of the States in which said property exists or may be found, and said first named party hereby releases to the second party all and every such rights, claims and demands, and hereby further agrees that it will neither apply for an injunction nor any stay of proceedings to arrest or prevent such sale from being made or possession being taken as hereinbefore provided.

In case of the sale of this road, or any part thereof, as contemplated and provided in the last preceding article, it is hereby agreed, and said trustee is hereby authorized, upon the written request of the holders of a majority of the bonds outstanding and secured by this mortgage, to bid in the said property so sold for the benefit of the holders of said bonds, provided the same may be obtained at a reasonable price, and for a sum not exceeding the par value of the principal of said bonds and such interest as may be outstanding thereon, and the necessary expenses of said sale, and to hold said property for the benefit of said bondholders, and in the proportion of their respective interests, and subject to any future use or sale of the same as a majority of them shall or may direct.

In case of the resignation or incapacity of the trustee herein named to act as trustee, or in case of the death, resignation or incapacity to act of any successor of said trustee, it shall be the duty of the board of directors of said railway company immediately thereafter to make application to some proper court of record, at the county where the general office of said railway company is located,

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for the appointment of some suitable person, persons or corporation to become the successor of said trustee, and thereupon the
588 person, persons or corporation so appointed shall be and are hereby vested with all the estate, rights and privileges, and liable to all the duties by this instrument conferred upon or to the party of the second part, to the same extent as if each person, persons or corporation were herein named.

It is hereby agreed and understood that for the better assurance to the party of the second part, and to the holders of the bonds secured by this instrument, the party of the first part agrees that it will, on demand, at any and all times hereafter make, execute and deliver all such other and further conveyances and assurances for the better assuring unto said trustee and its successors in the trust hereby created, the said railroad, with appurtenances, equipment and property hereinbefore described or intended so to be, and all other property belonging to said party of the first part, now owned or hereafter to be acquired for use in connection with said railroad, or any and all the franchises now held or hereafter to be acquired by said party of the first part, as said trustee, or its successors, by its counsel shall reasonably advise, devise or require.

Whenever it shall happen from changes required to be made in said railroad and appurtenances that any parcels of property, whether real or personal, have become unnecessary or useless to the said railroad company for its business, by reason of change of line, or depot or other grounds, or when any of the personal property shall have become worn out or inefficient and unnecessary to the operation of said railroad, then and in such case it shall be lawful for the directors of said railway company to make sales, exchanges or other disposition of such parcels of real or personal property as they may deem for the best interest of said railway company, and upon the sale or exchange of such property for any other, and when any other property shall be acquired in the place of such property, the same shall be held subject to the lien of this mortgage, as if it was the property of said company at the date hereof; and the parcels of prop-
589 erty so held and disposed of by said directors shall be exempt from the lien herein created.

In witness whereof, the said party of the first part—that is to say, the said Toledo, Wabash & Western Railway Company—has caused these presents to be signed in its corporate name by John N. Drummond, its assistant president, and attested by W. B. Corneau, its secretary, with the corporate seal of said company hereto, as authorized and directed by its board of directors this day and year above written. By JOHN DRUMMOND,

Assistant President.

Attest:

W. B. CORNEAU, *Secretary.*

Signed and sealed in the presence of

JNO. C. FEEFER.

ARO M. DANFORTH.

(Here follows Exhibit "C," marked p. 591.)

EXHIBIT "C."

Statement of Amount and Class of Mortgages and Other Interest Obligations, with Time of Maturity, Rate of Interest, &c.

NAME OF BOND.	Rank.	Date of Mortgage.	Date of Bond.	Time of Maturity.	Amount of Issue.	Denomination.	Rate of Interest. Per Cent.	INTEREST WHEN PAYABLE. January.	February.	March.	April.	May.	June.	July.	August.	September.	October.	November.	December.	TRUSTEE.	When and How Payable.
MAIN LINE.																					
Toledo & Illinois R. R. Co.	First.	Sept., 1853	Aug., 1853	Aug., *1865	900,000	1,000 each.	7		31,500						31,500					Farmers' Loan & Trust Co., New York.	Lawful Money in New York.
Lake Erie, Wabash & St. Louis R. R. Co.	do	Aug., 1853	Aug., 1853	Aug., *1865	2,500,000	1,000 "	7		87,500						87,500					do do do	do do
Great Western R. R. Co., West of Decatur.	do	April, 1853	April, 1853	April, 1868	4,000	1,000 "	10				200						200			do do do	do do
Illinois & Southern Iowa R. R. Co.	do	March, 1862	March, 1862	Aug., 1882	300,0000	1,000 "	7		10,500						10,500					Griswold, Jesup & Tilton, New York.	do do
Great Western R. R. Co. of 1859.	do	May, 1863	May, 1863	Aug., 1888	2,495,000	1,000 "	7		86,765						86,765					Griswold, White and Worden, New York.	do do
Quincy and Toledo R. R. Co.	do	May, 1865	May, 1865	Nov., 1890	500,000	1,000 "	7					17,500						17,500		John T. Terry, New York.	do do
Decatur & East St. Louis R. R. Co.	do	June, 1869	Aug., 1869	Aug., 1889	2,700,600	1,000 "	7		94,500						94,500					I. H. Knox, New York.	do do
Wabash & Western R. W. Co.	Second.	Oct., 1858	Oct., 1858	Nov., 1878	1,500,000	100 500 1000 each	7					52,500						52,500		E. D. Morgan, New York.	do do
Toledo & Wabash R. R. Co.	do	Oct., 1858	Oct., 1858	Nov., 1878	1,000,000	200 500 1000 each.	7					35,000						35,000		do do	do do
Great Western R. R. Co. of 1859.	do	May, 1865	May, 1865	May, 1893	2,500,000	1,000 each.	7					87,500						87,500		Humphreys & Jesup, New York.	do do
Toledo & Wabash R. W. Co.	Equipment.	Nov., 1863	Nov., 1863	May, 1883	600,000	100 500 1000 each.	7					21,000						21,000		Not secured.	do do
Toledo, Wabash & Western Railway Co.	Consols.	Feb., 1867	Feb., 1867	Feb., 1907	2,610,000	500 1000 each.	7		47,250			47,250			47,250			47,250		Knox & Jesup, New York.	do do
Preferred Stock. Toledo & Wabash R. W. Co.	Stock.				1,000,000		7					35,000						35,000		New York Guaranty & Indemnity Co	Gold do
Gold Mortgage.		Feb., 1873	Feb., 1873	Feb., 1893	2,503,000		7														
LEASED LINES.																					
Hannibal & Naples R. R. Co.	First.	Nov., 1868	Nov., 1868	Nov., 1888	675,000	1,000 each.	7					23,625						23,625		A. B. Baylis, New York.	Lawful Money in New York.
Hannibal & Naples R. R. Co.	Second.	June, 1870	July, 1870	July, 1890	225,000	1,000 "	7	7,875						7,875						do do	do do
Pekin, Lincoln & Decatur R. R. Co.	First.	Nov., 1870	Nov., 1870	Feb., 1900	1,076,000	1,000 "	7		37,660						37,660					do do	do do
Lafayette, Muncie & Bloomington R. R. Co.	do	Aug., 1871	Aug., 1871	Aug., 1901	666,000	1,000 "	7		23,310						23,310					do do	Gold, do
Lafayette, Bloomington & Mississippi R. W. Co.	do	Aug., 1871	Aug., 1871	Aug., 1901	1,300,000	1,000 "	7		45,500						45,500					do do	do do
LEASED TRACK AND OTHER OBLIGATIONS.																					
Chicago, Burlington & Quincy R. R. Co.	Rent.																				
Toledo, Peoria & Warsaw R. W. Co.	Rent.																				
Hannibal Bridge Co.	Stock.				835,000		10	10,000		10,000			10,000			10,000	10,000		10,000		Lawful Money in Toledo, O.
Wabash Equipment Co.	Bond.		July, 1872	July, 1877	700,000	1,000 each.	10				42,500										do do
								50,000						50,000						A. M. White, New York.	Lawful Money in New York.
Total for Leased Track and Other Obligations.																					do do
								60,000		10,000	42,500		10,000	50,000		10,000	42,000		10,000		

* Extended to August, 1890.

593 STATE OF OHIO, *Lucas County, ss:*

Be it remembered, that on this twelfth day of February, A. D. 1873, personally came before me the undersigned, a notary public, within and for the county and State aforesaid, John N. Drummond, who, being by me duly sworn, did depose and say that he is the assistant president of the Toledo, Wabash & Western Railway Company, grantor in the foregoing instrument; that the name of said company is signed to said instrument by him and by virtue of the order of the board of directors of said company as assistant president thereof; that the seal of the company attached thereto is the proper and genuine seal of said railway company, and is affixed thereto by order of the said board of directors. And likewise came Wm. B. Corneau, who was also sworn by me, and did depose that he is secretary of said railway company, and that he countersigned said instrument and affixed the seal of said company thereto by order of the board of directors thereof. And the said John N. Drummond, assistant president, and William B. Corneau, secretary, acknowledged the foregoing instrument to be the act and deed of the Toledo, Wabash & Western Railway Company for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office this twelfth day of February, A. D. 1873.

[SEAL.]

N. HARRINGTON,
Notary Public, Lucas County.

Recorded in Vol. 47, Pages 1, 2, 3, 4, 5, 6, 7, 8, March 26, 1873.

JOSIAH W. WHITE, *Recorder.*

"T."

594 EXHIBIT "D."

NEW YORK, —— —, 187-.

On demand after date, for value received, The Toledo, Wabash & Western Railway Company promise to pay to —— —— or Order —— Thousand Dollars, with interest at Seven per cent. per annum from date, having pledged herewith as collateral security, with full power to sell the whole or any part of the same after said period, at public or private sale or otherwise, at the holder's option, and without notice to said company, and to purchase on said sale if the holder sees fit to do so, viz.:

Consolidated Gold Bonds of the Toledo, Wabash & Western Railway Company, Nos. —.

TOLEDO, WABASH & WESTERN
RAILWAY COMPANY,
By J. B. COX, *President.*
BENJAMIN F. HAM,
Assistant Treasurer.

Order.

THE METROPOLITAN NATIONAL BANK, OF NEW YORK ET AL., Plaintiffs,
against
THE TOLEDO, WABASH & WESTERN RAILWAY ET AL., Defendants.

On the motion to the Court in this case, by Messrs. Wagner Swayne and E. D. Potter, Jr., Attorneys for the plaintiffs,
595 and upon appearance of the Toledo, Wabash & Western Railway Company, by John R. Osborn, Attorney for said defendant and not denying but admitting the allegations of the plaintiffs, contained in the petition filed in this case;

It is ordered and adjudged, that Jacob D. Cox be, and is hereby, appointed Receiver of the Toledo, Wabash and Western Railroad, its property, real and personal, and its franchises; the said road extending from the city of Toledo, in the State of Ohio, westerly through the said State of Ohio, the States — Indiana and Illinois, to the cities of Quincy and East Hannibal and Hamilton, on the Mississippi River, and from the city of Decatur, in the State of Illinois, to the city of East St. Louis, on the Mississippi River, together with the said several leased lines of railroads and branches thereto appertaining and belonging in the bill herein described, together with all the real estate and personal property of every kind and description, including rolling stock, supplies, all books of account, papers moneys, bills receivable, accounts and demands, moneys, bills receivable, accounts and demands, rents, profits and income of the premises and property aforesaid accrued, accruing or to accrue, as well as of all rights, easements, privileges and franchises of said corporation, so far as may be needful and proper for said Receiver to have and possess said property and exercise such franchises for the purpose of the proper and efficient performance of the duties imposed upon him by this Order.

It is further ordered that the said Receiver, upon filing a bond in this cause, payable to the State of Ohio, for the use of parties or persons interested in the property, rights of property, proceeds, rents, receipts of income thereof aforesaid, in the penal sum of $100,000, with surety to be approved by the Clerk of this Court, conditioned for the faithful performance of his duties in the premises, do forthwith, as such Receiver, take and hold possession of all and singular the property, real and personal, choses in action, books, papers, rights, privileges, easements and franchises aforesaid, subject
596 to the further order of this Court, from time to time, in the premises; and it is further ordered that all and singular, every person and corporation, and the servants and agents of every person and corporation now having or claiming to have possession of or rights in the premises or property embraced in this Order, or any portion or part thereof, be and they, personally, are strictly commanded and enjoined to surrender possession thereof to the said Receiver, to attorn to him, and to obey and respect his authority

in the premises, according to the full and true tenor, interest and meaning of this Order, under the pains and penalties attached by law to disobedience thereof.

It is further ordered that the said Receiver be, and is hereby, authorized to run and operate the entire line of said railroad, with its leased branches and appurtenances aforesaid; to keep the same with its equipments in repair; to make such additions as may be required from time to time; to keep up to a proper standard of capacity and efficiency the means of transportation on the said road; to purchase and pay, out of the rents, issues and income thereof, from time to time, for all supplies necessary for this purpose; to employ and pay and dismiss all needful agents and servants; to pay all lawful taxes and assessments upon the premises and property aforesaid; to protect and preserve all franchises touching the premises; to institute and defend suits and proceedings necessary to a proper discharge of his duties in the premises, with the right to use the name of said railway company in all such suits, and to prosecute appeals and writs of error in all such proceedings, and to use the corporate name and seal of said railway company where necessary, and to that end to employ such solicitors, attorneys and counsel as from time to time he may deem necessary and proper; and, generally, to do all acts and things proper and necessary to be done to protect the franchises, property and rights of which he is hereby appointed Receiver, and needful to promote the business and increase the earnings of the premises and property aforesaid; and to pay, compromise and
597 adjust all claims for injury, loss and damage to property and persons growing out of the operations of the said road as aforesaid, with leave to apply from time to time, for such instructions in the premises touching his rights, duties and liabilities as he may be advised.

It is further ordered that the said Receiver keep full, true, particular and accurate accounts of his earnings, receipts and expenditures in the premises, and that he render to this Court an accurate account thereof, once in every three months, and oftener if so required by the further order of this Court, and that said Receiver hold and safely keep all the rents, revenues and increase of said property and above expenditures and disbursements hereby authorized, subject to such order as this Court may from time — make in the premises.

It is further ordered that, as soon as practicable after taking possession of the premises and property embraced in this Order, the said receiver do cause an inventory to be made of all engines, cars, tenders, rolling stock, equipments, material, supplies and other personal property of which he is hereby appointed receiver, stating its kind, quality, amount and situation, and that he make oath to the same and file a copy thereof with the Clerk of this Court.

And it is further ordered that the said receiver pay from and out of the said earnings and increase all sums of money due and owing to agents, attorneys, servants and laborers heretofore employed in and about the operation, care and management of the said railroad; and that said receiver likewise pay out of said earnings and income

all sums of money due and owing for supplies heretofore purchased for use upon the said road, and the just and reasonable expenses incurred in and about his appointment as receiver, together with ordinary balances in freight and passenger accounting with other railway companies.

It is further ordered that the said receiver shall be entitled to receive such compensation for services as such, in the execution of this Order, as from time to time hereafter may be fixed by the
598 Court, on application, and that the said receiver have leave to apply from time to time for such orders and directions as he may be advised are necessary and proper to enable him to discharge his duties as such receiver.

It is declared to be the true intent and meaning of this Order, that its operation beyond the jurisdiction of this Court, and as to the property involved herein without the limits of this State, is dependant upon the judicial conformation thereof by proper Courts of the respective States of Indiana and Illinois, having jurisdiction in the premises.

TOLEDO, *Febraury 22d,* 1875.

You will enter the foregoing as the Order of the Court herein.
R. C. LEMON, *Judge.*

To Clerk Common Pleas, Lucas County, Ohio.

STATE OF OHIO, *Lucas County, ss:*

I, M. J. Enright, Clerk of the Court of Common Pleas of said County of Lucas, and in whose custody the files, pleadings, papers, records and journal of said Court are by law required to be kept, and are kept, hereby certify that the foregoing is a true copy of an Order made by Hon. R. C. Lemmon, one of the Judges of said Court, and recorded in the Journal of said Court, on the 22d day of February, A. D. 1875.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court, at Toledo, this 22d day of February, A. D. 1875.

[SEAL.] M. J. ENRIGHT.

599 *Bond.*

Know all men by these presents, that we, Jacob D. Cox, as principal, and the others as sureties, are held and firmly bound unto the State of Ohio, in the penal sum of one hundred thousand dollars; as witness our hands and seals this twenty-second day of February, A. D. 1875.

The condition of the above-recited obligation is such that whereas the said Jacob D. Cox has been appointed by the Court of Common Pleas of Lucas County, Ohio, to be receiver of the road, property, franchises, assets and income of every name and nature, belonging to the Toledo, Wabash & Western Railway Company, in a certain action pending against said company, in *in* said Court of Common

Pleas, wherein the Metropolitan National Bank, of the city of New York, and others are plaintiffs and the said Toledo, Wabash & Western Railway Company and others are defendants, as by the terms of the Order appointing the said receiver will more fully and at large appear.

Now, therefore, if the said Jacob D. Cox, Receiver as aforesaid, shall well and truly perform all and singular, the duties and obligations assumed by *time* as such receiver, and shall pay over all moneys to such proper persons as may be ordered or required of him by authority of law, and in pursuance of his said duties, and shall further abide by and perform all the orders which may hereafter be made by said Court of Common Pleas, according to the best of his skill and ability, then the foregoing obligation shall be void; otherwise to be and remain — full force and virtue in law.

J. D. COX. [SEAL.]
WAGER SWAYNE. [SEAL.]
GEO. W. DAVIS. [SEAL.]
V. H. KETCHAM. [SEAL.]
C. F. CURTISS. [SEAL.]
M. D. CARRINGTON. [SEAL.]
W. B. CORNEAU. [SEAL.]

600 The foregoing bond is approved by me this twenty-third day of February, A. D. 1875.

M. J. ENRIGHT, *Clerk.*

Oath of Office.

THE METROPOLITAN NATIONAL BANK OF NEW YORK ET AL.
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY ET AL.

STATE OF OHIO, *Lucas County, ss:*

Be it remembered that on the twenty-third day of February, A. D. 1875, personally appeared before me, Jacob D. Cox, the receiver appointed by order of the Court of Common Pleas of Lucas County, Ohio, in the above-entitled cause, and was by me duly sworn, and upon his oath did declare that he would perform the duties of receiver in the said cause faithfully, and according to the best of his ability, and discharge the duties pertaining thereto according to the requirements of the order made by said Court appointing said receiver, and such other orders as may be made in said cause.

J. D. COX.

Sworn to before me by said Jacob D. Cox, and by him subscribed in my presence, the day and year above written.

[SEAL.]

EDWARD H. SMITH,
Notary Public, Lucas County, Ohio.

601 *Order.*

This day came in open Court the parties plaintiff by their attorneys, and also the defendant the Toledo, Wabash & Western Railway by its attorney, and on motion of the plaintiff it is considered by the Court that the order which was made by his Honor Reuben C. Lemmon, at Chambers, on the twenty-second day of February, be, and the same is now, affirmed and made the order of the Court in the foregoing entitled cause.

THE STATE OF OHIO, *Lucas County, ss:*

I, M. J. Enright, Clerk of the Court of Common Pleas of said County, and in whose custody the files of said Court are required by law to be kept, and are kept, hereby certify that the foregoing is a true copy of the bond filed by Jacob D. Cox, receiver, in the within entitled action, and the oath taken by him and attached to said bond which were filed on the twenty-third day of February, A. D. 1875, in the within entitled action, and also of an order of the court made in said cause at the January term, 1875, thereof, to wit: on the twenty-third day of February, A. D. 1875.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at Toledo, this twenty-third day of March, A. D. 1875.

[SEAL.] M. J. ENRIGHT, *Clerk.*

602 No. 2.

Decree of Court of Common Pleas of Lucas County, Ohio, of Foreclosure of Gold Bond Mortgage.

This day came the parties, by their attorneys, and this cause came on to be heard upon the pleadings, and the exhibits attached to said pleadings, and upon the report of William B. Corneau, Special Master, to whom the same was referred, and to which report no exceptions have been taken, and upon the evidence produced by the parties, and was argued by counsel:

On consideration whereof it is found and adjudged that the statements and conclusions returned in said report are true and said report is approved and confirmed.

And it is further found that all of the defendants herein named have been served with process, or have entered their appearance and submitted to the jurisdiction of this Court.

And it appearing to the Court that like proceedings as have been herein taken, have also been taken in the courts of the States of Indiana and Illinois, into and through which the road of the Toledo, Wabash & Western Railway Company extends.

And this cause coming on to be heard upon the issues joined in the pleadings, and said master's report, and having been submitted to the Court upon the petition, the answers and cross-petitions of said

several defendants, and the Court being fully advised in the premises, do find that the equity of the case is with the said plaintiffs, and the said Valentine H. Ketcham, Trustee, and that the several allegations made in the petition of plaintiffs, and the cross-petition of said Valentine H. Ketcham, Trustee, are correct and true.

The Court find that the Toledo, Wabash & Western Railway Company is a corporation duly incorporated and organized by virtue of the laws of the States of Ohio, Indiana and Illinois, and
603 existing within said States, for the purpose of owning, controlling and operating a line or lines of railroad, extending from the city of Toledo, in the State of Ohio, to East St. Louis, and to Hamilton and Quincy, on the Mississippi River, in the State of Illinois, and that the same is a consolidated company in said States, consisting of the several separate railroad companies which are described in the plaintiff's petition, and as to all which the Court find the averments of said petition true.

It is further found by the Court that the several mortgages, alleged to have been made and delivered by said several railroad companies to the several trustees, as the same have been described in the plaintiff's petition, and the answers and cross-petitions of the several trustees, were each and all of them duly and legally made and recorded in pursuance of the laws of the several States hereinbefore named; that they are valid conveyances for the purposes herein mentioned, and as such are liens upon said road, and parts of the same, with the equipments, property and franchises of each, as hereinafter is more particularly set forth in this decree.

And the Court doth further find that the said Toledo, Wabash & Western Railway Company has not paid the installments of interest upon said several mortgages which have become due, and that the averments of the petition in that behalf and of said answers and cross-petitions are true, and that said Toledo, Wabash & Western Railway Company is truly and justly indebted for said respective installments, and for interest thereon, to said several trustees, which are particularly hereinafter designated in this decree, that is to say:

First.

That the mortgage executed and delivered by the Toledo & Illinois Railroad Company to the Farmers' Loan and Trust Company, trustee, is the first and best lien upon so much of the line of the
604 Toledo, Wabash & Western Railway Company's line of road as lies within the State of Ohio, extending from Toledo to the State Line between Ohio and Indiana, a distance of seventy-five and five-tenths miles, including the road bed and all real and personal property described in said mortgage. That the bonds of said company described and enumerated in said mortgage are outstanding to the amount of $900,000 and chargeable upon the trust created by said mortgage, and that on each bond two interest coupons are now due and unpaid, as set forth in the answer of said Farmers' Loan & Trust Company, and upon said coupons and the interest thereon there is due at the first day of this term of court, to wit, the 18th day

of October, 1875, to the said Farmers' Loan & Trust Company, trustee, the sum of $65,058.51, as further appears from the report of said master.

Second.

That the mortgage executed and delivered by the Toledo & Wabash Railroad Company to Edwin D. Morgan, Trustee, dated October 15, 1858, is the second and next best lien upon the said line of road lying within the State of Ohio, as last above described. That the bonds of said company, described and enumerated in said mortgage, are outstanding to the amount of $1,000,000, and chargeable upon the trust created by said mortgage, and that on each bond one interest coupon is now due and unpaid, as set forth in the answer of said Edwin D. Morgan, and for said coupon and interest thereon there is due, at the first day of this term of Court, to wit, October 18, 1875, to said Edwin D. Morgan, trustee, the sum of $36,143.43, as further appears from the report of said master.

Third.

That the mortgage executed and delivered by the Lake Erie, Wabash & St. Louis Railway Company to the Farmers' Loan & Trust Company, trustee, dated August 1, 1853, is the first and best lien upon so much of the line of railroad belonging to the Toledo,
605 Wabash & Western Railway Company as lies within the State of Indiana, being one hundred and sixty-six and one-tenth miles in length, including the road bed and all real and personal property described in said mortgage. That the bonds of said company described and enumerated in said mortgage, are outstanding to the amount of $2,500,060, and chargeable upon the trust created by said mortgage and that upon each bond two interest coupons are now due and unpaid, as set forth in the answer of said Farmers' Loan & Trust Company, and for said coupons and the interest thereon there is due, at the first day of this term of Court, to wit, October 18th, 1875, to said Farmers' Loan & Trust Company, trustee, the sum of $180,716.72, as further appears from the report of said master.

Fourth.

That the mortgage executed and delivered by the Wabash & Western Railway Company to Edwin D. Morgan, trustee, dated October 16, 1858, is the second and next best lien upon so much of said line of road lying and being in the State of Indiana, and the same last above described. That the bonds of said company, described and enumerated in said mortgage, are outstanding to the amount of $1,500,000, and chargeable upon the trust created by said mortgage, and on each bond one interest coupon is now due and unpaid, as set forth in the answer of said Edwin D. Morgan, trustee, and for said coupon and the interest thereon there is due, at the first day of this term of Court, to wit, October 18th, 1875, to said Edwin D. Morgan, trustee, the sum of $54,215.01, as further appears from the report of said master.

Fifth.

That the mortgage executed and delivered to the Great Western Railroad Company, on so much of the line of road of said Toledo, Wabash & Western Railway Company as lies west of Decatur to the State line, to the Farmers' Loan & Trust Company, trustee, is
606 the first and best lien on that part of said line of road, and that there is due to said trustee, on account of the same, the sum of $4,000 without interest.

Sixth.

That the mortgage executed and delivered by the Great Western Railroad Company of 1859, to Alexander M. White, and Henry H. Warden, trustees, dated May 25, 1863, is the first and best lien upon so much of the Toledo, Wabash & Western Railway Company's line of road lying and being within the State of Illinois, between the eastern boundary of said State and the town of Meredosia, one of its termini, a distance of one hundred and seventy-six and nine-tenths miles, and from Bluffs to the town of Naples, the other of its termini, an additional distance of three and eight-tenths miles (including the road bed and all real and personal property described in said mortgage), excepting the lien last above described for the sum of $4,000, on the line of road lying west of Decatur. That the bonds of said company described and enumerated in said mortgage are outstanding to the amount of $2,495,000, and chargeable upon the trust created by said mortgage, and that on each bond two interest coupons are now due and unpaid, as set forth in the answer of said George Griswold, Alexander M. White, and Henry H. Warden, trustees, and for said coupons and the interest thereon, there is due at the first day of this term of Court, to wit: October 18th, 1875, to the said George Griswold, Alexander M. White, and Henry H. Warden, trustees, the sum of $180,354.23, as further appears from the report of said master.

Seventh.

That the mortgage executed and delivered by the Great Western Railroad Company of 1859, dated May 25, 1865, to Solon Humphreys and James R. Jesup, trustees, is the second and next best lien on that part of the aforesaid railway line lying and being in
607 the State of Illinois, described last above, with the exception of the lien of so much of said road as lies west of Decatur, described in fifth paragraph. That the bonds of said company, described and enumerated in said mortgage, are outstanding to the amount of $2,500,000, and chargeable upon the trust created by said mortgage, and that on each bond one interest coupon is now due and unpaid, as set forth in the answer of said Solon Humphreys and James R. Jesup, trustees, and for said coupon and the interest thereon, there is due, at the first day of this term of Court, to wit: October 18th, 1875, to said Solon Humphreys and James R. Jesup, trustees, the sum of $90,358.36, as further appears from the report of said master.

Eighth.

That the mortgage executed and delivered by the Illinois & Southern Iowa Railroad Company to John N. A. Griswold, James R. Jesup and Lucien Tilton, trustees, dated March 1, 1862, is the first and best lien upon that part of the said railway line which extends from the town of Clayton to Carthage, in said State of Illinois, a distance of twenty-nine and one-tenth miles, including the road bed and all real and personal property described in said mortgage. That the bonds of said company, described and enumerated in said mortgage, are outstanding to the amount of $300,000, and chargeable upon the trust created by said mortgage, and that on each bond two interest coupons are now due and unpaid, as set forth in the answer of said John N. A. Griswold, James R. Jesup and Lucien Tilton, trustees, and for said coupons and the interest thereon there is due, at the first day of this term of Court, to wit: October 18, 1875, to said John N. Griswold, James R. Jesup and Lucien Tilton, trustees, the sum of $21,685.98 as further appears from the report of said master.

Ninth.

That the mortgage executed and delivered by the Quincy & Toledo Railroad Company to John T. Terry, trustee, and dated May
608 29, 1865, is the first and best lien upon that part of said railway line lying between the west bank of the Illinois river opposite Meredosia, Camp Point and Clayton, in the State of Illinois, a distance of thirty-three and six-tenths miles, including the road bed and all real and personal property described in said mortgage. That the bonds of said company, described and enumerated in said mortgage are outstanding to the amount of $500,000, and chargeable upon the trust created by said mortgage, and that upon each bond *one* interest coupon is now due and unpaid, as set forth in the answer of said John T. Terry, trustee, and for said coupons and the interest thereon there is due, at the first day of this term of Court, to wit: October 18, 1875, to said John T. Terry, trustee, the sum of $18,071.67, as further appears from the report of said master.

Tenth.

That the mortgage executed and delivered by the Decatur & East St. Louis Railroad Company to Isaac H. Knox, trustee, dated June 3, 1869, is the first and best lien upon that part of said railway company's line of road which lies between Decatur and East St. Louis, within the State of Illinois, a distance of one hundred and eight and five-tenths miles, including the road-bed and all real and personal property described in said mortgage. That the bonds of said company described and enumerated in said mortgage are outstanding to the amount of $2,700,000, and chargeable upon the trust created by said mortgage, and on each bond two interest coupons are now due and unpaid, as set forth in the answer of said Isaac H. Knox, trustee, and for said coupons and the interest thereon there is due at the first day of this term of Court, viz.: October 18, 1875, the sum of $195,174.24, as further appears by report of said master.

Eleventh.

It is found by the Court that the several railroad companies which are hereinbefore enumerated and described, excepting the
609 said Decatur & East St. Louis Railroad Company, on or about the 6th day of July, 1865, by virtue of the laws of said several States, became and were consolidated into one corporation, which was known as the Toledo, Wabash & Western Railway Company, and as such corporation, on the first day of February, A. D. 1867, executed and delivered the said mortgage which is described in the petition as "Exhibit A," on its entire line of road, equipments and property, and delivered the same to said trustees, Isaac H. Knox and James R. Jessup. That the gross amount of the bonds secured by said mortgage was fixed at $15,000,000. That the sum of two million seven hundred thousand dollars of bonds was only issued under said mortgage, of which amount $90,000 was transferred to the sinking fund provided by the terms of said mortgage, and that there is now outstanding, in the hands of holders thereof, bonds secured by said mortgage amounting to the principal sum $2,610,000 and interest coupons which have become due, upon both said sums last mentioned, including the interest accruing thereon at the first day of the present term, amounting to the sum of $146,380.50, as further appears by said master's report. That the Court find said mortgage to be the first and best lien upon the whole and consolidated lines of railroad belonging to said Toledo, Wabash & Western Railway Company, excepting the branch leading from Decatur to East St. Louis, distance one hundred and eight and five-tenths miles, as to which said mortgage is not a lien, but subordinate and inferior to the several mortgage liens upon the several parts and subdivisions of said entire road, which are more particularly described in paragraphs numbered from one to nine, inclusive of this decree, excepting the road between Carthage and the Mississippi River, viz: from Carthage to Evanston, five and four-tenths miles completed, and from Evanston to the Mississippi River at Hamilton, a further distance of about seven miles, for which the right of way is owned by said company, and, excepting also the road from Clayton
610 to Camp Point, a distance of six miles, as to all of which this is a first mortgage. The Court find that said mortgage is also a lien upon all of the personal property which is described in paragraph Thirteen of this decree. But such lien upon said personal property is subordinate and inferior to the several liens thereon hereinafter, in paragraph Thirteen of this decree, specially provided and ordered.

Twelfth.

It is found by the Court that the Toledo, Wabash & Western Railway Company, on the first day of February, 1873, made and delivered its mortgage on the entire line of railroad then belonging to it, and upon its personal property, to secure the payment of $5,000,000, payable in gold, with interest likewise payable in gold, which mortgage was made to the New York Guaranty & Indemnity

Company, trustee. That said New York Guaranty & Indemnity Company afterwards resigned said trust, and Valentine H. Ketcham was duly appointed trustee and has accepted the same and filed his answer and cross-petition herein. The Court find that said mortgage is a lien upon the whole and entire line of railroad and personal property, equipment and machinery of the said railway company, and that it is subordinate and inferior to the other mortgages and liens in this decree hereinbefore described in the manner and to the extent following, that is to say: The said mortgage is the second and next best lien upon the branches of said railway company's road lying and being found between Decatur and East St. Louis and the part lying between Carthage and the Mississippi River; the first and best liens on said branches of railroad being the mortgage respectively described in paragraphs Ten and Eleven of this decree. As to all the rest and residue of said property of the Toledo, Wabash & Western Railway Company, said mortgage lien is subordinate and inferior to all the other mortgage liens which are in this decree specified and set forth.

The Court further find that said Toledo, Wabash & West-
611 ern Railway Company has parted with the entire amount of the bonds provided by said mortgage, and that of said bonds two thousand five hundred and three, amounting to the gross sum of $2,503,000, have been sold absolutely to persons who are the absolute and *bona fide* holders of the same; and that said company has borrowed money of the plaintiffs in this case, and others, to the amount of $902,000, and has deposited the residue of said bonds, amounting to the gross sum of $2,497,000, to said plaintiffs and others, as security for the repayment of the same. The Court find that the bonds described in and secured by said mortgage, amounting to the gross sum of $5,000,000, have, by the conditions thereof, become due and payable in gold, and the coupons due upon the bonds sold absolutely together with interest accumulated thereon at the first day of this term of Court, amounting to $180,894.40 in gold.

The court find, also, that the said railway company is indebted to the plaintiffs and other parties as found in said master's report, the said principal sum of $902,000 and interest thereon amounting on the first day of this term, viz., October 18, 1875, to the sum of $50,302.93, making due and payable to said parties the total sum of $952,302.93.

The Court also find that the principal sum described in said 2,502 bonds which have been sold, viz., $2,503,000 in gold, and the further sum of $180,894.40 for coupons matured and interest thereon of said bonds, making the gross amount of $2,683,894.40 in gold, became and was due and payable by the terms and the conditions of said bonds to the holders thereof on the first day of this term aforesaid.

Wherefore, it is considered that the defendant Valentine H. Ketcham, trustee as aforesaid, have judgment against said Toledo, Wabash & Western Railway Company for said amounts herein de-

scribed, amounting in the aggregate to the sum of $3,636,197.33, of which $952,302.03 shall be payable in legal tender notes, and $2,683,894.40 shall be payable in gold.

That by reason of a demand of the majority of the holders
612 of said bonds upon said trustee to execute the powers entrusted to him, and their determination and notice to said trustee requiring the principal of said bond to be at once due and payable (as to which the Court find the averments contained in the answer and cross-petition of said Valentine H. Ketcham to be true), it has become the right and is the duty of said trustee to execute the powers to him confided as such, and to cause the said railroad, with all its fixtures, and the franchises and property as described therein of said Toledo, Wabash & Western Railway Company, to be sold and disposed of to the highest and best bidder. And by the consent of said trustee, and of the parties plaintiff herein, and in virtue of the power belonging to this Court to enforce the provisions of said trust, it is ordered, adjudged and decreed, that the officer hereinafter named be, and he is hereby, substituted in lieu of said trustee to sell the same, and that he be, and is hereby, required to sell said railroad, fixtures and property, at the city of Toledo, in the State of Ohio, and that he cause notices to be given in the several cities which are particularly designated for that purpose in said mortgage, of the time and place of such sale, and that he be governed in making the same, as he shall be hereafter more particularly ordered.

Thirteenth.

It is further found by the Court that the several parts and divisions of railroads which have been set forth and described in the foregoing paragraphs of this decree, constitute the railway line of road belonging to said defendant the Toledo, Wabash & Western Railway Company, and that the sum total of said several parts and divisions of said road, extending from Toledo, the eastern terminus, to East St. Louis, and to Hamilton, on the Mississippi river, and to Naples and Camp Point, in the State of Illinois, makes an aggregate of six hundred and one miles of said railway line of road.

The Court also find that for the purposes of its business as
613 a carrier of passengers and freight over the said line of railway, and parts thereof, that the said Toledo, Wabash & Western Railway Company has become the owner of the following rolling stock, machinery, implements and property, that is to say:

196 Locomotives engines.
61 Passenger cars.
32 Baggage cars.
3,485 Freight box cars.
401 Freight platform cars.
489 Freight coal cars.
96 Caboose cars.
30 Dump cars.
6 Wrecking cars.

Also machinery, tools, furniture and other personal property used in connection with said Toledo, Wabash & Western Railway Company; and that the value of all said rolling stock, machinery, implements and property is not less than $3,000,000.

The Court further find that at the time the said several parts and divisions of railroads, as hereinbefore described, were consolidated into and became part of the line of railroad of the Toledo, Wabash & Western Railway Company, the said railway company likewise, and by virtue of said agreement, became and was possessed of the rolling stock and machinery, implements and furniture used in connection therewith, as aforesaid, all of which, by the terms of said mortgages, were and continued to be subject to the liens created thereby; said rolling stock and other property has been so used and commingled and renewed by said Toledo, Wabash & Western Railway Company that the lien of said mortgages can not be charged upon said property otherwise than as a whole. Reserving, however, to all parties, such legal and equitable rights of lien, or otherwise, on the whole or any part of such personal property as may in any proceedings to foreclose and sell under either of said mortgages be found secured to them by the facts and the terms of said mortgages.

614 Fourteenth.

Whereas, by order of the Court in this case, made on the twenty-second day of February, 1875, it was provided that the receiver appointed upon motion of plaintiffs should, out of the income and earnings of said railway, pay the amounts due for service and supplies furnished theretofore for said company, and it appearing to the Court by the report of said receiver that certain sums therefor are still due and unpaid, amounting, at the first day of this term, to the sum of about $350,000, it is ordered, adjudged and decreed, that the amount yet remaining due and unpaid for said services and materials, and also such amount of other liabilities incurred by the receiver in operating said road under said order, shall remain a lien upon the property, income and earnings of said road, to be appropriated therefrom after the current expenses of operating the same are fully paid, and that such sale and disposal of said road, fixtures and equipments, as may be hereinafter directed and ordered, shall be subject to such appropriation until said services and supplies shall have been fully paid. It is, however, ordered that all amounts due for such labor, services and liabilities shall be evidenced by the certificate of the receiver, bearing interest at the rate of 7 per cent. per annum.

Fifteenth.

It is further found by the Court that the several sections and subdivisions of the line of road belonging to said Toledo, Wabash & Western Railway Company, extending from Toledo to the several termini on the Mississippi River, hereinbefore in this decree described, combined to form a valuable and important line of travel and transportation, for which said several companies were organized, and that it is for the highest and best interest of the holders of the

several mortgage bonds in this petition and respective answers set forth and described, as well as for the stockholders of said railway company, that said entire line of railroad, with all its real
615 and personal property and franchises, be sold as an unit and in its entirety.

And for this purpose the Court finds that said amount found and adjudged to be due in paragraph twelfth of this decree on the bonds secured by the mortgage to Valentine H. Ketcham, as is therein described, to-wit, $3,636,197.30, on the whole line of said road, shall be the basis for which a decretal order, as hereinafter provided, shall be issued and the property offered for sale.

And the Court being of opinion that said road, with its equipments and franchises, ought to be sold as an entirety, it is considered that the several first and second mortgages, and said consolidated mortgage, with their accumulated interest, described in the paragraphs numbered from one to eleven, inclusive, and being all the mortgages which have been executed prior to the said Gold bond mortgage last above mentioned, be and remain as is hereinbefore provided, liens upon the several sections and subdivisions which have been particularly described hereinbefore, and in the order of priority as to any of them heretofore found and ordered; and that the sale of said road property, equipment and franchises be made subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds called the Equipment Bonds, referred to in the petition, as to which all questions arising are left open.

And because of the necessity of the sale of such road, property, equipment and franchises as an entirety, and subject to the existence of said several prior mortgage liens, it is ordered that the same be sold without the appraisement required for sales of real estate, but is ordered that such sale shall not be for a less sum than one million dollars, and to the highest and best bidder therefor.

Sixteenth.

Whereupon it is ordered, adjudged and decreed, that said
616 Toledo, Wabash & Western Railway Company, within ten days from and after the entry of like decrees in the States of Indiana and Illinois, pay into the hands of the receivers in this case, the amount of money hereinabove found to be due and unpaid, adjudged to said Valentine H. Ketcham, trustee, together with the costs of this proceeding, and increase of interest upon the aforesaid amount at 7 per cent. per annum till paid. And in default of such payment it is ordered that the railroad of said Toledo, Wabash & Western Railway Company, including the right of way, road bed, superstructures of all sorts thereon; all water and other stations, houses, shops and lands connected therewith; all repair and other shops and manufactories, with the fixed and movable machinery, tools and implements thereunto belonging; all engines, cars, rolling stock and equipment of every kind and description; all supplies of timber, lumber, fuel, iron, steel and other supplies intended for use

in running said road; all equities to any real and personal property, debts and demands due to said company, together with the franchise of said railway company, and the right and franchise to be a corporation, be sold as herein directed, and as an entirety, but subject to the existence and continuance of the aforesaid several liens, as provided in paragraph fifteen of this decree, and also subject to the payment of the amounts due for services and supplies, as hereinbefore provided, and that the purchaser or purchasers thereof hold the same free and discharged of all equities or claims of or against said Toledo, Wabash & Western Railway Company, or its stockholders, and subject only to the paramount liens thereon hereinbefore described and set forth.

Seventeenth.

It is further ordered that Jacob D. Cox be, and he is hereby, appointed a Special Master Commissioner to execute and carry into effect the order of sale which is herein made. That, before offering said premises, property and franchises for sale, he shall first advertise the time, place and terms of sale, and the specific prop-
617 erty to be sold, in not less than two daily newspapers printed in the city of New York, and at least in one daily paper published in the cities of Toledo, Ohio; Lafayette, Indiana; and Springfield, Illinois, for a period of time at least sixty days prior to the day of sale.

That such sale shall be made at the door of the court house of the county of Lucas, in the city of Toledo and State of Ohio, and in pursuance of the provisions hereinbefore specified, and without the benefit or privilege of any redemption thereof, or any part thereof. If the minimum amount hereinbefore limited shall not be bid on the day said sale shall be advertised to take place, then it shall be lawful for said Master *Master* publicly to adjourn said sale to a definite period, not exceeding ninety days thereafter, without giving other or further notice thereof. And it is further ordered that a decretal order issued upon the *precipe* of the said Valentine H. Ketcham, trustee, and that said order be directed to said Master to carry this decree into execution, and requiring him to return the same, with a report of his doings thereon, to this Court. That no deed shall be executed by the said Master to the purchaser or purchasers at said sale, until the same shall have been reported to the Court, and said sale and the proceedings of said Master be confirmed, and that upon such confirmation said Master shall be authorized and empowered to execute a deed, investing and conveying to said purchaser or purchasers all the property aforesaid, together with all the title of said Toledo, Wabash & Western Railway Company in and to the property so sold, but subject to the paramount liens and incumbrances thereon, which are hereinbefore described.

Eighteenth.

And it is further ordered and adjudged that the special master herein, who is directed to carry this decree into execution, after re-

ceiving from the purchaser or purchasers of the said property
618 so sold by him the sum of twenty thousand dollars in cash, is hereby authorized and required to receive from him or them, at his or their option, the whole or any part of the balance bid therefor in the said gold bonds, for the ratable proportion of the sum applicable to them respectively upon a distribution of the proceeds of such sale, but not exceeding the amount due thereon, as found in the master's report confirmed by the Court.

And the said master is directed to return all such bonds received in payment of such bid to this Court with his report of sale, and in the event that such sale is confirmed, and the amount of such bid ratable applicable to such bonds respectively is less than the amount due thereon, the proper amount so applicable shall be endorsed thereon, and such bonds shall be redelivered to the purchaser or purchasers; but, if the same shall be fully paid thereby, such bonds shall be cancelled and delivered to said railway company.

It is ordered that this cause stand continued to the next term of this Court, with a reservation to the parties to correct any errors or mistakes in computation or otherwise by any further order of the Court.

No. 3.

Articles of Consolidation by and between the Toledo & Wabash Railway Company, the Great Western Railroad Company of 1859, the Quincy and Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company. Witnesseth (printed *ante* p. 387):

On the twelfth day of April, 1883, being the twenty-fifth day of the March term, 1883, of said District Court, an order in said cause was made, an entry of which appears in the Journal of said Court, in the words and figures as follows, to wit:

619 *Transcript of Journal Entry.*

The District Court of Lucas County, Ohio.

STATE OF OHIO, *Lucas County:*

At a term of the above-named Court, begun and held before the Hon. E. T. Hamilton, Hon. G. M. Barber, Hon. J. E. Ingersoll, presiding judges, on the twelfth day of March, A. D. 1883, among other proceedings had by and before said Court on the twelfth day of April, A. D. 1883, being the twenty-fifth day of said term, as appears by its Journal of that day, were the following, viz.:

1308.

JAMES COMPTON
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

This day came the parties by their counsel and present to the Court an agreed statement of the facts upon which this cause is to be heard, duly executed; and the Court order the same to be filed herein and made part of the record in this cause. And thereupon this case came on to be heard upon the pleadings on file, and exhibits annexed thereto, and the said agreed statement of facts, and was argued by counsel, on consideration whereof and it appearing to the Court that important and difficult questions arise as to the proper judgment and decree to be rendered herein, on motion of the said defendants it is ordered that this cause be reserved and sent to the Supreme Court for final decision, and that the Clerk of this Court duly prepare, certify and transmit the papers and documents, or copies thereof in this case, to said Court as provided by law.

620 In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court, at Toledo, this 23d day of April, 1883.

[SEAL.]

R. C. QUIGGLE, *Clerk*,
By M. V. FISK,
Deputy Clerk.

On the eighteenth day of May, 1888, there was filed in the Court of Common Pleas of said County of Lucas, and in said cause, a mandate from the Supreme Court of this State, which mandate is recorded in the Journals of said Court, in Mandate Journal No. 1, page 392, and which mandate is in the words and figures as follows, to wit:

In Supreme Court of Ohio, January Term, A. D. 1888.

THE STATE OF OHIO, *City of Columbus:*

JAMES COMPTON
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Error Reserved in the District Court of Lucas County.

This cause having come on to be heard upon the pleadings thereon on file, to wit, the petition of the plaintiff filed February 3rd, 1880; the amended and supplemental petition of the plaintiff filed January 14th, 1881; the answer of the defendants the Toledo, Wabash & Western Railway Company, the Wabash Railway Company,

621 and the Wabash, St. Louis & Pacific Railway Company, filed June 1st, 1880; the answer of the defendants Knox and Jesup, as trustees, filed June 7th, 1880; the answer of the Wabash, St. Louis & Pacific Railway Company to the plaintiff's supple-

mental and amended petition filed February 2nd, 1881; the answer of the defendants Solon Humphreys and Daniel A. Lindley, as trustees, filed February 4th, 1881; and the replies of the plaintiff to the answers of the defendants the Wabash, St. Louis & Pacific Railway Company and Solon Humphreys and Daniel A. Lindley, as trustees, filed February 5th, 1881. And upon the proofs, exhibits and Agreed Statement of Facts, filed in the Court below, and it having been shown that all the defendants herein have been served with the summons herein or that they have entered their appearance herein. And the attorneys for the respective parties herein been duly heard and the premises considered, the Court now finds, declares, adjudges and decrees:

1. That the Toledo & Wabash Railway Company was on the first day of November, 1862, a corporation duly organized and existing under and by virtue of the laws of the States of Ohio and Indiana, especially the consolidation statutes of those States, and owned a line of railway extending from the city of Toledo, in the State of Ohio, and passing through the counties of Lucas, Henry, Fulton, Defiance and Paulding in said State, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren in the State of Indiana, to and terminating at a point on the west line of State Line City, in said last-named county. That said Toledo & Wabash Railway Company was a consolidated company and that the railroad companies which were consolidated to form it were the Toledo & Wabash Railroad Company, a corporation organized under the laws of the State of Ohio, and the Wabash & Western Railroad Company, a corporation organized under the laws of the State of Indiana; and that the said Toledo & Wabash Railroad Company owned and operated a railroad extending from
622 the city of Toledo to Harrison township, Paulding county, in the State of Ohio, and the said Wabash & Western Railroad Company owned and operated a railroad extending from the State line in Allen county, to State Line City, Warren county, in the State of Indiana.

2. That on the first day of November, 1862, the said Toledo & Wabash Railway Company by its president and secretary, duly authorized thereto, executed under its corporate seal and issued a series of bonds, severally and consecutively numbered, amounting altogether to the sum of six hundred thousand dollars known as equipment bonds. That the principal of said bonds was due on the first day of May, 1883, and they bear interest at the rate of seven per cent. per annum, payable semi-annually, on the surrender of the respective interest warrants thereto appended, in the city of New York, from and after May 1st, 1863, and that there is a series of interest warrants for each semi-annual installment of interest which would become due and payable on said bonds, attached to each of said bonds. That said bonds were duly put upon the market by said Toledo & Wabash Railway Company at the time of their issue and were sold.

3. That the plaintiff is the owner, as alleged in his said petition, of one hundred and twenty-four of said bonds of the denomination of one thousand dollars each, and of fifty-two of said bonds of the

denomination of five hundred dollars each, and the total par value of the bonds so owned by the plaintiff being the sum of one hundred and fifty thousand dollars. And that the said bonds so owned by the plaintiff are the same bonds specially mentioned and enumerated in plaintiff's said petition. That no part of the interest due on said bonds, on and since the first day of May, 1875, excepting the interest warrants on bonds numbers 563, 564, 565 and 566, among those owned by the plaintiff, which matured on the first day of May, 1875, has been paid, though payment thereof was duly demanded.

That there is now, the first day of May, 1888, due and payable as and for interest on said bonds, so owned by the plaintiff
623 pursuant to the terms thereof and the interest warrants thereto attached, the sum of $5,180, with interest thereon from May 1st, 1875, amounting to $4,040.40; the sum of $5,250, with interest thereon from November 1st, 1875, amounting to $3,937.50; the sum of $5,250, with interest thereon from May 1st, 1876, amounting to $3,780; the sum of $5,250, with interest thereon from November 1st, 1876, amounting to $3,622.50; the sum of $5,250, with interest thereon from May 1st, 1877, amounting to $3,465; the sum of $5,250, with interest thereon from November 1st, 1877, amounting to $3,307.50; the sum of $5,250, with interest thereon from May 1st, 1878, amounting to $3,150; the sum of $5,250, with interest thereon from November 1st, 1878, amounting to $2,992.50; the sum of $5,250, with interest thereon from May 1st, 1879, amounting to $2,835; the sum of $5,250, with interest thereon from November 1st, 1879, amounting to $2,677.50; the sum of $5,250, with interest thereon from May 1st, 1880, amounting to $2,520; the sum of $5,250, with interest thereon from November 1st, 1880, amounting to $2,362.50; the sum of $5,250, with interest thereon from May 1st, 1881, amounting to $2,205; the sum of $5,250, with interest thereon from November 1st, 1881, amounting to $2,047.50; the sum of $5,250, with interest thereon from May 1st, 1882, amounting to $1,890; the sum of $5,250, with interest thereon from November 1st, 1882, amounting to $1,732.50; and the sum of $5,250, with interest thereon from May 1st, 1883, amounting to $1,575.

That the principal sum secured to be paid by said bonds, so owned by the plaintiff, to wit, the sum of $150,000, became due and payable pursuant to the terms thereof on the first day of May, 1883, and that there is now due on account thereof the said sum of $150,000 with interest thereon from the first day of May, 1883, to the first day of May, 1888, amounting to $52,500.00.

And the Court finds and adjudges the total amount due and payable on said bonds, so owned by the plaintiff, for principal and interest on the first day of May, 1888, to be the sum of
624 three hundred and thirty-nine thousand nine hundred and twenty dollars and 40/100 ($339,920.40).

4. That said Toledo & Wabash Railway Company continued a separate corporation until the year 1865, when it was consolidated with various other railroad companies, to wit: The Great Western Railway Company of 1859, the Quincy & Toledo Railroad Com-

pany, and the Illinois & Southern Iowa Railroad Company to form the Toledo, Wabash & Western Railway Company, as alleged in the plaintiff's petition. The agreement providing for said consolidation was dated the 29th day of May, 1865, was duly executed by such various companies and duly ratified by their stockholders and was filed in the office of the Secretary of State of the State of Ohio, on the 6th day of July, 1865, and thereby all the rights, franchises, property, real and personal, and its appurtenances of the said Toledo & Wabash Railway Company passed to and became vested in said Toledo, Wabash & Western Railway Company.

That through various *mesne* conveyances, foreclosure proceedings and consolidations as alleged in the plaintiff's petition, all of said rights, franchises, railroad property, real and personal and its appurtenances, which belonged to and were owned by the said Toledo, & Wabash Railway Company at the time of such consolidation passed to and became vested in the defendant, the Wabash, St. Louis & Pacific Railway Company, which, at the time of the commencement of this suit, owned and was in possession of the same.

5. That upon the consummation of such consolidation, said bonds issued as aforesaid by the Toledo & Wabash Railway Company known as equipment bonds, and all moneys due and to grow due thereon and among them such of said bonds as are now owned, as aforesaid, by the plaintiff, and the moneys due and to grow due thereon, became an equitable lien upon all of the said railroad and real property and the structures thereupon and the fixtures and appurtenances thereto appertaining, which were owned by said Toledo & Wabash Railway Company at the time of said consoli-
625 dation and which through said consolidation passed to and vested in the said Toledo, Wabash & Western Railway Company and which afterwards passed to and vested in the defendant, the Wabash, St. Louis & Pacific Railway Company, which last-named company was, at the time of the commencement of this suit, in possession of the same, being all of its railroad and property, connected therewith, commencing in the city of Toledo, in the State of Ohio, and extending therefrom through the counties of Lucas, Henry, Fulton, Defiance and Paulding in said State, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren in the State of Indiana, to and terminating at a point in the west line of State Line City in said last-named county, and that said bonds are now a lien on such railroad and property and the plaintiff is entitled to enforce the same. That the said lien of said bonds is prior and superior to the rights, interests, estates, claims and liens of the defendants in this action and each of them, in and upon said railroad and property upon which said lien is hereby declared, and is prior and superior to the rights, interests, estates, claims and liens of all persons and corporations who have derived any such rights, estates, claims and liens from, by or through the said defendants or any of them since the commencement of this action or otherwise; but, as to all that part of said railroad and property which is situate

within the State of Ohio, such lien is inferior and subject—but inferior and subject only—to the two mortgages mentioned in the petition herein, one of which was executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company on the eighth day of September, 1853, for the security of the bonds of that company, amounting to $900,000, due as extended August 1st, 1890, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first day of February and August in each year, and the other of which was executed by the Toledo & Wabash Railroad Company to Edwin D. Morgan, trustee,
626 on the fifth day of October, 1858, for the security of the bonds of that company, amounting to $1,000,000, due on the first of November, 1878, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first day of May and November in each year.

6. That the said defendants or any of them pay to said plaintiff the said sum of $339,820.40 now due on said bonds owned by the plaintiff as aforesaid, with interest thereon to the day of payment to the plaintiff within ten days from the entry of this decree, and if default shall be made in such payment that an order of sale, issue for the sale, as upon execution at law, of all said railroad and real property, together with the structures thereupon and the fixtures and appurtenances thereto appertaining, upon which the lien of said bonds known as equipment bonds is hereby declared to exist, which is situated in the State of Ohio and the jurisdiction of this Court, subject, however—but subject only—to the lien of the two mortgages hereinbefore mentioned as executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company, and the Toledo & Wabash Railroad Company to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages, and that from the proceeds of such sale the costs of this action as taxed to be paid, and the residue of such proceeds be brought into court to abide its further order herein on the footing of this decree. That, before offering the property hereby directed to be sold for sale, the officer conducting the same shall cause the same to be appraised according to law by three disinterested freeholders of either or any of the counties in which the same is situated, and such appraisal shall be of the value of said property subject to the incumbrance and lien of the two mortgages hereinbefore mentioned, as executed respectively by the Toledo & Illinois Railroad Company and the Toledo & Wabash Railroad Company, subject to which it is directed to be sold, and over and above the lien of such mortgages according to the amount of the indebtedness secured thereby, as the same shall be ascertained by the officer conducting such sale, with interest computed to the time of the sale.

627 It is further ordered and decreed that this case and decree be remanded to the Court of Common Pleas of Lucas county to carry this decree into execution and for all further proceedings, and that a special mandate therefor be sent to the said Court.

I, Urban H. *H.* Hester, clerk of the Supreme Court of Ohio, do

hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court this twelfth day of May, A. D. 1888.

[SEAL.]

URBAN H. HESTER, *Clerk*,
By HORACE M. CROW, *Deputy*.

Supreme Court of Ohio.

STATE OF OHIO, *City of Columbus:*

To the Honorable Court of Common Pleas within and for the County of Lucas, Ohio—Greeting:

We do hereby command you that you proceed, without delay, to carry the within and foregoing judgment of our Supreme Court of Ohio, in the cause of James Compton *vs.* The Wabash, St. Louis & Pacific Railway Company *et al.*, into execution.

Witness Urban H. Hester, clerk of our said Supreme Court of Ohio, at Columbus, this twelfth day of May, 1888.

[SEAL.]

URBAN H. HESTER, *Clerk*,
By HORACE M. CROW, *Deputy*.

628 THE STATE OF OHIO, *Lucas County, ss:*

Office of the Clerk of the Court of Common Pleas and Circuit Court, Lucas County, Ohio.

I, John P. Bronson, Clerk of the Court of Common Pleas, and of the Circuit Court of said county, do hereby certify that I have the custody and control of the records and papers of all proceedings in said Courts, and of the District Court, which by law has been abolished and the Circuit Court organized in its stead, and that the above and foregoing is a true and exemplified transcript of all the record and proceedings in the case of James Compton, plaintiff, *vs.* The Wabash, St. Louis & Pacific Railway Company, The Toledo, Wabash & Western Railway Company, The Wabash Railway Company, James R. Jesup and Isaac H. Knox, trustees; George I. Seney, trustee, and Solon Humphreys and Daniel A. Lindley, trustees, defendants, in the Court of Common Pleas and District Court of said county, and truly copied from the complete record of said cause in the records in my office.

In witness whereof, I have hereunto subscribed my name and affixed the seals of said Court of Common Pleas and Circuit Court, this — day of —— 1888.

——— ———,
Clerk of Court of Common Pleas, Lucas County, Ohio.

Court of Common Pleas, Lucas County, Ohio.

I, Reuben C. Lemmon, do hereby certify that I am one of the judges of the Court of Common Pleas of Lucas County, Ohio. That the above certificate and attestation of John P. Bronson,
629 Clerk of said Court, to the foregoing exemplified transcript of the record in said cause is in due form of law and regular. That said John P. Bronson is the Clerk of said Court, having lawful custody of its records, and the seal attached thereto is the seal of said Court.

Dated Toledo, Lucas County, Ohio, Oct. — 1888.

——— ———,
Judge of the Court of Common Pleas,
Lucas County, Ohio.

Circuit Court, Lucas County, Ohio.

I, Charles S. Bently, do hereby certify that I am the presiding judge of said Circuit Court for Lucas County, Ohio; that the District Court of said county and all District Courts in the State were abolished in the year 1885 and the Circuit Court organized in its stead, and that all records, papers and proceedings in and of said District Court were by law transferred to said Circuit Court; that John P. Bronson is the Clerk of said Circuit Court, having lawful custody of its records and papers, as well as the records and papers of said District Court; that the certificate and attestation of said John P. Bronson to the foregoing exemplified transcript of the record in said cause is in due form of law and regular, and that the seal attached thereto is the seal of said Court.

Dated at Toledo, in said County and State this — day of October, 1888.

——— ———,
Presiding Judge, Circuit Court, Lucas County.

[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Clk.

630 EXHIBIT N (AGREED STATEMENT OF FACTS).

Lucas County Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO.

The following is a list of the bonds owned by the plaintiff & cross-petitioners, with the numbers thereof:

By the plaintiff: Nos. 557 & 558, at $500 each.
Ed. H. Litchfield, New York: 122, 129, 130 121, 132, 134, 159, 381, 382, 383, 384, 395, 495, 497, 496, 498, 499, 500, 89, 318, 371, 374, 375, 376, 377, 25, at $1,000.... $25,000

Wm. F. Redmond, New Jersey: 434, 336, 33, 327, 125, 334, 333, 314, 228, 243, 10, at $1,000 10,000
John B. Manning, New York: 15, 10, 7, 16, 79, 78, 43, 14, 44, at $1,000 9,000
629, 612, at $500 1,000
Irving D. Ferry: 49, 91, 67, 95, 170, 96, at $1,000 6,000
663, 630, at $500 ea 1,000
Kohn, Popper & Co., New York: 40, 63, 84, 172, 173, 185, 195, 236, 242, 249, 266, 296, 302, at $1,000 ea 13,000
583, 584, 676, 577, 654, 682, 636, 675, 683, 690, at $500 ea. 5,000
Ham Brorhers, New York: 581, 542, 641, 540, at $500 ea.. 2,000
J. S. A. Wittke: 42, 106, 107, 108, 109, 110, 143, 144, 145, 146, 175, 265, 268, 292, 297, 335, 414, 416, 475, 476, 479, at $1,000 ea 21,000
631 640, 643, 647, 691, 692, 693, 694, 695, 696, 697, 698, 699, 539, at $500 ea 6,500
James M. Ham, New York: 537, 538, 633, at $500 ea.... 1,500
Henry W. Smith: 400 1,000
Chas. S. Webb: 358, 351, 343, 344, 480, at $1,000 ea.... 5,000
Jane A. Sullivan, New York: 100, 101, 154, at $1,000 ea.. 3,000
Mrs. E. R. Johnson: 50, 51, 183, 200, 199, at $1,000 ea.. 5,000
Chas. E. Thorne: 303 1,000
James Moir: 269, 234, 227, 142, 48 at $1,000 ea 5,000
Rollins & Co.: 71, 90, 230, 322, at $1,000 ea 4,000
666, at $500 ea 500
Eugene E. Bishop: 347 1,000
Frederick Hubbard: 378, 355, 354, 317, 315, 32, 33, 34, $1,000 ea. 8,000
W. G. Creamer: 20, 93, 117, 127, 192, 306, 349, 379, 387, 421, at $1,000 ea 10,000
Geo. B. Mead: 660, 661, 662, at $500 ea 1,500
122, 233, 359, 398, at $1,000 ea 4,000
Est. of H. R. Mead, c/o G. Mead: 609, 611, 659, at $500 ea. 1,500
5, 53, 62, 187, at $1,000 ea 4,000
John W. Alling: 433 1,000
E. Kellog Beach: 294, 295, at $1,000 ea 2,000
582, at $500 ea 500
Clarence Morfit: 41 1,000
Preston Wing: 112, 178, 182, 184, at $1,000 ea 4,000
Josephine L. Cadmus: 320, 298, 419, 420, 288, 321, 6, 68, 166, at $1,000 ea 9,000
628, 681, at $500 ea 1,000
Vassar Brothers Hospital, New York: 310 1,000
518, 520, at $500 ea 1,000
Mary L. Oliveira: 1, 2, 3, 4, $1,000 ea 4,000
Charles G. Peters: 472, 340, 267, 473, 293, 73, 341, 342, 471, 290, 407, 469, 409, 474, 424, 417, 426, at $1,000 ea. 17,000
632 516, 559, 510, 680, 527, 610, at $500 ea 3,000
James Walker: 58, $1,000 1,000

Henry F. James: 115, 124, 209, 307, 397, 399, $1,000 ea..	6,000
613, 644, 645, 700, $500 ea.....	2,000
Israel M. Simon: 114, 120, 121, 123, 418, $1,000 ea.....	5,000
Louis G. Hampton: 9, 227, each $1,000.....	2,000
Wilson H. Pierce: 603, 619, 674, at $500 each.....	1,500
Est. of Maria C. Henry: 147, 148, 149, 151, 152, 153, 160, 161, 162, 163, 164, 222, 223, 224, 225, 226, 256, 257, 258, 259, 260, 261, 262, 263, 264, at $1,000.....	25,000

[Endorsed:] Filed in C. C., Jan. 14/95. L. E. Clark, Clk.

EXHIBIT O (AGREED STATEMENT OF FACTS).

Dates of Acquisition of Equipment Bonds by Cross-Petitioners.

William F. Redmond, $5,000, May 19th, 1886, and $5,000 December 6th, 1888.

John B. Manning, Oct. 30th, 1886.

John Popper & Co., from 1875 to 1885 (they have no means of closer information).

Ham Brothers, in the year 1873.

Israel M. Simon, July 11th, 1885.

Edward H. Ditchfield, five bonds in 1886, one in 1872, one in 1881 and 18 on May 18th, 1888.

Irving D. Ferry, in the years 1872, 1873 and 1874.

John S. A. Wittke, in April, 1888.

James M. Ham, in 1873.

Henry W. Smith, March 8th, 1884.

Charles S. Webb, in the year 1882.

Jane A. Sullivan, lately deceased, of whom T. E. Stevens and W. P. Rowe are executors, in the year 1874. Mrs. Sullivan re-
633 sided in Liverpool, Eng., where her executors also reside. We have no means of better information.

Ella R. Johnson, in the year 1872.

Charles E. Thorne, in the year 1870.

James Moir, Bond No. 227, on the 20th of October, 1870; No. 269 on the 1st November, 1871; Nos. 40 and 142 on the 23rd November, 1872, and No. 234 on the 18th September, 1873.

Rollius & Co., No. 17, March 4th, 1872; No. 230, Oct. 13, 1872; Nos. 666, December 7th, 1872, No. 322, April 28th, 1873, and No. 90, October 30th, 1873.

Eugene E. Bishop, December 17, 1886.

Frederick Hubbard, Nos. 32, 33 and 34, 354, 355, Mar. 31st, 1864; No. 378, Sep. 2nd, 1867; No. 315, Nov. 18, 1868; No. 317, Jan. 18, 1872.

William G. Cramer, No. 3, Feb. 11th, 1869; No. 2, Aug. 14, 1869; No. 1, May 2nd, 1870, and No. 4, Jan. 21, 1874.

George B. Mead, in the years 1866 and 1867.

The Executors of H. R. Mead, in the years 1866 and 1867.

John B. Allen, in the year 1869.

E. Kellogg Beach. This gentleman resides in Chicago; is probably now in Mexico. We have been unable to communicate with him.

James Walker, December 26th, 1888.

Vassar Brothers' Hospital, June 21, 1886.

Josephine L. Cadmus, in the year 1867.

Preston Wing. This gentleman died February 2nd, 1890, leaving a last will and testament by which he appointed Sheldon Wing and William A. Sheldon executors. They have examined his papers without being able as yet to find any trace of the date of the acquisition of his bond.

Mary L. Oliviera. This lady resides in Spain and is now in the Island of Madeira. Messrs. Drexel Morgan informed us that her equipment bonds have been in their possession since Nov. 18, 1875, and that, of course, she acquired them at some earlier date.

Charles H. Peters, in the year 1882.

Clarence Merfel, May 9th, 1881.

634 Estate of Henry R. James, in the year 1869.

Wilson H. Pierce. Mr. Pierce has not yet been made a party to this case; he owns three bonds which he acquired under the will of some relative in August, 1890. He is a lawyer residing in Waterbury, Conn., and has no means of knowing how long the relative who left him these bonds owned them. We propose to make him a defendant.

Louis G. Hampton, May 1, 1883.

[Endorsed:] Filed in C. C., Jan. 14, '95. L. E. Clark, Clk.

635 EXHIBIT P (AGREED STATEMENT OF FACTS).

Pleas of the Circuit Court of the United States for the District of Indiana, begun and holden at the United States Court House, in the City of Indianapolis, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-three, before the Honorable William A. Woods, Judge of the District Court of the United States for the District of Indiana and *ex officio* Judge of said Circuit Court.

6025. Chancery.

DAVID J. TYSON, JR., BENJAMIN F. HAM, EDWARD DE ROSE, HENRY A. MOTT, JOHN W. FERDON, CHARLES JACKSON, G. M. WHITTEMORE, TOWNSHEND UNDERHILL, M. L. UNDERHILL, and THOMAS W. MAYO

against

THE WABASH RAILWAY COMPANY, THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, ISAAC H. KNOX and JAMES R. JESUP, as Trustees.

Be it remembered that heretofore, to wit, at the May Term of said Court, on the 31st day of May, 1878, before the Honorable

Walter Q. Gresham, one of the Judges of said Court, the following proceedings in the above-entitled cause were had, to wit:

Come now the defendants by Baker, Hord and Hendricks,
636 their solicitors, and enter in this Court copies of all process, pleadings, depositions, testimony and other proceedings issued, filed, had or taken in said Fountain Circuit Court affecting or concerning the said defendants.

And said transcript is in the words following, to wit:

Pleas before the Honorable Thomas F. Davidson, Judge of the Circuit Court of Fountain County, in the Twenty-first Judicial Circuit of the State of Indiana, at a Term of said Court convened at the Court House, in Covington, on the 13th day of May, 1878, the same being the 2d Monday in said month, and the time fixed by law for holding a term of said Court, and heretofore, to wit, on the 16th day of May, 1878, the same being in vacation, the following complaint was filed in the cause of David J. Tyson, Jr., *vs.* The Wabash Railway Co. *et al.* in the Clerk's Office of said Court, viz.:

The plaintiff David J. Tyson, saying herein for himself and other bondholders similarly situated, who may deserve to come into this suit and contribute to the expenses thereof, complains of the defendants, The Wabash Railway Company, Isaac H. Knox and James R. Jessup, trustees; Edwin D. Morgan, trustee; The Farmers' Loan and Trust Company, and George I. Seney, trustee, and says:

1. The Wabash Railway Company is a consolidated corporation under the laws of Ohio, Indiana and Illinois. It has been for over a year in possession, claiming title to a line of railway extending from Toledo, Ohio, through Indiana, including this County, to the Mississippi River. Said line of railway was formerly the property of the Toledo, Wabash and Western Railway, which has been itself formed by consolidation between precedent corporations, including the Lake Erie, Wabash and St. Louis Railroad Company and the Wabash and Western Railway Company, both of Indiana.

2. The said Wabash and Western Railway Company, in October, 1858, executed, acknowledged and delivered to defend-
637 ant Morgan, as trustee, a trust deed or mortgage covering all said line of railway in Indiana to secure its bonds, amounting to $1,000,000, bearing 7 per cent. interest, payable in May and November, until the principal matured in November 1, 1878. The said mortgage was duly recorded in each of the counties in Indiana through which said line of railroad was situate, and became thereby a lien on all the property described in said encumbrance.

3. Shortly thereafter the said Wabash and Western Railway Company negotiated all of said bonds for value to various persons and corporations, and the present holders of said bonds are numerous, unknown and scattered; but plaintiff is the holder of divers of said bonds, and the coupons thereto belonging, and all of said bonds are outstanding, and the interest thereupon all of plaintiff's bonds since May 1st, 1875, remains due and unpaid, and the principal of all of said bonds will mature on November 1st, 1878.

4. The property covered by said trust deed to said Morgan, trustee, was at its execution subject to a trust deed of August 1st, 1853, to the Farmers' Loan and Trust Company, executed by the then owners of said line of railroad, viz., The Lake Erie, Wabash and St. Louis Railroad Company, to secure an issue of bonds amounting to $2,500,000, bearing 7 per cent. interest, all of which bonds are outstanding and unpaid, together with large accumulations of interest.

5. After the execution and delivery of said two conveyances, by force of certain consolidated agreements, the Toledo, Wabash and Western Railway Company became the owner of said line of railway from Toledo, Ohio, westwardly through Indiana and Illinois to the Mississippi River. Being such owner and in possession, it executed to Isaac H. Knox and James R. Jessup, trustees, its trust deed (a copy of which is filed herewith, marked "A"), conveying to them all its line of road in existence, or thereafter to be acquired, equipment, appurtenances and franchises, to secure the payment of a proposed issue of bonds to the amount of $15,000,000, called "consolidated bonds," bearing interest at 7 per cent. per
638 annum, payable quarterly in New York on the first days of February, May, August, and November in each year, until maturity of the principal in 1907.

6. The said deed of trust was duly recorded shortly thereafter in every county wherein said line of road is situate, and thereby became a valid lien thereupon. The said bonds were partly negotiated, and $2,610,000 thereof now remain outstanding for value, and the holders thereof are numerous and scattered; but plaintiff holds divers of said bonds and the coupons thereto belonging.

7. The said railroad, formerly owned and operated by the Toledo, Wabash and Western Railway Company, and since by the said Wabash Railway Company is, and for years have been, a continuous line of road leading from Toledo, in the State of Ohio, to the Mississippi River, operated on one line for the transportation of passengers, freight, United States mails and express goods.

The rolling stock owned by said former corporation, and now recently by the said Wabash Railway Company, have always been used indiscriminately on and upon all portions of said line of railway, has never been apportioned to any special division or part thereof, and substantially the entire equipment now owned and used by the Wabash Railway Company was owned by the former Toledo, Wabash and Western Railway Company, and by it used as appurtenant to its entire line of road, and therefore became, and has since continued to be subject to the lien of the said trust deed to said Jessup and Knox as trustees, as being an inseparable part of said mortgage premises, and plaintiff charges a very large proportion of such present equipment was constructed or purchased directly by said Toledo, Wabash and Western Railway Company, and never belonged to any of the original companies, and therefore the said consolidated mortgage is a first lien thereon.

8. The object and design of the said consolidated mortgage was

to absorb, exchange at par, and secure all the then outstand-
639 ing bonds of every kind specified therein, including an issue of 600,000 equipment bonds due May 1st, 1883, by consolidating the same into one and the same mortgage debt upon equitable principles, and that for such purposes $13,300,000 were retained by the said Toledo, Wabash and Western Railway Company to retire a like amount of the bonds of the various companies.

And it is further resolved by the said corporation that the holders of the outstanding bonds described should be invited and have the right to exchange at par any and all of their bonds for such consolidated bonds, and over a million dollars of such previous bonds, including all the sinking fund bonds, have been actually exchanged; wherefore, plaintiff claims that in equity the holder of such equipment bonds are entitled to share in the security afforded by said consolidated mortgage precisely as though they had gone through the formality of an exchange.

Plaintiff is the holder and owner of divers of said equipment bonds together with all the coupons unpaid belonging thereto issued by the Toledo and Wabash Railway Company, which bonds bear interest at seven per cent. per annum, payable on the first days of May and November.

No interest has been paid on any of said bonds since and including May 1, 1875, and about $175,000 is now due for interest on such bonds, and such indebtedness is in equity fully entitled to share ratably with the holders of the consolidated bonds precisely as though they held the new bonds in exchange for the said equipments, whereas the said Wabash Railway Company wholly refused to recognize the said equipment bonds in any manner, or to make any payment thereon, but does wholly repudiate the said obligations; a copy of one such equipment bond is herewith filed as an exhibit.

9. Since the interest due and payable on the first days of February and May, 1875, the said Wabash and Western secured mortgage bonds and said consolidated bonds and said equipment bonds
640 have been in default, and no money whatever has ever been paid to plaintiff on such interest, and except certain preferential and partial payment to bondholders, which said Wabash Railway Company have inequitably made, all of said accrued interest on the whole issues of such bonds remains unpaid and due the different holders, and the Wabash Railway Company is without any present means or property to satisfy the said arrears of interest.

10. Besides such arrears of interest the said mortgagor company and its successor have wholly failed to perform the covenants in said consolidated mortgage as to the sinking fund, and there is now due over $400,000 on such account.

11. John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post took possession of and pretended to acquire title and ownership of all said line of railway, appurtenances, franchises, formerly known as the Toledo, Wabash and Western Railway, by virtue of a conveyance from one J. D. Cox, as Special Master Commissioner, under certain judicial proceedings which are described in part in the said Master's conveyance, a copy of which

is hereto attached, marked Exhibit "C," and thereupon, on January 12th, 1877, they conveyed the same by deed to the Wabash Railway Company.

The judicial proceedings therein recited were to enforce a junior encumbrance on said railway created in 1873, and were instituted long after the default on said consolidated mortgage, and on the first mortgage also. Four of the five purchasers of said property, viz., Ellis, White, Martin and Seney, were directors of said Toledo Wabash and Western Railway Company in February, 1875, when they brought suit for the purpose of foreclosing such inferior mortgage, and thus acquiring the ownership of said railway by a sale contrary to law, being without redemption, and thus secure the payment of their individual claims by controlling the current revenue which should have been appropriated to the interest upon the said consolidated and other elder mortgages, thus delaying and defrauding the rights and liens of prior creditors. After such
641 purchase the said Ellis and associates organized the present Wabash Railway Company.

12. It was part of the consideration and agreement of the transfer of title by said Ellis and associates unto said Wabash Railway Company that it should, out of the railway earnings, pay to certain junior creditors the sum of over one million dollars in five annual installments, and that said corporation should mortgage all the railway property covered by such prior mortgages unto said defendant Seney, as trustee, to secure the payment thereof. In order to enable the payment of such junior claims to be thus accomplished out of the future revenue, it was agreed that the said parties being in possession of said railway should endeavor to persuade the senior and paramount mortgage creditors to postpone their prior claims on the property, and stop any and all payment on defaulted interest until the said junior creditors should succeed in getting their full million of dollars paid out of the railway revenues in such five years.

The said Wabash Railway Company was originally composed exclusively of the said junior creditors and of stockholders of the Toledo, Wabash and Western Railway Company and its property, with but slight addition or exception, was and is the identical property formerly belonging to said Toledo, Wabash and Western Railway Company, and the said consolidated mortgage of 1867 to said Knox and Jessup is a lien in substance upon the entire property so by it acquired and held, paramount in equity to any claim of the parties now enjoying and disbursing its revenues.

13. By force of the consolidations and judicial proceedings aforesaid the particular corporations which issued the bonds owned by plaintiff and executed the mortgages to secure them have become dissolved and extinct, having neither property, officers or agents, and, as the present Wabash Railway Company have never in any way assumed or promised to pay the amounts due and to become due under the said mortgage executed by its predecessors, the plaintiff and other bondholders have no other remedy to enforce the collection
642 of the debt due them except by invoking the equitable powers of this Court to foreclose the said mortgages and distribute

the earnings of the property and the proceeds of the sale thereof, according to the equities of all those entitled in the order of their several priorities as they may be adjudged.

14. The said line of railway is about 600 miles in length and is subject to first mortgage liens to the amount, including arrearages of interest, of about eleven million- of dollars; the amount of second mortgage liens, including arrearages of interest, is over six million- of dollars, making nearly $30,000 of such mortgage debt for each mile of road, with an annual interest burden of nearly one million two hundred thousand dollars, to be realized before there can be any legal payment of interest even upon the consolidated bonds. The principal and defaulted interest upon the consolidated bonds amounts to over three million dollars.

Exclusive, therefore, of the Seney mortgage for ($1,000,000), the financial condition of said property is this:

It is covered by the liens of first, second and consolidated mortgages, aggregating, with defaulted coupons and interest thereon, over $20,000,000, or considerably over $33,000 of such prior mortgage debt to each mile of railroad.

The fixed interest charge on that indebtedness amounts to the annual sum of nearly $1,500,000, together with a sinking fund contribution of $50,000 per annum, every dollar of which has a clear, legal and equitable preference in payment over the claims of the present owners of said Wabash railway, or the debts secured by the said Seney mortgage. Including the Seney mortgage, the road is indebted over $35,000 per mile, and the property actually came out of said Ellis foreclosure proceedings, as shown by its own reports, burdened with a greater mortgage debt on the road than when it originally defaulted in February, 1875, because it appears that, while the "gold bonds" were extinguished to the amount of $2,503,000, the arrearages of interest on the elder bonds ac-
643 crued during the foreclosures amounted to nearly $3,000,000, which has been still further increased by more recent defaults.

Plaintiff, therefore, charges that the said property is an inadequate security for the debts charged against it by the mortgage executed prior to the said Seney mortgage, and especially that it is an inadequate security for the full amount secured by the consolidated mortgage after the discharge of the liens resting upon the property elder to such consolidated bonds, and said property will not bring at public sale under foreclosure a price sufficient to satisfy the said consolidated mortgage after paying precedent liens.

15. The annual current interest charge on the said mortgage, other than the Seney, even if the whole defaulted interest should be capitalized, amounts to about $1,500,000; that the track, rentals and equipment payment amount to over $100,000; the sinking fund to $50,000 more, and the installment of the Seney mortgage, including interest, to over $250,000 in addition.

During the year 1878 the principal of two mortgages, one for $1,000,000 and the other for $1,500,000, mature, and there is due to the sinking fund of the consolidated mortgage over $400,000 for arrearages, excluding the last two items from the account; and it

appears that the interest and other obligations for the corporation for the year 1878 will require over $1,850,000, which sum is justly chargeable against the revenue of the current year.

16. The past and present business of the said railway, as shown by its own reports, conclusively demonstrate that the said corporation is hopelessly encumbered and insolvent, and will not be able to meet such current debt out of its revenues for the year 1878. No causes exist why the business of the road should be greater or prices better, or the necessary expenditures less, than they have been heretofore.

In order to demonstrate the insolvency of the said corporation and the inadequacy of the security available to pay its debts or discharge its annual fixed obligations, plaintiff shows that during the said judicial proceeding, wherein said property was sold out, the
644 treasurer of the company, who had been familiar with the road for many years, testified in November, 1875, that "an examination of its books and papers shows that since 1872 it had not earned all the interest on its bonded debt, exclusive of the gold bonds, thus proving the property to be worthless as a shareholder's investment at the present time."

The business of the road during several years, as shown by its own official reports, has been as follows:

For 1873:

Gross receipts	$5,738,807 76
Operating expenses	4,407,378 74
Balance	$1,331,429 02
Deduct construction and improvement expenses	$1,342,790 78

Thus creating an actual deficit without any interest payment whatever abounds.

For 1874:

Gross receipts	$5,047,191 57
Operating expenses	3,836,438 96
Balance	$1,210,752 61

Deduct for construction and improvement 240,587.35, leaves only $970,165.26 available for interest payments, being insufficient to pay the interest on the first and second mortgage bonds.

For 1875:

Gross earnings	$4,004,273 66
Operating expenses	3,499,757 91
Balance	$504,515 75
Deduct for construction and improvement	222,765 06
Leaves only	$281,350 69

Available for interest, being less than half the interest on the first mortgage bonds.

645 For 1876:

Gross earnings	$4,410,222 81
Operating expenses	3,554,410 31
Balance	$855,812 50
Deduct for construction, rentals and improvements	385,288 69
Leaving only	$470,523 81

Available for interest, not sufficient for interest on the first mortgages.

In 1877:

The gross receipts (including the Hannibal and Naples, not included in previous years) are reported	$4,585,914 30
Operating expenses	3,200,919 93
Balance	$1,384,994 37
Deducting taxes	128,881 48
For construction	98,408 45
Improvements	97,305 70
Leaves balance of	$1,060,398 74
But still further deducting for rental of leased tracks.	$61,823 10
Equipment interest	27,580 00
Installment on equipment	56,000 00
Making	$145,403 10

Leaving apparently $914,995.64 available for interest, being only about half the amount actually required for the current year according to the full tenor of the coupons and sinking fund obligation.

In a certain public statement recently and widely circulated, and purporting to give in detail the receipts and expenses of the Wabash Railway for the year 1877, its managers state the "actual net" available for "fixed charges" at $1,060,398.74, and the said fixed charges are itemized at $891,498.10, thus purporting to carry over for the year a pretended "surplus" of $168,900.64.

646 Plaintiff charges that said statement is delusive and untrue, and conceals the actual condition and expenses of the said company in many important particulars:

1st. It wholly conceals the fixed charge of $56,000 due for the installment for the equipment purchase, which was chargeable against the year's revenue.

2d. It wholly conceals the fixed charge of $206,555.42 due on January first, 1878, by the terms of the Seney mortgage, and which was therefore a charge on the revenues of the year 1877, and plaintiff is advised that such sum or a large portion thereof was actually paid during the year 1877 to the said parties who held such subordinate debts.

3d. It wholly conceals the expense and payment of over $130,000, which plaintiff is informed was actually disbursed during the year

1877 for divers purposes, and charged up to "expenses of reorganization."

4th. It wholly conceals the payment to one Harding, Stone and others of large sums paid them on defaulted coupons for the years 1875 and 1876 on all classes of bonds, including first, second and consolidated, amounting to the large sum of at least $100,000, as plaintiff is advised.

Thus entirely suppressing from the statement of "its operations" actual expenses and payments, amounting to nearly $500,000.

The itemized statement, showing $891,498.10 as the "fixed charges" for 1877, is a purely fictitious amount, invented on the theory that every bondholder had actually agreed to the limited interest payments proposed by the company, when the said managers well knew at the time said circular was issued that the sum so stated was wholly fictitious, because they well knew all the bondholders had not accepted such scheme, and that every one of said ten mortgages was in default.

The said sum only includes one of the four coupons due in the year on the consolidated bonds by their terms, and makes no provision for the defaulted coupons, and only included one-half the interest due for the year on the second mortgage and Decatur and
647 East St. Louis, and nothing for defaulted interest, nor did said amount include $50,000 due under the terms of the sinking fund of the consolidated mortgage, which is also a "fixed charge" for the year 1877. In giving the principal of the fixed obligations the said circular entirely suppresses $1,560,000 of indebtedness, viz., $1,000,000 due on the Seney mortgage, and $560,000 due in yearly indebtedness to the equipment company.

18th. As plaintiff is advised and so charges, instead of passing into the year 1878 with any surplus, as pretended, there was actually a large deficit resulting from the receipts and expenses of the year, and the said Wabash Railway Company was, at the beginning of this year, substantially without money, and in such financial straits that it had to borrow large sums of money to enable it to make payment of the February, 1878, installment of interest, being utterly unable out of its actual earnings to pay even the interest then due on its first mortgage bonds, and a large amount of floating debt, created for money borrowed to pay interest on its bonded debt, is now outstanding and unpaid.

19th. The largest earnings of the railway for the last four years was in 1874, being $5,047,191.57.

Assuming that largest revenue for this year, and then deducting what are claimed to be the economical expenses and fixed charges of present company, viz:

Operating expenses	$3,200,919 93
Taxes, const., &c.	324,595 63
Leased track	62,633 37
Equipment interest	40,320 00
Equipment purchase	56,600 00
Total	$3,683,478 93

Leaving available only $1,363,712.64, and producing a deficit of several hundred thousand dollars under its actual required fixed charges for interest, sinking fund, and installment of the Seney mortgage, wholly irrespective of the defaulted sums now due.

By the last year's report the average ratio of operating expenses (including taxes, insurance and improvement) to gross revenue was over seventy-six per cent. In order, therefore, to realize at the same proportion even an additional $750,000 net revenue necessary to prevent default and bankruptcy, it would require the gross receipts to be increased at least $2,000,000 over those of the last year, being a revenue far in excess of any ever realized from its operations during its existence, while the actual receipts of the first three months of this year (excluding the Han. and Naples earnings) are not much in excess of last year, and are not as large as in 1876. During the year 1877 the gross earnings of the whole road only increased $18,627.85 over those of the year 1876.

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Its management, as appears by a pamphlet herewith attached, guessed off its business at $5,500,000, and its operating expenses at only 60 per cent., while its actual earnings fell a million short of the estimate, and its expenses, irrespective of rentals or equipments, -mounted to 76 per cent.

20th. By every test which can be applied to determine the value or revenue-producing capacity of the said railway, it is a security wholly inadequate to satisfy the first, second and consolidated mortgage debt charged against it; that the said Wabash Railway Company will inevitably break down during the current year, and make default in the payment of the obligations it has assumed; and, that, in truth and in fact, the persons interested in said Seney mortgage, and the holders of the common stock of the Wabash Railway Company have no practical interest in the said mortgaged railway property, and have no right in equity to enjoy any portion of its revenues, or delay or defeat the prompt enforcement of your orator's security, which is absolutely necessary for the protection of the bondholders of the prior classes. By the terms of the deed under which said Wabash Railway Company acquired title to said Railway Company, it was expressly made subject to the prior liens upon said road, and by the distinct terms of the said consolidated mortgage it has no right to either the possession or control of said railroad, except so long as it shall faithfully perform the covenants thereof by the due payment of the interest and sinking fund installments.

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21st. Notwithstanding the premises and the fixed nature of plaintiff's security and priority, and the fact that the condition of said mortgages is broken, the said Wabash Railway Company wholly refuses to pay any of the current or past due coupons, or interest thereon belonging to plaintiff, except on the condition that he will postpone for many years the principal of nearly all such past-due coupons, and thus enable the present possessors of said line of said railroad to pay out of the earnings over a million of dollars subordi-

nate debt on such Seney mortgage, when, according to the actual priorities they are not entitled to receive any sum whatever until full payment of all precedent obligations.

Plaintiff charges that the priority to which he and others similarly situated is entitled is a matter of strict legal right, and that the present possessors of the mortgaged property have no discretionary powers to defeat the same, or postpone without his consent the payment of the debt due him, but, to the contrary, the said Wabash Railway Company during the past year has been wrongfully diverting the revenues of said property which ought to be paid out in due order of the several liens, and making discriminating and unlawful payments thereof in this—

1st. By taking certain of the moneys derived from revenue and appropriating it on consolidated bond interest, due November first, 1877, leaving interest largely in arrears on first and second mortgages.

2d. By paying in full some defaulted coupons on first, second and consolidated mortgage bonds, and refusing payment to others, thus making an unlawful and fraudulent preference between these entitled to share in a common security.

3d. By paying certain current coupons on said last-named classes of bonds, and refusing it to others.

4th. By paying out of the revenues a large sum—viz., over
650 $200,000—upon the said Seney mortgage, and leaving large defaults of interest on prior securities wholly unpaid.

5th. By paying certain current coupons due in 1877, and not applying the revenue to the discharge of the coupons first falling due.

The result of such misappropriation, and the inequitable preferences as between bondholders and the disregard of the legal liens in their order, will be to greatly damage the security of plaintiff by increasing the indebtedness in front of him, and, meantime, prevent all payment to him and greatly depreciate the market value of his bonds, especially such consolidated bonds. Although there is about 28 per cent. past due interest now due on such consolidated bonds, the market price is only $560 for $1,280, principal and interest thereof.

22d. The present corporation still avows its determination to continue to disregard the rights and liens of plaintiff and others similarly situated, and make such unlawful preferential payments upon junior debts; and they do and will refuse all payment to those who will not agree to their terms of composition, which they have arranged solely to enable them to disburse the earnings and pay off the most inferior debt out of the first earnings.

Plaintiff fears and believes that, unless restrained by orders of this Court, such maladministration of the trust property will continue, and the diversion of such revenue so as not to keep down the interest on the senior bonds, will produce great and irreparable mischief to plaintiff, and is in clear violation of the trusts of said early mortgages.

By the terms of said second mortgage and said consolidated mortgage and installment of interest becomes due and payable on such

debt on May 1st, 1878; that unless restrained by the order of this Court the said Wabash Railway Company will proceed, in violation of the trust deed and plaintiff's right to appropriate the railroad earnings in its custody to the payment of the current coupons maturing on that day, to such bondholders as have agreed with
651 it to extend for several years the principal of the coupons of 1875, 1876, and 1877, and will wholly refuse any payment to plaintiff and other non-funding bondholders either their current or past due coupons.

23d. Plaintiff has not assented to any such scheme, and insists that said coupons are liens in the order of their maturities, and must be paid in such order out of any available revenue, and that a part of his co-bondholders have no power to agree to a postponement of such coupons, and thus permanently and largely increase the mortgage debt to plaintiff's injury by applying the earnings to extinguish within a few years the entire Seney mortgage; but that, notwithstanding any such agreement, plaintiff has the right to have the railway income sequestered and disbursed according to the priorities of the several mortgages, ratably liquidating the coupons of each class according to the order of their maturity, without preference as between bondholders, and, until the defaulted interest of every class has been discharged, to enjoin any payment whatever on the said Seney mortgage or other subordinate debt.

24th. Plaintiff further charges that, notwithstanding the large unarranged and defaulted indebtedness due on bonds held by himself and others, the Wabash Railway Company is without any present means or earnings to pay either the past-due or current coupons of such bonds or any considerable portion thereof, or even the past-due interest on the unfunded bonds; that it has been compelled to borrow money to pay interest on even the eldest mortgage; that the mortgages on said road exclusive of said Seney's are ten in number, and at the present time every one thereof is in defualt for a considerable amount, aggregating a sum far in excess of the present ability of said corporation to pay each of such nine sectional mortgages is therefore subject to immediate foreclosure, which has been repeatedly threatened. The said consolidated mortgage is the only one covering all the property, appurtenances, equipment and franchises, and plaintiff believes that by the appointment of a Receiver of said property as an entirety under the said encumbrance its unity
652 can be preserved, and the right of all interested be better marshaled and enforced while its revenue received and disbursed under the orders and protection of this Court can be appropriated to the satisfaction of the several liens in their order.

25. Plaintiff shows that the said Jessup is trustee in both the Great Western seconds and the consolidated mortgages, and cannot therefore actively or impartially represent either interest as against the other; that said Knox is trustee in the Decatur and East St. Louis as well as the consolidated mortgages, and therefore has interest antagonistic to your orator as a holder of the consolidated bonds.

Plaintiff is advised and charges that both the said Morgan, Knox and Jessup have been guilty of great supineness and negligence in

their trust, because they well knew and consented to and acquiesced in such perversion of the revenues of the trust property as is hereinbefore described; that they have been repeatedly called upon by bondholders to enforce their security, and, well knowing the several defaults, have always neglected to do anything to protect their several trusts or secure any legal appropriation of the income thereof, and never have taken any steps whatever to enforce payment of said overdue coupons or said sinking fund covenants, or prevent such unjust preference between bondholders of the same class.

Plaintiff claims they ought for such reasons to be removed and others placed in their stead who will discharge their obligations as trustees of such important and complicated trusts. In consequence of the corporate extinction of said Toledo, Wabash and Western Railway Company, it is wholly impossible to make any non-judicial appointment of substituted trustees under the provisions of said trust deed, as it requires the assent of said corporation now dissolved.

The said Farmers' Loan and Trust Company as trustees, and said Seney as trustee, are made parties, so that they may fully set forth their lien upon the said road, and the amount due thereon, to the end that such debts may be adjudged and paid out of the income
653 or proceeds of any sale of said property in the legal order in which they are entitled.

26th. Plaintiff claims that unless judicial control be promptly taken of all said property under said consolidated mortgage it may result that the holders of some of the defaulted bonds on one or more of the nine other mortgages may institute actions in different Courts in this State, or Illinois, or Ohio, to foreclose the mortgages resting on different sections of said railroad, and thus create a multiplicity of suits, the orders and decrees of which will likely be conflicting, and so tend to the disruption of said property and greatly damage the interests of all concerned therein.

Besides the large and growing accumulations of interest on all the said liens, two of said divisional mortgages, covering the road in Ohio and this State, mature on the first of November of this year.

The Wabash Railway Company is without any means or resources to meet any of the principal thereof, and neither expects or intends to pay any portion thereof. Plaintiff is advised that the holders of a large number of such maturing bonds, including himself, have not and will not extend the payment thereof, but will at their maturity, in about six months, demand full payment, and, if refused, will bring foreclosure actions to enforce it.

27th. Plaintiff shows that the funding scheme has, in effect, come to a standstill, and there are now about two and a quarter millions (principal) of bonds of all classes, besides $600,000 of equipment bonds, the holders of which, to a large extent, have not consented in any way to postpone payment of their defaulted coupons, but do and will insist upon their legal rights under the mortgages, and there is now due for such defaulted and wholly unarranged interest over $500,000 which the said Wabash Railway Company

has no means to meet, and has no intention of paying, its funding scheme (a copy of which is herewith filed), being substantially a declaration that no payment will be made save in accordance therewith.

28th. Plaintiff claims, therefore, on behalf of himself and
654 all other unpaid bondholders, that by reason of the matters above recited he is entitled to the foreclosure of said mortgages by reason of their conditions being broken, and because the interest and sinking fund is largely in arrears, and the Wabash Railway Company has no means wherewith to pay such defaults.

To the appointment of a Receiver, because the said Wabash Railway Company has permitted repeated defaults on the elder mortgages and misappropriated the income to junior debts, and because the said mortgage security is inadequate.

To an injunction restraining the said Wabash Railway Company, until such time as a Receiver shall be appointed, from making any payment whatever out of the road's earnings, except for interest on the first mortgage bonds.

To the removal of the mortgage trustees, because they have been guilty of neglect and supineness, and have not in any way enforced their trust or protected the interest of the bondholders they represented.

Plaintiff therefore prays that the said defendants be summoned to appear herein and answer the premises; that an account be taken of all the debts secured by the said mortgages and the amount thereof, and the persons to whom due, and the relative priorities thereof, on the said property; that a decree may be enrolled declaring the right of such equipment bonds to share in the security of said consolidated mortgage; and that the respective rights and priorities of all the said mortgages be duly established, and payment decreed to plaintiff and all others entitled of all such sums as are so adjudged to be due; and in default of such payment, by a short day to be named, that all the said property, equipment and franchises be sold to pay such debt and costs and expenses, including attorney's and counsel's fees herein, and that the net proceeds be distributed among all those entitled according to their respective privileges.

Pending the said decree, and until such sale and distribution, plaintiff prays that the Court will appoint a Receiver of all
655 said mortgaged property, equipment, appurtenances and franchises; to receive the income and earnings thereof, and disburse the same, under the orders of this Court, in such manner as to keep down, as far as practicable, the accumulations of interest on the senior mortgages; and until such appointment plaintiff prays that said Wabash Railway Company be designated and required to hold said property as temporary Receiver under the order of the Court.

Plaintiff further prays that until such Receiver can be appointed and take possession an injunction be forthwith granted prohibiting and restraining the said Wabash Railway Company, and all its officers, agents and representatives of every class, from using or

disbursing any of the earnings of said railroad, except to pay strict operating expenses, including taxes, insurance, rentals, renewals and repairs, and interest on the first mortgage bonds, and especially be enjoined from making any payment on May 1, 1878, or at any other time hereafter, until further order, of any interest coupons to any holders of second or consolidated mortgage bonds, or any installment of interest or principal of any of the notes due, or to become due, under said Seney mortgage, but that said corporation be required to safely keep unencumbered all the net earnings over and above the payments hereinbefore designated, until the Court shall give directions touching the same, and for the reason that plaintiff has a clear, legal and undisputed right to such appropriation of the earnings he claims he is entitled to an injunction against such palpable breach of trust without being compelled to give any bond to the wrongdoer temporarily in possession of the trust estate; for such other and further relief as may be necessary to fully protect his interest, and as the Court may be competent to award in the premises.

S. A. HUFF,
Attorney for Plaintiff.

656 STATE OF INDIANA, *Marion County, ss:*

David I. Tysen, Jr., being duly sworn, says that he is the plaintiff in the within bill, and that he has read the same and knows the contents thereof, and that the same are true of his knowledge, except as to those matters stated on information, and as to such matters he believes they are true. He further says that he verily believes that he and other bondholders similarly situated will be unduly prejudiced if the injunction prayed for is not issued immediately and without notice, and that, if notice is required, the said Wabash Railway Company will pay over the earnings in some way, and thus prevent the operation of any prohibitory order thereafter obtained.

DAVID J. TYSEN, JR.

STATE OF INDIANA, *Marion County, ss:*

Subscribed and sworn to before the undersigned, a notary public in and for said county, this 27th day of April, 1878.

[SEAL.]

T. S. ROLLINS,
Notary Public.

(Here follows Deed of Wabash and Western Railway Company to Edwin D. Morgan, of October 12th, 1858. Printed *ante*, p. 380.)

Pleas before the Honorable Thomas F. Davidson, Judge of the Circuit Court of Fountain County, in the Twenty-first Judicial Circuit of the State of Indiana, at a term of said Court convened at the Court House in Carrington on the 13th day of May,
657 1878, the same being the second Monday in said month, and the time fixed by law for holding a term of said Court, and heretofore, to wit, on the 10th day of May, 1878, the same being in vacation, the following complaint was filed in the cause of David J. Tysen, Jr., *vs.* The Wabash Railway Company *et al.*, in the Clerk's Office of said Court, viz.:

* * * * * * *

The Clerk having failed to insert a copy of the plaintiff's complaint, filed in the Fountain Circuit Court, the original is now here filed, and is to be treated as though it had been here copied, all irregularities on that account being waived. The Clerk has certified the proceedings to remove the cause for trial to this Court, and the intervening petitions separately, instead of embracing them all in one transcript; they are to be filed and treated as though properly embodied in the transcript, and no objection is to be made on either side as to the manner of the removal.

S. A. HUFF,
Solicitor for Complainant.
BAKER, HORD & HENDRICKS,
Solicitors for Wabash R. W. Co.

(Copy of Second Mortgage Bond.)

Wabash and Western Railway Company.

Second Mortgage Bond.

UNITED STATES OF AMERICA, *State of Indiana:*

No. 852. $1,000.

Wabash and Western Railway Company.

Second Mortgage Bond.

Principal payable November 1st, 1878; interest at seven per cent., payable half yearly, May 1st and November 1st.

658 Know all men by these presents, that the Wabash and Western Railway Company of the State of Indiana acknowledges itself indebted to Edwin D. Morgan, Esq., of the City of New York, or bearer, in the sum of one thousand dollars, which sum said Wabash and Western Railway Company promises to pay to the holder of this bond on presentation thereof at the office of the said Edwin D. Morgan, or elsewhere, in the City of New York, as may be appointed, on the first day of November, 1878, with in-

terest thereon at the rate of seven per centum per annum, payable semi-annually on the first day of May and the first day of November in each year, until said principal shall be paid, on the presentation of the annexed interest warrants as they become due, at the office of Edwin D. Morgan, or such other place in the City of New York as may be designated.

And the said railway company hereby waives all benefit of valuation, stay or appraisement laws.

This bond is one of a series of one thousand bonds of one thousand dollars each, nine hundred and fifty bonds of five hundred dollars each, and two hundred and fifty bonds of one hundred dollars each, of like tenor and date, amounting in all to one million five hundred thousand dollars, the full and final payment of which is secured by an indenture of mortgage, bearing even date herewith, on the railway of said company, made and to be made, with its rolling-stock, furniture, fixtures, rails, depots and depot grounds, and the accessions and franchises of said company, executed and delivered to the said Edwin D. Morgan, and duly recorded in the several counties through which the road of said company is made and to be made.

The said mortgage is given, and the holders of this issue of bonds take them, subject to a lien existing on the same property for the security of a prior debt of two million five hundred thousand dollars, and no more; said prior debt is provided to be paid by a bond of said company, dated October 12th, 1858, payable on the first day of February, 1876, for the above-named sum of
659 $2,500,000, and secured by a mortgage of the same date on the same property; the Wabash and Western Railway Company or any company with which it may be consolidated reserving the privilege of substituting for that bond others of smaller denominations, but not exceeding the amount thereof, in gross, the intent of this declaration being to make this series of second mortgage bonds subordinate to said prior indebtedness by whatever evidence it may exist.

In witness whereof, the said Wabash and Western Railway Company has caused this bond to be signed by its president, countersigned by its treasurer, and its corporate seal attached thereto, at the City of Lafayette, in the State of Indiana, this 15th day of October, 1858.

[L. S.]

A. BOODY,
President of the Wabash and Western Railway Company.

Countersigned:
J. R. OSBORN,
Treasurer of the Wabash and Western Railway Company.

I, Edwin D. Morgan, do hereby certify that the foregoing bond is one of the series of bonds abeve named, amounting to one million five hundred thousand dollars.

E. D. MORGAN.

No. 40. $35.

The Wabash and Western Railway Company will pay the bearer, in the City of New York, thirty-five dollars, on the first day of November, 1878, for six months' interest, due that day on its second mortgage bond for $1,000, numbered 852.

Dated Oct. 15th, 1858.

C. H. PIERCE, *Secretary.*

(Copy of Equipment Bond. Printed *ante* Exhibit C to Agreed Statements of Facts, p. —).

660 (Copy of Supplemental to Consolidated Mortgage.)

This indenture, made the first day of April, 1873, between the Toledo, Wabash and Western Railway Company, a corporation created and existing under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, of the first part, and Isaac H. Knox and James R. Jessup, of the City, County and State of New York, of the second part.

Whereas, by a certain indenture of mortgage, bearing date the first day of February, 1867, and made by and between the parties hereto, the said party of the first part did mortgage all of the railroad entering from Toledo, in the State of Ohio, through the State of Indiana to Meredosia, in the State of Illinois, together with other premises in the said mortgage described, to the parties hereto of the second part, as trustees, in order to secure the payment of certain consolidated mortgage sinking fund convertible bonds of the said party of the first part, to the amount altogether of fifteen millions of dollars, as by reference to the said indenture of mortgage will more fully and at large appear:

And whereas, of the said bonds to be made and issued under and secured by the said indenture of mortgage $13,300 in amount were reserved for the purpose of being used to retire a like amount of certain other bonds enumerated and described in the said indenture of mortgage, which were outstanding at the time said mortgage was given, and then constituted the funded debt of the said party of the first part;

And whereas, of the said funded debt $1,000,000 *dollars* in amount has since matured and been retired, and for that purpose an equal amount of the said reserved bonds have been used, leaving now unissued and reserved for the purpose of being used to retire the remainder of the said funded debt the amount of $12,300,000 of the said $15,000,000 of bonds originally secured by the said indenture of mortgage;

And whereas, it is the desire of the parties hereto by more express and specific stipulations than are contained in the said in-

661 denture of mortgage to give assurance to all persons whom it may in anywise concern that the said reserved bonds shall not nor shall any or either of them be used for any other purpose than the retiring of the said funded debt *in* some part thereof;

Now, therefore, this indenture witnesseth, that the party of the first part, for, and in consideration of the premises and the sum of one dollar, lawful money of the United States, to it duly paid at or before the ensealing and delivery of these presents by the parties of the second part, and divers other good causes and considerations, hath covenanted and agreed, and by the present doth covenant and agree, with the parties of the second part, and with all parties whom it may in anywise concern, that the said party of the first part will not make or issue, or attempt to make or issue, any of the remaining $12,300,000 aforesaid bonds secured by the said indenture of mortgage, except for the purpose of, and subsequent to or simultaneously with, the retiring of an equal amount of the balance remaining of the said funded debt, so that when all of the said reserved bonds shall have been issued the whole of the balance of the said funded debt will have been also extinguished and discharged; and that whenever the said party of the first part shall call upon or request the said parties of the second part or their Receiver to sign the trustees' certificate endorsed upon any of the reserved bonds, the said party of the first part shall produce and exhibit to them at the same time canceled or for cancellation an equal amount at least of the bonds constituting the balance of said funded debt, and that without such production of the said last-mentioned bonds and the cancellation of the same, the parties of the second part shall [not], nor shall either of them, nor the successors of either of them, sign the trustees' certificate upon either of said reserved bonds.

And the said parties of the second part do hereby, each for himself, covenant and agree that they will not sign the trustees' certificate upon either of the said reserved bonds, except as hereinbefore provided.

662 And the party of the first part doth further covenant and agree with the parties of the second part, and their successors, and with all persons with whom it may in anywise concern, that the covenants herein contained shall be supplementary to and constitute a part of the said indenture of mortgage, and be of the same effect to all intents and purposes as if they were interested therein.

In witness whereof the said party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by the president and secretary, and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

TOLEDO, WABASH AND WESTERN
RAILWAY COMPANY,
By A. BOODY, *Pres't.*

Attest:
WM. B. CORNEAU, *Sec'y.*
JAMES R. JESSUP.
ISAAC H. KNOX.

Se[illegible]l and delivered in the presence of
ALEX. M. WHITE,
As to the signature of A. Boody, Pres't.
CHARLES TUTTLE,
Bon. of James R. Jessup and Isaac H. Knox.

663 (Copy of Consolidated Mortgage Sinking Fund Convertible Bond.)

UNITED STATES OF AMERICA,

States of Ohio, Indiana, and Illinois.

No. 1568. $1,000.

Toledo, Wabash and Western Railway Company Consolidated Mortgage Sinking Fund Convertible Bond.

Know all men by these presents, that the Toledo, Wabash and Western Railway Company, a corporation created and existing under the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, acknowledged themselves indebted to Isaac H. Knox and James H. Jessup, of the city of New York, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which sum the said company promise to pay to the said Isaac H. Knox and James R. Jessup, or to the bearer hereof, on the first day of February which will be in the year 1907, at their office or agency in the City of New York, with interest thereon at the rate of seven per centum per annum, payable quarter-yearly at their said office or agency in the City of New York on the first days of May, August, November and February in each year, on the presentation and surrender of the coupons or interest warrants hereto annexed, as they severally become due, and in case of the non-payment of any quarter-yearly instalment of interest which shall have become payable and shall have been demanded, if such default shall continue for the space of six months after the maturity and de- of the said installment, the principal of this bond shall become due in the manner and with the effect as provided in the deed of trust hereinafter mentioned. It is agreed between the said company and the holder of this bond that, in case of any default in the payment hereof, the said company hereby waives the benefit of any extension, stay or appraisement laws not existing or that may hereafter exist; and the
664 said company further agree that on the surrender of this bond, together — all outstanding coupons for interest thereon, and at any time within ten years from the date hereof, the proprietors of this bond shall be entitled to the common stock of this company at par for the face of this bond in satisfaction thereof, and to a certificate of such stock entitled to draw *pro rata* dividends from the maturity of the last interest due on said bonds at or immediately prior to the time of such conversions. And the said company further agree that they will pay to the commissioners named in the said deed of trust, at the times and in the manner therein stated, the sum of fifty thousand dollars per year, for the purpose of being applied and used by such commissioners as a sinking fund for the payment and extinguishment of the principal of all the bonds issued under and secured by said deed of trust, and that this bond shall be entitled to all the benefits of said sinking fund as therein provided, this bond

shall pass by delivery or transfer on the books of the company in the City of New York after a registration of ownership certified thereon by the transfer agent of the company. No transfer, except on the books of the company, shall be valid unless the transfer be to bearer, which shall restore transferability by delivery, but this bond shall continue, subject to successive registrations and transfers, to bearer as aforesaid at the option of each holder.

This bond is one of a series of fourteen thousand two hundred bonds, 14,000 of which, numbered consecutively from one to fourteen thousand, inclusive, are each for the sum of five thousand dollars; 200 of which, numbered consecutively from fourteen thousand and one to fourteen thousand two hundred, inclusive, are each for the sum of five thousand dollars; and the whole series, amounting in the aggregate to fifteen millions of dollars and no more, and all of like tenor, and all dated February 1st, 1867, and are made and issued to retire all the various classes of bonds and securities now composing the funded debt of the said company and to provide means for additional equipment and for the special improvement of the
665 property of said company; and the payment of all said bonds is secured by an indenture of mortgage or deed of trust dated February 1st, 1867, made by said company to Isaac H. Know and James R. Jessup, of the City, County and State of New York, trustees, conveying the said road, equipment, franchises and property of said company as therein described and stated, and subject only to such prior liens on any of said property as therein stated. This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed thereon and duly signed by said trustees.

In witness whereof, the said company have caused their corporate seal to be affixed hereto, and the same to be attested by the signatures of their president and secretary, this first day of February, 1867.

A. BOODY,
President.

[L. S.]

J. N. DRUMMOND,
Secretary.

The Toledo, Wabash and Western Railway Company will pay the bearer, at their office or agency in the City of New York, seventeen 50/100 dollars, on the first day of February, 1907, for three months' interest on bond.

J. N. DRUMMOND, *Secretary.*

No. 1568.

(Copy of Consolidated Mortgage.)

Toledo, Wabash and W. R. Co. to I. H. Knox and J. R. Jessup.

(Printed *ante* p. 485).

And afterwards, to wit, on the said day, the following proceedings in the above-entitled cause were had, to wit:

666 Upon filing the petition of Edward De Rose, praying, among other things, that he may be made a party in the

above-entitled cause, and it appearing that the prayer of said petition in that request ought to be granted:

It is on motion of Charles W. Hassler, a counsel with the petitioner, ordered that said petitioner be, and he hereby is, admitted and made a party plaintiff in the above-entitled cause, and that he have notice of all proceedings now pending or hereafter to be had or taken in this cause.

Upon filing the petition of Edward De Rose, Henry A. Mott, John W. Fuden, Thomas W. Mayo, Charles Jackson, G. M. Whitemore, Townsend Underhill and M. S. Underhill, praying among other things, that they be made parties in the above-entitled cause, and it appearing that the prayer of said petition in that respect ought to be granted:

It is, on motion of Charles W. Hassler, a counsel with the petitioner, ordered that said petitioners be, and they hereby are, admitted and made parties plaintiffs in the above-entitled cause, and that they have notice of all proceedings now pending or hereafter to be had or taken in this cause.

Comes now the plaintiff, by his attorneys, and files an affidavit of a competent person, that the defendants Isaac H. Knox and James R. Jessup, trustees; Edwin D. Morgan, trustee; The Farmers' Loan and Trust Company, trustees, and George I. Seney, trustee, not residents of the State of Indiana, and moves the Court for an order of publication of notice to said non-resident defendants.

Whereupon the Court orders that notice be given to said non-resident defendants of the pendency of this action by publication in some newspaper of the county of general circulation for said non-resident defendants to appear on the first day of the next term of this Court.

And said petition of Edward De Rose *et al.* is in the words following, to wit:

667 To the Honorable Judge of said Court, sitting in Chancery:

The petition of Edward De Rose, Henry A. Mott, John W. Ferndon, Thomas Mayo, Charles Jackson, G. M. Whittemore, Townsend Underhill and M. L. Underhill respectfully shows:

That your petitioners are the holders and owners of divers of the equipment bonds referred to and mentioned in the bill of complaint filed in the above-entitled cause, and as such owners your petitioners, by leave of Court, join in said bill of complaint filed in the above-entitled cause, and do adopt and affirm for themselves the general allegations and charges made therein except as relates to the personal interest of said complainant Tysen.

Your petitioners especially repeat for themselves the charges and allegations of said bill regarding the execution of the said consolidated mortgage and the purposes for which the bonds authorized to be issued thereunder were directed to be used, and that the six hundred thousand dollars ($600,000) of equipment bonds previously issued were to be exchanged for said consolidated bonds.

And your petitioners further show that the interest upon their

said equipment bonds was regularly paid up to and including that due on the first day of November, 1874, but that the interest due on the first days of May and November in each of the years 1875 and 1876 and 1877, and on the first day of May, 1878, has not been paid, and the said Wabash Railway Company wholly refused and still refuses to pay the same.

Wherefore, your petitioners pray that they may be made parties to the above-entitled action; that a foreclosure of the said consolidated mortgage and a sale of the property covered thereby and the rights of the holders of said equipment bonds to share in the security of the said consolidated mortgage may be decreed. That this Honorable Court will take under its control and management the property of every kind and nature whatever belonging to or in the
668 control of said Wabash Railway Company and protect the same from any and every person or persons interfering in anywise therewith, and appoint a Receiver or Receivers with full power to render effectual the orders of the Court made in this cause, and to operate the said railroad and receive the income thereof during the pendency of the litigation, with the power usually given to such Receivers, and with authority to demand, receive and collect all the property of said Wabash Railway Company, wherever the same may be.

That an account may be taken of the amount due to your petitioners and to the other holders of the bonds of the said Wabash Railway Company, and that the sums so found to be due may be declared liens upon said property, and that the said Wabash Railway Company may be decreed to pay the same by a short day to be named, and in default thereof the said railroad line of said Wabash Railway Company, and all property thereunto belonging, and all the other property of said Wabash Railway Company, may be sold for the payment of said indebtedness, and the money realized from such sale distributed in accordance with equity.

And your petitioners further pray that a writ of injunction may issue out of and under the seal of this Honorable Court, directing, commanding, enjoining and restraining the said Wabash Railway Company from making any payment except for interest on the first mortgage bonds.

That the trustees, defendants in said bill of complaint, may be removed and relieved of and from their office as trustees; that your petitioners may have such other or further relief in the premises as may be meet and just and in accordance with equity and the rules of this Court.

And your petitioners will ever pray, &c.

CHARLES W. HASSLER,
Solicitor for Petitioners.

669 STATE OF INDIANA, *County of Fountain, ss:*

Charles W. Hassler, being duly sworn, on his oath says: That he is the agent and attorney in fact of the above-named petitioners; that he has read the foregoing petition and knows the contents

thereof and that the matters and things therein stated are true of his knowledge, except as to those matters which are stated to be on information and belief, and as to those matters he believes it to be true.

CHARLES W. HASSLER.

Subscribed and sworn to before me this 13th day of May, 1878.

E. N. BOWMAN, *Clerk.*

STATE OF INDIANA, *Fountain County, ss:*

I, Elliott N. Bowman, Clerk of the Circuit Court in and for said County and State, do hereby certify that the within and foregoing is a full, true and complete copy of the petition of Edward De Rose *et al.* in the above-entitled cause, filed in said Court on the 13th day of May, 1878, as the same appears from the papers now on file in my office.

In witness whereof, I have hereupto set my hand and affixed the seal of said Court, at my office in Covington, this 14th day of May, 1878.

[SEAL.]

E. N. BOWMAN,
Clerk Circuit Court, Fountain Co., Ind.

And afterwards, to wit, on the 15th day of May, 1878, the said being the 3d judicial day of said May Term, the following proceedings were had in the above-entitled cause:

670 Comes now the Wabash Railway Company, by Baker, Hord and Hendricks, Wager, Swayne and Stuart, her attorneys, and files her petition and bond to remove this cause to the United States Circuit Court, which petition and bond reads in words and figures following, to wit:

Petition for the Removal of the Cause to the Circuit Court of the United States for the District of Indiana.

STATE OF INDIANA, *Fountain County, ss:*

In the Circuit Court, May Term, A. D., 1878. In Chancery.

DAVID J. TYSEN, JR.
against
THE WABASH RAILWAY COMPANY, ISAAC H. KNOX, and JAMES R. JESSUP, Trustees; THE FARMERS' LOAN AND TRUST COMPANY, Trustee; EDWIN D. MORGAN, Trustee, and GEORGE I. SENEY, Trustee.

To the said Circuit Court:

Your petitoner, The Wabash Railway Company, respectfully shows to this Honorable Court that the matter and amount in dispute in the above-entitled suit, exclusive of costs, exceeds the sum or value of five hundred dollars; that the controversy in said suit is between

citizens of different States, and that the petitioner was at the commencement of this suit, and still is, a citizen of the State of
671 Indiana, and that the complainant herein, David J. Tysen, Jr., was then, and still is, a citizen of the State of New York, and that the said Farmers' Loan and Trust Company was then, and still is, a duly incorporated corporation of the State of New York, and a citizen of said State, and the said James R. Jesup, Edwin D. Morgan, and George I. Seney were then, and still are, citizens of the State of New York; that the said Isaac H. Knox was then, and still is, a citizen of the State of Missouri.

Your petitioner states that, in the said suit above mentioned, there is a controversy which is wholly between citizens of different States, and which can be fully determined between them, to wit, a controversy between the said petitioners and mortgage debtors and the said complainant David J. Tysen, Jr., as mortgage creditors, and, moreover, that all the parties named in said suit as co-defendants with petitioner are also creditors of petitioner, whose debts are secured by mortgage upon the same property as that upon which is secured the debts owing by petitioner to complainant, or as trustees, represent such creditors; and that said co-defendants are made parties to this suit only in the capacity of mortgage creditors as aforesaid, or as trustees for the same, and that in fact this suit is wholly between your petitioner and mortgage debtor and its mortgage creditors as such, all of whom are citizens of different States from your petitioner, and the real and substantial controversy therein is as to the taking of the mortgaged premises out of the hands of your petitioner at the instance of the said mortgage creditors and of complainant as such, and the foreclosure and sale thereof to satisfy said mortgage debts.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in the said Circuit Court of the United States for the District of Indiana, on the first day of its next term, a copy of the record in this suit, and for paying all costs that may be awarded by said Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto, and he prays this honorable Court to proceed no further herein, except to make the
672 order of removal required by law, and to accept the said surety and bond, and to cause the second herein to be removed into the said Circuit Court of the United States in and for the District of Indiana. And he will ever pray.

WAGER SWAYNE,
CHARLES B. STUART,
Attorneys for Petitioner.

STATE OF INDIANA, *Fountain County, ss:*

Charles B. Stuart, being duly sworn, on his oath says: That he is one of the attorneys for the petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true, and affiant verily believes.

CHARLES B. STUART.

Subscribed and sworn to by the said Charles B. Stuart before me this 14th day of May, 1878.

E. N. BOWMAN, *Clerk*,
By S. F. MILLER, *Deputy*.

"Bond."

Know all men by these presents, that we, the Wabash Railway Company, and Adam Earle and Charles B. Stuart, as sureties, are held and firmly bound unto David J. Tysen, Jr., in the penal sum of one thousand dollars, the payment whereof well and truly to be made unto the said David J. Tysen, Jr., heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

673 Yet, upon the conditions the said Wabash Railway Company having petitioned the Circuit Court of Fountain County, State of Indiana, for the removal of a certain cause therein pending, wherein David J. Tysen, Jr., is plaintiff and the Wabash Railway Company one of the defendants, to the Circuit Court of the United States in and for the District of Indiana.

Now, if the said Wabash Railway Company, your petitioner, shall enter into the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

WABASH RAILWAY CO.,
Per I. A. ROOSNER, *President*.

Witness our hands and seals this — day of May, 1878.

ADAM EARL. [SEAL.]
CHARLES B. STUART. [SEAL.]

Attest:
W. B. CORMAN, *Secretary*.

STATE OF INDIANA, *Tippecanoe County, ss:*

I, Adam Earl, of said county, the surety named in the foregoing bond, having duly sworn, do depose and say: That I am a resident of the State of Indiana and a property holder therein; that I am worth the sum of one thousand ($1,000) dollars over and above all my debts *our* liabilities and exclusion of property by law exempt from execution; that I have property in the State of Indiana liable to execution of the value of more than one thousand dollars.

ADAM EARL.

Subscribed in my presence by Adam Earl, and by him sworn to before me, this 14th day of May, 1878.

[L. S.] W. F. STILWELL,
Notary Public.

674 STATE OF INDIANA, *Fountain County, ss:*

I, Charles B. Stuart, of said county, the surety named in the foregoing bond, being duly sworn, do hereby depose and say that I am a resident of the State of Indiana and a property holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Indiana liable to execution of the value of one thousand dollars.

CHARLES B. STUART.

Subscribed in my presence by Charles B. Stuart, and by him sworn to before me, this 14th day of May, 1878.

E. N. BOWMAN, *Clerk,*
By S. F. MILLER, *Deputy.*

And the Court, after being sufficiently advised in the premises, makes the following order, to wit:

It is hereby ordered that the foregoing petition be allowed, and the said suit therein described and entitled be removed to the United States Circuit Court for the District of Indiana, a sufficient bond having been filed herein.

STATE OF INDIANA, *Fountain County, ss:*

I, Elliott N. Bowman, clerk of the circuit court in and for said county, do hereby certify that the above and foregoing is a full, true and complete transcript of the proceedings had in the above-entitled cause, as appears from the papers on file and the records of said Court now in my office.

Witness my hand and the seal of said court, at Covington, this 27th day of May, 1878.

[SEAL.]

E. N. BOWMAN, *Clerk,*
By —— ——, *Deputy.*

675 And afterwards, to wit, on the 10th day of June, 1878, at the May Term of said Court, before the Honorable Walter Q. Gresham, one of the Judges of said Court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants by counsel, and upon their motion the complainant is ruled to file cost bond by the 13th inst.

And afterwards, to wit, on the same day, at the same Term of said Court, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Samuel Barton, by counsel, and files his intervening petition herein, in the words following, to wit:

* * * * * * *

And afterwards, to wit, on the 15th day of June, 1878, at the May term of said court, before the Honorable Walter Q. Gresham, Judge

as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by counsel, and files his amended bill of complaint herein, in the words following, to wit:

To the Judges of the Circuit Court of the United States for the District of Indiana:

Your orators, David J. Tysen, Jr., Samuel Barton, Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, G. M. Underhill, Townsend Underhill, M. L. Underhill, residents and citizens of the State of New York, and Thomas Mayo, a resident and citizen of the State of Connecticut, on their own behalf, as well as on behalf of all others having like interests who may come in and contribute to the expenses of and join in the prosecution of this suit, bring, by leave of Court first had and obtained, this their amended bill of complaint against the Wabash Railway Company, a corporation
676 organized under and by virtue of the laws of the States of Ohio, Indiana and Illinois, and a citizen of said States, and against the Farmers' Loan and Trust Company, a corporation organized under and by virtue of the laws of the State of New York, and a citizen of said State, as trustee; Edwin D. Morgan, a resident and citizen of the State of New York, as trustee; Isaac H. Knox, a resident and citizen of the State of Missouri, and James R. Jessup, a citizen and resident of the State of New York, as trustee, and George J. Seney, a resident and citizen of the State of New York, as trustee.

And thereupon your orators complain and say that the defendant The Wabash Railway Company is a corporation duly organized and existing under the laws of the States of Ohio, Indiana and Illinois, and under said laws became, and is now possessed of the power, right, privilege and franchise of constructing, operating, maintaining and using the continuous line of railroads hereinafter described, including the railroad described in the deeds of trust or mortgages, of which copies are annexed to the original bill of complaint filed in this cause.

That the Toledo, Wabash and Western Railway Company, prior to the year 1870, was a corporation duly incorporated, existing within and by virtue of the laws of the States of Ohio, Indiana and Illinois, and prior to the delivery of the deed by J. D. Cox, as Master Commissioner, as hereinafter mentioned, was possessed, under said laws, of the power, right, privilege and franchise of constructing, maintaining and operating a railroad, *or* hereinafter stated, and on behalf of all others having railroads leading from Toledo, in the State of Ohio, through the States of Indiana and Illinois to East St. Louis, and also East Hannibal, Quincy and Hamilton, on the Mississippi river, in said State of Illinois.

That said Toledo, Wabash and Western Railway Company was a consolidated company by virtue of the laws of said several States, and was composed of the following-named railroad corporations and companies, that is to say:

677 The Toledo and Wabash Railway Company, organized to maintain and operate a railroad from Toledo, in the State of Ohio, to the west Line of State Line City, in the State of Indiana.

The Great Western Railroad Co. of 1859, a corporation organized to maintain and operate a railroad from State Line City, in the State of Indiana, to Meredosia, in the State of Illinois.

The Quincy and Toledo Railroad Company, a corporation organized to maintain and operate a railroad from Meredosia, in the State of Illinois, to Camp Point, in the State of Illinois.

The Illinois and Southern Iowa Railroad Company a corporation organized to maintain and operate a railroad from Clayton, in the State of Illinois, to Carthage, in the same State; and the Decatur and East St. Louis Railroad Company, a corporation organized to maintain and operate a railroad from Decatur, in the State of Illinois, to East St. Louis, in the same State.

That the said Toledo and Wabash Railway Company, one of the aforesaid railroad companies, was itself a consolidated railway company and was formed by the consolidation of the Toledo and Wabash Railroad Company, a corporation existing within and by virtue of the laws of the State of Ohio and organized to maintain and operate a railroad from Toledo to Harrison Township, Paulding County, in the State of Ohio, and the Wabash and Western Railway Company, a corporation existing within and by virtue of the laws of the State of Indiana, and organized to maintain and operate a line of railroad from State Line, in Allen County, to State Line City, Warren County, in the State of Indiana.

All the railroad companies above enumerated and described were corporations formed within and under the laws of the respective States within which they were severally organized, to maintain and operate railroads as aforesaid, and were severally possessed under the laws of said several States of the powers, privileges and fran-
678 chises of constructing, maintaining and operating the lines of railroad respectively appertaining to each of said corporations as aforesaid.

And your orator further shows that on or about the 15th day of October, 1858, the Board of Directors of the said Wabash and Western Railway Company, in pursuance of the power and authority in them by law vested, adopted resolutions to make its bonds and to secure the same by the trust deed or mortgage, all as hereinafter mentioned.

That the said Wabash and Western Railway Company, on or about the 15th day of October, 1858, made its certain mortgage or deed of trust, dated on the said 15th day of October, 1858, between the said company, as party of the first part, and the defendant, Edwin D. Morgan, as trustee, as party of the second part, and which deed of trust or mortgage was duly sealed with the corporate or common seal of said company, and subscribed by the president and secretary thereof, and duly acknowledged by the said president and secretary, who made at the same time due proof of said corporate seal; and that said company, on or about said 15th day of October, 1858, delivered the said deed of trust or mortgage to the said trustees therein named. A copy of said deed of trust or mortgage is annexed to the original bill filed in this cause, and which your orators pray may be taken and received as part of this their amended bill of complaint.

That in and by said deed of trust or mortgage the said Wabash and Western Railroad Company, for the purpose of securing the payment of the sums of money mentioned and provided for in its bonds, as hereinafter mentioned, and each and every of them, and the interest thereon, according to the true intent and meaning thereof, and in consideration of the premises, the loan of the money, and the sum of one dollar paid to said company, granted, sold and conveyed to the said Edwin D. Morgan and his successors, severally, in trust, all its railroad made and to be made, the right of way and all the land occupied thereby, together with all the superstructure,
depots, depot grounds and buildings erected or to be erected
679 thereon, and the rail, tracks, side tracks, bridges, fences,
viaducts, culverts, rights, privileges and franchises of the said railway company in the State of Indiana, and all the rolling-stock, materials, machinery, furniture and equipments thereof.

That said deed of trust or mortgage was presently thereafter filed for record and duly recorded in the proper offices in the State of Indiana, in the manner required by law.

That the said Wabash and Western Railway Company made its several negotiable bonds in the form mentioned in said deed of trust or mortgage, and sealed the same with the corporate or common seal of said company, and caused the names of the president and treasurer to be thereto affixed, which bonds were in the denominations mentioned in said deed of trust or mortgage, and to the total amount of one million five hundred thousand dollars ($1,500,000), each of which said bonds was made payable to the said trustee or bearer on the first day of November, 1878, and bore interest at and after the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year thereafter, at the office of said company, in the City of New York, all of which bonds were equally secured by the said mortgage to the said trustees, and that interest warrants or coupons for the payment of said interest at the time above mentioned were annexed to each of said bonds.

That all of said bonds which by the provisions thereof were not to become valid or obligatory until authenticated by certificate endorsed thereon and duly signed by the said trustees were afterwards, and before delivery thereof, authenticated by a certificate signed by said trustees.

That the said Wabash and Western Railway Company at divers times sold, issued and delivered all the said bonds secured by the said deed of trust or mortgage to the amount of one million five hundred thousand dollars to a great number of individuals, partnerships, firms and corporate bodies who thereupon and thereby became the holders, owners and bearers of the said bonds, and
680 entitled to the moneys therein mentioned and agreed to be
paid, and that the bonds so made, sold, issued and delivered amounted, in the aggregate, to the entire sum authorized to be issued under the said deed of trust or mortgage; and that they have come by transfer and delivery, into the hands of a large num-

ber of persons, some of whom are unknown to your orator, and are too numerous to be made parties to this action; and that certain of the said bonds, amounting to the principal sum of ten thousand dollars, have, for a valuable consideration, come, by transfer and delivery, into the possession of your orator, David J. Tysen, Jr., and that certain of the said bonds, amounting to the principal sum of twenty-eight thousand and five hundred dollars, have come, by transfer and delivery, into the possession of your orator Samuel Barton; and certain of said bonds, amounting to the principal sum of twelve thousand dollars, have come, by transfer and delivery, into the possession of your orator Edward De Rose; all of which said bonds are of the denomination of one thousand dollars each, and are now held and owned by your orators, together with the unpaid coupons thereon.

That on or about the thirtieth day of June, 1865, the said Great Western Railway Company of 1859, the Illinois and Southern Iowa Railway Company, and the Quincy and Toledo Railroad Company, each of which said companies was then existing under the laws of the State of Illinois, and owning lines of railroad in said State, and the Toledo and Wabash Railway Company, a consolidated company then existing under the laws of the States of Ohio and Indiana and owning lines of railroad in said States, consolidated their roads, property and capital stock into one company, thereafter known as the Toledo, Wabash and Western Railway Company, and thereby the property covered by said mortgage trust deed dated October 15th, 1858, became and thenceforth continued to be until the delivery of the deed by Jacob D. Cox, hereinafter mentioned, part of the railroad and property of the said Toledo,

Wabash and Western Railway Company, subject nevertheless to the continuing lien of the deeds of trust or mortgages above set forth; and that in and by certain articles of agreement made at or about the said last-named date by and between the said companies the payment of the principal sum of said bonds and of the interest maturing on the same were expressly assumed and agreed to be paid by the said Toledo, Wabash and Western Railway Company.

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That said Wabash and Western Railway Company has dissolved, and is not now a corporation.

And your orator further shows that on the first day of May, 1875, and likewise on the respective first days of November, 1875, May, 1876, November, 1876, May, 1877, November, 1877, and May, 1878, the said Toledo, Wabash and Western Railway Company utterly failed to pay and made default in payment of the interest warrants or coupons which became due on those days respectively upon the entire amount of bonds issued under the said deed of trust or mortgage; and that ever since those days respectively the entire amount of coupons or interest warrants upon said issue of bonds falling due upon said days respectively has remained due and unpaid, except that the said Wabash Railway Company has paid the coupons or interest warrants maturing on the aforesaid first days of

May, 1877, and May, 1878, to certain holders thereof, who agreed to and did accept scrip certificates as hereinafter mentioned; and that certain holders of said bonds have received payment of their coupons or interest warrants thereon maturing May 1st, 1877, and May 1st, 1878, and have deposited with the Metropolitan National Bank of the City of New York their coupons or interest warrants maturing prior thereto and unpaid, and have accepted the scrip certificates hereinafter mentioned; but that your orators are ignorant as to what number of such holders or as to what amount such payment has been made and issue of scrip certificates had.

Your orators further show that the property described in the said mortgage trust deed is subject to the prior lien of a mortgage trust deed, executed on or about the first day of August,
682 1853, by the Lake Erie, Wabash and St. Louis Railroad Company to the defendant, the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds to the amount of two million five hundred thousand dollars ($2,500,000), payable on the first day of August, 1865, bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August, in each and every year, until the maturity thereof; and that all said bonds have been duly issued and delivered to and are now held by various parties, of whose names your orators are ignorant.

That on the said first day of August, 1853, the said Lake Erie, Wabash and St. Louis Railroad Company was a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, with full power to make and execute its bonds, and secure the same by its mortgage trust deed as aforesaid. That subsequently the Wabash and Western Railway Company became the owner of the property covered by said mortgage trust deed, and afterwards the said Toledo, Wabash and Western Railway Company became the owner thereof, and expressly assumed and agreed to pay the principal and the interest on said bonds. That by agreement entered into on or about the first day of August, 1865, by and between the holders of said bonds and the said Toledo, Wabash and Western Railway Company, the payment of the principal sum of said bonds was deferred until the first day of August, 1890, and new coupons were issued by the said company to the several holders of said bonds for the continuing payment of interest thereon.

That the coupons annexed to said bonds which became due on the first days of February and August in each of the years 1875, 1876 and 1877, and that which became due on the first day of February, 1878, have not been paid, but are wholly unpaid, except a portion of the said coupons which became due on the first days of February and August, 1877, and February, 1878, which have been paid by the defendant, the Wabash Railway Company, to those of the holders thereof, who agreed to, and did, accept scrip cer-
683 tificates, as hereinafter mentioned; and that certain holders of said bonds have received payment of their coupons which became due on the said first days of February and August, 1877,

and February, 1878, and have deposited with the Metropolitan National Bank of the City of New York their coupons maturing prior thereto and unpaid, and have accepted the said scrip certificates, but that your orator is ignorant as to what number of holders or as to what amount such payment has been made and issue of scrip certificates had.

That the said The Farmers' Loan and Trust Company, as trustee, is made a party defendant hereto, in order that such sums as shall be found to be justly due upon the bonds and interest coupons secured by the deed of trust or mortgage last mentioned may, and if to the Court it shall seem meet and proper shall, be paid bearers of said bonds out of the proceeds of any sale had of said mortgaged property prior to any payment being made to the holders of the bonds and coupons secured by the said deed of trust executed to the said Solon Humphreys and James R. Jessup, defendants herein, as trustees, to secure bonds held by your orders.

And your orators further show that on or about the first day of October, 1862, the Board of Directors of the Toledo and Wabash Railway Company, a consolidated company existing under and by virtue of the laws of the States of Ohio and Indiana, and then owning, controlling and enjoying a continuous line of railway in said States, in pursuance of the power and authority in them by law vested, adopted resolutions to make its bonds to an amount not exceeding the sum of six hundred thousand dollars ($600,000), the proceeds of the same to be used for the purpose of providing further equipments and satisfying other requirements of said company, and the said bonds to bear date November 1, 1862, and bearing interest at the rate of seven per cent. per annum, and the principal made payable to a trustee or bearer, in the City of New York, on the first day of May, 1883, and to have attached interest cou-
684 pons, payable semi-annually, payable in said City of New York. And said bonds were authorized to be issued in denominations of one hundred, five hundred and one thousand dollars each, or of such other denominations as might be deemed advisable, the same to be convertible into stock of said company at par at any time within five years from the date thereof; and the executive committee of said Board of Directors was authorized to issue, sell and dispose of said bonds in such manner and upon such terms as they might deem for the best interest of the said company. And thereupon the said Executive Committee did issue, sell and dispose of the whole amount of said bonds, and they have come by transfer and delivery into the hands of a large number of persons, many of whom are unknown to your orators; and your orator David J. Tysen, Jr., is the owner and holder of certain of said bonds amounting to four thousand dollars; your orator Edward De Rose is the owner and holder of certain of said bonds amounting to eighteen thousand dollars; your orator Henry A. Mott is the owner and holder of certain of said bonds amounting to seventeen thousand dollars; your orator John W. Ferdon is the owner and holder of certain of said bonds amounting to ten thousand dol-

lars; your orator Thomas Mayo is the owner and holder of certain of said bonds amounting to five thousand dollars; your orator G. M. Whittemore is the owner and holder of certain of said bonds amounting to two thousand dollars; your orator Townsend Underhill is the owner and holder of certain of said bonds amounting to nine thousand dollars; your orator M. L. Underhill is the owner and holder of certain of said bonds amounting to nine thousand dollars, and your orator Charles Jackson is the owner and holder of certain of said bonds amounting to thirty-two thousand dollars; all of which said bonds so owned and held have attached the coupons overdue and unpaid.

And your orators further show that the directors of the said Toledo, Wabash and Western Railway Company did make
685 and issue one million dollars in bonds, secured by the consolidated mortgage hereinafter mentioned, and did thereby retire a like amount of certain of the bonds previously issued, and which bonds are enumerated in the said consolidated mortgage trust deed, viz., bonds of the Toledo, Wabash and Western Railway Company, known as sinking fund bonds, amounting in the aggregate to the said sum of one million dollars, and that said one million dollars of said consolidated bonds so issued are now outstanding, except as the same may have been purchased for the sinking fund, as hereinafter stated.

But the said directors of the Toledo, Wabash and Western Railway Company have not made nor issued any other of said consolidated bonds for the purpose of retiring a like amount of any other of the bonds issued previous to and outstanding at the date of the said consolidated mortgage, and recited in said mortgage trust deed, nor have they prescribed at any time the manner nor the terms upon which any other of said outstanding bonds should be retired by, or should be exchanged for, an issue of a like amount of said consolidated bonds, but have failed so to do; and especially have the directors aforesaid not prescribed, but have failed to prescribe, at any time, the manner or the terms upon which the said equipment bonds, so held and owned by your orators, as aforesaid, should be retired by, or should be exchanged for, an issue of a like amount of said consolidated bonds.

And your orators show that the failure of the said directors to prescribe the manner and terms upon which their said bonds, known as equipment bonds, should be retired by, or should be exchanged for, an issue of a like amount of said consolidated bonds, has not been for the benefit of the holders of the said equipment bonds, but has been greatly to the injury of your orators and the other holders thereof. That the directors of said Toledo, Wabash and Western Railway Company have not held a meeting for a very long time, viz., for over a year, and the directors of the Wabash Railway Company have
failed to carry out the provisions of said consolidated mort-
686 gage trust deed, whereby it was provided that certain of said bonds thereby authorized to be issued should be issued for the benefit of your orators and the other holders of said equipment bonds.

And your orators further show that on or about the first day of February, 1867, the Board of Directors of the aforesaid Toledo, Wabash and Western Railway Company, in pursuance of the power and authority in them by law vested, adopted resolutions to make its bonds and to secure the same by a mortgage trust deed, to be known as its consolidated mortgage, all as is hereinafter mentioned.

That the said Toledo, Wabash and Western Railway Company, on or about the first day of February, 1867, made its certain mortgage trust deed dated on that day between the said company, as party of the first part, and the defendants, Isaac H. Knox and James R. Jessup, as trustees, as parties of the second part, and which mortgage trust deed was duly sealed with the corporate seal of said company, and subscribed by the president and secretary thereof, and duly acknowledged by the said president and secretary, who made at the same time due proof of said corporate seal; and that said company, on or about said date, delivered the said mortgage trust deed to the said trustees therein named, as will more fully appear from a copy thereof, attached to the original bill, filed in this cause, and which your orators pray may be taken and received as part of this their amended bill.

That in and by said indenture the said company, for the purpose of securing the bonds as therein named and each and every of them, and the interest thereon, according to the true intent and meaning thereof, and in consideration of the premises, the loan of the money, and the sum of one dollar paid to said company, granted, sold and conveyed to the said Isaac H. Knox and James R. Jessup, as trustees, and their successors severally, in trust—

All the right of way and railroad of the said company, extending from Toledo, in the State of Ohio, to and through the State of Indiana, and thence in the State of Illinois to Meredosia, with
687 branch of said road to Naples, and from Meredosia to Camp Point, in said State of Illinois, and also with branch of said road from Clayton to the east bank of the Mississippi River at Hamilton, in said State, as then made or as thereafter has been made, and as then used, or as thereafter has been used, together with all the property, real and personal, then owned or used, or that might thereafter be owned or used, in connection with the said railroad, and everything appertaining and appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said company, together with all the property, real and personal, then owned or thereafter to be acquired at the City of Quincy, as also the rights and privileges secured by certain contracts, all of which, together with the full terms of the deed of trust or mortgage, will more fully and at large appear by reference to a copy of said deed, annexed to the original bill, filed in this cause, and which your orators pray may be taken and received as part of this their amended bill.

That said mortgage trust deed was presently thereafter filed for record, and was duly recorded in the proper offices in the manner required by law.

That in the said mortgage trust deed it was recited that the said Toledo, Wabash and Western Railway Company was, at the date thereof, the first day of February, 1867, a corporation duly formed under the statutes of the several states of Ohio, Indiana and Illinois, by the consolidation of the stock, property, rights, franchises and interests of the several railroad companies, known as the Toledo and Wabash Railway Company (a corporation framed by the consolidation of the Toledo and Wabash Railway Company of Ohio, and the Wabash and Western Railway Company of Indiana), the Great Western Railway Company of 1859, the Quincy and Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company; that the property of said consolidated company was held subject to prior mortgages created by said several corporations or others of which they were composed, or to which they were successors, which at the time of their execution were owners of portions of the line of railroad operated and owned by said consolidated company.

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And in said mortgage trust deed it was further recited that the funded debt of said Toledo, Wabash and Western Railway Company, including that secured by mortgage liens, as well as that not secured, amounted in the aggregate to the sum of thirteen million and three hundred thousand dollars, besides interest, and that said funded debt was represented and made up as follow, viz.:

First mortgage bonds of the Toledo and Illinois River Railroad Company for the sum of nine hundred thousand dollars ($900,000), secured upon that part of the road and property of said company lying within the State of Ohio.

Second mortgage bonds of the Toledo and Wabash Railroad Company for the sum of one million dollars ($1,000,000), secured upon the same property within the State of Ohio.

First mortgage bonds of the Lake Erie, Wabash and St. Louis Railroad Company for the sum of two million five hundred thousand dollars ($2,500,000), secured upon that part of the road and property of said company lying within the State of Indiana, by a certain mortgage trust deed executed to the defendant the Farmers' Loan and Trust Company, as Trustee, as hereinbefore stated.

Second mortgage bonds of the Wabash and Western Railway Company for the sum of one million five hundred thousand dollars ($1,500,000), secured upon the same property within the State of Indiana by a certain mortgage trust deed executed to the defendant, Edwin D. Morgan, as trustee, as hereinbefore stated.

First mortgage bonds of the Great Western Railroad Company of 1859, for the sum of two million five hundred thousand dollars ($2,500,000), secured upon property within the State of Illinois.

Second mortgage bonds of the Great Western Railway Company of 1859, for the sum of two million five hundred thousand dollars ($2,500,000), secured upon the same property within the State of Illinois.

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First mortgage bonds of the Illinois and Southern Iowa Railroad Company for the sum of three hundred thousand dollars ($300,000), secured upon property within the State of Illinois.

First mortgage bonds of the Quincy and Toledo Railroad Company for the sum of five hundred thousand dollars ($500,000), secured upon property within the State of Illinois.

Bonds of the Toledo and Wabash Railway Company for the sum of six hundred thousand dollars ($600,000), and known as equipment bonds.

Bonds of the Toledo, Wabash and Western Railway Company for the sum of one million dollars ($1,000,000), and known as sinking fund bonds.

And in said mortgage trust deed it was further recited that it was deemed for the interest of the said parties of the first part, as well as for the benefit of the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt, upon equitable principles, and that of bonds so to be made and issued to the amount in the aggregate to the sum of fifteen million dollars ($15,000,000), there should be retained thirteen million three hundred thousand dollars to retire in such manner and upon such terms as the directors of said company might from time to time prescribe, a like amount of the bonds of the various companies hereinbefore enumerated, and representing the aforesaid funded debt, and that the balance of said bonds, to wit, one million seven hundred thousand dollars thereof, should be used for obtaining additional equipment and improvements, and for such additional purposes as the directors might deem advisable.

That said mortgage trust deed was presently thereafter filed for record and duly recorded in the proper offices in the States of Ohio, Indiana and Illinois, in the manner required by law.

That said company made its several negotiable bonds in the form mentioned in said indenture, and sealed the same with the
690 corporate or common seal of said company, and caused the names of the president and treasurer to be thereto affixed, which bonds were in the denomination of one thousand dollars each, and that the same should be payable on the first day of February, 1910, and bear interest at and after the rate of seven per cent. per annum, payable quarterly on the first days of February, May, August and November in each year until the payment of the principal sum thereof, at the office of the said company in the city of New York, all of which bonds were equally secured by the said mortgage of said trustees, and interest warrants or coupons for the payment of said interest at the times above mentioned were annexed to each of said bonds.

And in said mortgage trust deed it was further provided that, for the benefit of all those persons who should become owners of any of the bonds so authorized to be issued, the said railway company would pay to the commissioners therein named, at the times and in the manner therein stated, the sum of fifty thousand dollars per annum for the purpose of being used by said commissioners as a sinking fund for the payment and extinguishment of the principal of all of said bonds to be issued under and secured by the said mortgage trust deed, the first payment to be made on the first day of February,

1868, and in equal semi-annual installments on the first days of February and August in each year thereafter until the principal sum shall have been fully paid. And ninety thousand of said bonds have been transferred to the sinking fund aforesaid, but the said Toledo, Wabash and Western Railway Company and the said Wabash Railway Company have wholly failed to pay the said installments of a sinking fund except as aforesaid.

That said bonds were, by the provisions thereof, not to become valid or obligatory until authenticated by certificate indorsed thereon and duly signed by the said trustees, and that certain thereof, amounting to the sum of one million seven hundred thousand dollars were sold, issued and delivered for value; and that certain thereof, amounting to the sum of one million dollars, have
691 been exchanged for and used to retire the bonds of the Toledo, Wabash and Western Railway Company, known as sinking fund bonds, and that the sum of ninety thousand dollars thereof have been redeemed by moneys paid into the sinking fund, as provided in said indenture; and that there are now outstanding bonds amounting to the sum of two million six hundred and ten thousand dollars which have come by transfer, sale and delivery into the possession of, and are now held by, a large number of individuals, partnerships and corporate bodies, who are now the owners thereof and are entitled to the moneys therein mentioned and agreed to be paid, but whose names are unknown to your orators and are too numerous to be made parties to this action; and that seven of said bonds have come by purchase, transfer and delivery into the possession of your orator, David J. Tysen, Jr., who is the holder and owner thereof; and two of said bonds have come by purchase, transfer and delivery into the possession of your orator, Samuel Barton, who is the holder and owner thereof.

And your orators would further show that afterwards, to wit, on or about the 10th day of August, 1870, the said Decatur and East St. Louis Railroad Company became consolidated with the said Toledo, Wabash and Western Railway Company, the consolidated company retaining the name of the latter and being thereafter known thereby. And by such agreement of consolidation the said Toledo, Wabash and Western Railway Company became the owner of the line of said Decatur and East St. Louis Railroad Company's railroad, with all the appurtenances and all other property thereunto belonging, subject to the lien of a certain mortgage trust deed, executed by said Decatur and East St. Louis Railroad Company, on or about the third day of June, 1869, to Isaac H. Knox, as trustee, to secure an issue of bonds, amounting to the principal sum of two million and seven hundred thousand dollars ($2,700,000), and also expressly subject to the payment of the principal and interest of the bonds secured by said mortgage trust deed.

692 And your orators further show that the railroad that was operated by the Toledo, Wabash and Western Railway Company above named, at the time of the institution of the actions hereinafter mentioned, is a continuous line of road leading from Toledo,

in the State of Ohio, through the States of Indiana and Illinois to East St. Louis, in Illinois, and to East Hannibal, Quincy and Hamilton, on the Mississippi River, in the State of Illinois. That said road was operated by said Toledo, Wabash and Western Railway Company, and is now operated by the Wabash Railway Company, defendan- therein, as one continuous line of railroad. That the rolling stock owned and used by said Toledo, Wabash and Western Railway Company, and covered by said deeds of trust or mortgages, and now owned by the Wabash Railway Company, defendant herein, was and is used indiscriminately upon all parts of the said continuous line of railroad, and was not, and is not, confined in its use to any portion of said railway, notwithstanding it was originally purchased or acquired as part of the rolling stock, furniture and equipment of one particular portion of said continuous line of railroad. That large amounts of the rolling stock then owned by the said several companies, and covered by mortgage trust deeds executed by them, has been replaced by new rolling stock, which is now in the possession of the defendant, the Wabash Railway Company, and large amounts of rolling stock have been purchased by said Toledo, Wabash and Western Railway Company and the defendant, the Wabash Railway Company, that are subject to the lien of and are covered by said deeds of trust or mortgages, notwithstanding its use indiscriminately as aforesaid.

Your orators further show that on or about the first day of February, 1873, the said Toledo, Wabash and Western Railway Company made and delivered its deed of trust or mortgage upon the entire line of railroad then belonging to it, and upon other property, to secure the payment of five million dollars ($5,000,000), payable in gold, which mortgage was made to the New York Guaranty
693 and Indemnity Company, as trustee. That said New York Guaranty and Indemnity Company afterwards resigned said trust created thereby, and one Valentine H. Ketcham was duly appointed trustee in its place and stead, and accepted the trusts created thereby. That bonds were issued under said last-named deed of trust or mortgage to an amount hereinafter set forth and specified, as found and determined in the actions and proceedings hereinafter mentioned.

That said Toledo, Wabash and Western Railway Company was in possession of said continuous line of railroad and of other property described in the said deeds of trust or mortgages, on or about 22d day of February, 1875, and thereafter, and that on or about said day a petition was filed in the Court of Common Pleas, Lucas County, Ohio; and that on or about the 24th day of February, 1875, a complaint was filed in the Cass County Circuit Court, State of Indiana, and that on or about the said 24th day of February, 1875, a complaint was filed in the Vermillon County Circuit Court, Illinois, all by the Metropolitan National Bank of the City of New York, and others, complainants, against said Toledo, Wabash and Western Railway Company and the defendants hereto, except the defendant railway company, all as trustees, and others; and that in the suits so commenced as aforesaid in each of said States of Ohio, Indiana and

Illinois a cross-bill or cross petition was filed by the said Valentine H. Ketcham, as trustee, praying that the property covered by the mortgage made to him as trustee as aforesaid might be sold to satisfy the amounts due to the holders of the bonds secured thereby, and that in the suit so as aforesaid instituted in the State of Ohio a decree was on or about the 14th day of December, 1875, entered in the said Court of Common Pleas, Lucas County, Ohio, by which it was ordered, adjudged and decreed that the several deeds of trust or mortgages hereinbefore set forth were each and all of them duly and legally made and recorded in pursuance of the laws of the several States of Ohio, Indiana and Illinois, and that the same were
694 valid conveyances for the purposes therein mentioned, and as such were liens upon the said railroad, and parts of the same prior to the lien of said mortgage trust deed, dated said first day of February, 1873, with the equipment, property, and franchises thereof, as more particularly is set forth in the said decree.

That in and by the said decree it was further found and adjudged that at the time the said several parts and divisions of the railroads, as hereinbefore described, were consolidated into and became a part of the line of railroad of the Toledo, Wabash and Western Railway Company, likewise and by virtue of the agreement of consolidation of said companies, became and was possessed of the rolling stock and machinery, implements and furniture used in connection therewith as aforesaid; all of which, by the terms of said deeds of trust or mortgages, were and continue to be subject to the liens created thereby; that said rolling stock and other property had been so used and commingled and renewed by said Toledo, Wabash and Western Railway Company; that the liens of said deeds of trust or mortgages could not be charged upon said property otherwise than as a whole; but said decree reserved, however, to all parties such legal and equitable rights of lien or otherwise, on the whole or any part of such personal property as might, in any proceeding to foreclose and sell under either of said several deeds of trust or mortgages, be found secured to them by the facts and the terms thereof; that in and by the said decree, by consent of said Valentine H. Ketcham, as trustee, and of the parties plaintiff in said suit, and in order to enforce the provisions of the deed of trust or mortgage made to said Ketcham as aforesaid, it was ordered that the road, property, equipments and franchises, as an entirety, of the said Toledo, Wabash and Western Railway Company should be sold by the special master commissioner hereinafter named, in lieu of said Valentine H. Ketcham, subject to the liens of all deeds of trust or mortgages prior to the said deed of trust or mortgage dated February 1, 1873, made and executed to the New York Guaranty and Indemnity Company, as trustee,
695 and that the aforesaid prior deeds of trust or mortgages should remain liens upon the property in the order of their priority, and that such sale should be made subject to the priority and continuance of said several mortgage liens.

That subsequently and at the February Term, 1876, of the said Circuit Court of Cass County, Indiana, and of the Circuit Court of Vermilion County, Illinois, decrees were made between the same

parties in the aforesaid suits, in all particulars adopting the said decree of the said Court of Common Pleas of Lucas County, Ohio, as the decree of said several courts respectively; that, in pursuance of the said decrees and all of them a sale was had of all the said property, effects, rights and franchises of the said Toledo, Wabash and Western Railway Company, in the city of Toledo, on the 10th day of June, 1876, to John W. Ellis, Alexander M. White, John T. Martin, George L. Seney, and Henry A. V. Post, hereinafter named as joint tenants; and that subsequently, and on or about the first day of January, 1877, a proper deed of conveyance was made, executed, and delivered to the said John W. Ellis and others by Jacob D. Cox, who had been appointed by said decrees Special Master Commissioner to execute the same, and who had made said sale, whereby was conveyed and assured to said John W. Ellis and others all and singular the railroad of the said Toledo, Wabash and Western Railway Company, extending from the city of Toledo, in the State of Ohio, southwesterly to and through the State of Indiana, and to East St. Louis, and to Hamilton on the Mississippi river, and to Naples and Camp Point, in the State of Illinois, an aggregate length of six hundred and one miles, including the right of way, roadbed, and the superstructures of all sorts thereon, all repair and other shops and manufactories, with the fixed and movable machinery, tools and implements thereunto belonging; all engines, cars, rolling stock and equipment of every kind and description; all supplies of timber, lumber, fuel, iron, steel and other supplies intended for use in running said railroad, and all equities to any real or personal property,
696 debts and demands due the said company, together with the franchises of said railway company and of the several original railway companies of which it was composed and the right and franchise to be a corporation, together with all corporate franchises of said company and of the said companies of which it was composed severally, including the rights and franchises of said several companies to be and act as corporations; to have and hold the same, with the appurtenances, subject as aforesaid unto the said John W. Ellis and others as joint tenants, and not tenants in common, and to the survivors and survivor of the said parties, and their assigns, and to the heirs of the last survivor of the said parties, forever, as fully and completely as the said Jacob D. Cox, by virtue of said last-named deed of trust or mortgage, and by virtue of the power of sale contained therein, and by virtue of said decrees, as a special Master Commissioner, could sell and convey the said premises, property and franchises, and not otherwise.

That said John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, on or about the 12th day of January, 1877, executed and delivered to the defendant the Wabash Railway Company a deed of the aforesaid property conveyed by them by the said Jacob D. Cox, as Special Master Commissioner, subject to the payment of all liabilities charged upon said property by the aforesaid decrees.

That said Wabash Railway Company forthwith entered into pos-

session of the said property, rights, equipment and franchises conveyed to them as aforesaid, and are now in possession thereof, and are now the owners and holders thereof, and are now engaged in operating and running the continuous line of railroad and in exercising the franchises conveyed and transferred to them as aforesaid.

That the said Wabash Railway Company, defendant herein, has never agreed to or assumed to pay the amounts due under the aforesaid deeds of trust or mortgages.

And your orator further shows that in the aforesaid actions
697 brought by the Metropolitan National Bank and others, in the petition and bills of complaint by which said actions were commenced, the plaintiffs prayed that a decree of foreclosure and sale of said mortgaged property together with the other property owned by said Toledo, Wabash and Western Railway Company might be rendered, with such provisions in said decree for the ascertainment of the priority of the respective incumbrances, and of the due application of the proceeds of said sale, according to the respective priorities of said parties in interest under said incumbrances, as to the court might seem meet and proper. That the said trustees, defendants herein, caused their appearance to be entered in said actions by one James R. Jessup, as their attorney, the James R. Jessup being also one of the trustees of the consolidated mortgage made by the said Toledo, Wabash and Western Railway Company upon the whole of the said continuous line of railroad; and that the said trustees, by the said James R. Jessup, as their attorney, interposed answers in said actions, setting up their liens by virtue of the said deeds of trust or mortgages, which said answers were identical as to their prayers for relief, and which answers did not pray that the said trustees be paid the amounts due them as such trustees, or any amounts, and did not ask for any relief to them as such trustees, for the benefit of the bondholders represented by them, and each of which said answers prayed as relief as follows, and not otherwise:

First. That the lien of his said trust for the payment of all the obligations and interest as above set forth may be declared and decreed to be a first lien on the premises, rights and property above described, and more particularly set forth in the said deed of trust.

Second. That in any future proceedings, orders, or decrees of this court in this cause, the priority of his said several liens may be fully preserved and in all particulars protected.

Third. That the said Toledo, Wabash and Western Railway Company, its receiver or agent, may be directed to pay the said
698 accrued interest, and all maturing interest on said obligations, out of the earnings of said Toledo, Wabash and Western Railway Company, as may be just and right in the premises.

Fourth. That no proceedings or decree for the sale of the railroad, franchise, and property of the said Toledo, Wabash and Western Railway Company, or for the sale of any part of said consolidated property, shall be had until after the rights of this defendant herein, by reason of the premises, shall have been first duly determined.

Fifth. That no sale shall be had by the plaintiffs of any of the road or property of said Toledo, Wabash and Western Railway Company, except subject in the hands or possession of any purchaser, to all the rights, equities and lien of this defendant as trustee in and to the same extent as he is now entitled to have the same.

"Sixth. That this defendant may also recover his cost herein incurred, and may have such other and further relief, order, judgment and decree as to him may hereafter be considered right and equitable."

That the said Edwin D. Morgan, as trustee named in said mortgage trust deed executed by said Wabash and Western Railway Company, on or about the 15th day of October, 1858; and the said Isaac H. Knox and James R. Jessup, as trustees named in said consolidated mortgage trust deed executed by said Toledo, Wabash and Western Railway Company, on or about the first day of February, 1867, permitted the aforesaid decrees to be entered, and did not obtain nor seek to obtain an absolute sale of the aforesaid property freed from all liens and incumbrances, as they might and could have done had they prayed therefor, and did not ask for payment of the aforesaid bonds owned by these plaintiffs and others, and the matured interest thereon, out of the proceeds of the sale of the said property, as they ought to have done; and that thereby your orators and the parties who were then the holders of all the bonds secured by the aforesaid mortgage trust deeds, have been hindered and delayed in the lawful recovery of the
699 moneys due them from the proceeds of a sale of said property; and that thereby the filing of this bill and the incurring of costs and expenses of this proceeding have been rendered necessary to protect the rights of your orator and the holders of the other bonds aforesaid in the premises.

And your orators charge that neither the said Edwin D. Morgan, as trustee, nor said Isaac H. Knox nor James R. Jessup, as trustees, justly or fairly represent the interests of your orators, nor of the holders of the other bonds accrued by the mortgage trust deeds in which they are named as trustees, and that they entitled to have them removed from their said offices of trustees, and that it is necessary to the proper protection of your orators' rights that they be removed therefrom by order of this Court.

That the property described in the mortgaged trust deeds, copies of which are annexed to the original bill of complaint filed in this cause, is inadequate security for the payment of the amounts secured thereby.

That the net earnings of the said Toledo, Wabash and Western Railway Company for twelve months prior to the first day of March, 1875, and for a long time previous thereto, were inadequate to meet and discharge the accruing obligation of interest upon said bonded indebtedness, and the interest accruing upon the bonds of its leased lines.

That upon the filing of the bill of complaint in the aforesaid-mentioned actions, which were brought in the States of Ohio, In-

diana and Illinois, and Jacob D. Cox was appointed Receiver of the aforesaid continuous line of railroad, and other property used in connection therewith.

That the bonds secured by mortgage upon said continuous line of railway amounted in the aggregate to the principal sum of over seventeen million dollars ($17,000,000), all of which said bonds bear interest at the rate of seven per cent. per annum, and that the interest thereon for one year amounts to about the sum of one million two hundred thousand dollars ($1,200,000), and that
700 during the years 1875 and 1876 the net earnings of the said line of railway did not equal the sum required to pay the interest on the first mortgage bonds.

That the officers of the defendant company issued and published a statement of the operations of the said railway in which it was stated that the net earnings for the year 1877 amounted to the sum of one million sixty thousand three hundred and ninety-eight dollars and seventy-four cents ($1,060,398.74), which said statement your orators aver was not a true statement, but concealed large expenditures which had been made by the said defendant during said year, amounting in the aggregate to about the sum of five hundred thousand dollars ($500,000), and your orator shows that the actual net revenue received from the operations of said railway was not sufficient to pay the amount of interest accruing during the said period upon the first mortgage bonds.

That the first mortgages, not including the unpaid coupons for two years and a half, as aforesaid, with interest thereon, upon said continuous line of railroad amount to the sum of nine million four hundred thousand dollars. That they all bear interest at the rate of seven per cent. per annum, and that the amount of said interest for any one year is six hundred and fifty-eight thousand dollars.

That the capital of said Wabash Railway Company is the sum of sixteen million dollars, and that all of its capital stock has been delivered to the said John W. Ellis and others, in consideration of the deed to it, dated and delivered as aforesaid on the 12th day of January, 1877.

That said Wabash Railway Company is insolvent, and has no property, assets or funds other than the property formerly of said Toledo, Wabash and Western Railroad Company, and such funds as were in the Receiver's hands and at the time of the sale made by the Receiver as aforesaid to the said John W. Ellis and others, and that have been delivered and paid over by the said Receiver to said Ellis, and by said Ellis to said Wabash Railway Company.

That on the 13th day of January, 1877, the said Wabash
701 Railway Company executed and delivered to George I. Seney, as trustee, a certain mortgage to secure certain promissory notes payable at various times, until January 1st, 1882, amounting in all to one million twenty-six thousand five hundred and fifty-five dollars and forty-two cents ($1,026,555.42). That said Wabash Railway Company has made its certain promissory notes, amounting to the said sum, and delivered the same to certain persons who now

hold the same, and of whose names your orator is ignorant. That said mortgage was duly recorded on or about the 19th day of January, 1877, in the proper offices. That of said notes so secured the sum of two hundred and six thousand five hundred and fifty-five dollars and forty-two ($206,555.42), became due and payable on the first day of January, 1878, and the same were paid on or prior to that date, together with the interest which had accrued upon the whole amount of said notes.

That said Wabash Railway Company, in place of applying the net earnings of the said road and of said mortgaged property in the discharge of the matured interest upon the securities in the respective order of their priorities, has applied, and avows its intention to continue to apply, the said net earnings to the payments of interest upon debts secured by liens inferior to the liens of the mortgages securing the bonds held by your orators, and especially to the payment of the interest and principal of the notes secured by the mortgage to George I. Seney, as trustee aforesaid, prior to making application of said net earnings to the discharge of the matured interest upon the liens upon said property that are prior to said mortgage, except upon the compliance by the owners of bonds secured by the said prior liens with certain onerous conditions.

Your orators further show that the said defendant company has inequitably discriminated among the holders of the bonds and coupons referred to in said circular, and that said company has paid and is paying coupons on all the said bonds, provided only that their holders deposit certain other coupons which had previously matured and accept scrip certificates, in accordance with the proposals
702 of said circular, and has refused and continues to refuse to pay current maturing coupons to all holders thereof who decline to make such deposits and to receive such certificates, and that said company refuses to pay the coupons which have matured during the years 1875, 1876, 1877, and the first six months of the year 1878, except upon certain onerous conditions.

And your orators further show that, by reason of the default in the payment of the interest upon their said bonds, the principal thereof has become due and payable. That said continuous line of railroad is a public highway, carrying the United States mails in all the States through which it passes. That no proceedings at law have been had, or any suit or action commenced, by or on behalf of your orators or any holders of any of the bonds of said company secured by the mortgage aforesaid for any interest unpaid or accrued thereon, except only this action.

Therefore, and inasmuch as your orators have no sufficient remedy in the premises save in this your Honor's Court of Equity, where matters of this kind are properly cognizable and relievable, your orators pray that the said Wabash Railway Company, the said Edwin D. Morgan, the Farmers' Loan and Trust Company, James R. Jessup, Isaac H. Knox and George I. Seney, each in his capacity as trustee, or one of the trustees named in the mortgage deeds aforesaid, may be made parties defendant to this amended bill of com-

plaint, and be required to answer the same on their several oaths, as fully and particularly as if specially interrogated in relation to the matters herein alleged.

That the said Edwin D. Morgan, the trustee named in said mortgage trust deed executed by said Wabash and Western Railway Company on or about the 15th day of October, 1858, and the said Isaac H. Knox and James R. Jessup, the trustees named in said mortgage trust deed executed by said Toledo, Wabash and Western Railway Company on or about the first day of February, 1867, may be removed and relieved of and from their said offices as trustees of the mortgages aforesaid.

703 That an account may be taken of the amount due to your orators and to the other holders of the bonds herein described, and that the sums so found to be due may be declared liens upon said property, and that the said defendant Railway Company may be decreed to pay the same by a short day to be named, and in default thereof the said railway of the defendant, and all property thereunto belonging, and all other property of said defendant mentioned in said mortgage trust deeds may be sold for the payment of said indebtedness, and the money realized from such sale distributed in accordance with the equities of the parties hereto.

That this Honorable Court, the premises considered, may order, adjudge and decree that the equipment bonds now held by your orators shall be considered secured by the consolidated mortgage aforesaid, and that they may be received in payment *pro rata* with the bonds issued under said consolidated mortgage in payment for the property covered by said mortgage at any sale that may be decreed thereof, in foreclosure of said mortgage.

That this Honorable Court will take under its control and management the property, of every kind and nature whatever, belonging to or in control of said Railway Company, covered or intended to be covered by the said mortgages or deeds of trust as hereinbefore recited, and protect the same from any and every person or persons interfering in anywise therewith, and appoint a Receiver or Receivers with full power to render effectual the orders of the Court made in this cause, and to operate the said railroad, and receive the income thereof during the pendency of this litigation, with the power usually given to such Receivers, and with authority to demand, receive and collect all the property of said Railway Company, wherever the same may be.

And that your orators may have such other and further or different relief in the premises as to your Honors may seem meet and just and in accordance with the rules of this Court.

May it please your Honor to grant unto your orators the
704 writ of subpœna of the United States of America, to be directed to the said Wabash Railway Company and the said Edwin D. Morgan, the Farmers' Loan and Trust Company, James R. Jessup, Isaac H. Knox and George I. Seney, each in his capacity as trustee, or one of the trustees named in the mortgage trust deeds aforesaid, the defendants respectively therein and thereby commanding them on a day certain to be named and under a certain penalty,

to be and appear before this Honorable Court, then and there to answer all and singular the premises, and stand to, perform and abide by such orders and decrees as may be made against them in the premises, and as shall seem meet and agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, &c.

S. A. HUFF,
CHAS. W. HASSLER,
Solicitors and of Counsel for Complainants.

JAMES MATTHEWS,
R. E. WILLIAMS,
Of Counsel.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

David J. Tysen, Jr., being duly sworn, deposes and says that he is one of the complainants, and that he has read the amended bill of complaint and knows the contents thereof to be true, except as to the matters therein stated to be upon information and belief, and as to them he believes it to be true.

DAVID J. TYSON, JR.

Subscribed and sworn to before me this 13th day of July, 1878.

[SEAL.]

S. G. LEATHAM,
Notary Public, New York Co.

705 And afterwards, to wit, on the 29th day of June, 1878, at the May term of said Court, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

And now on this day comes on to be heard the motion of complainants for the appointment of a Receiver in accordance with the prayer of the bill filed in this cause; and after argument of counsel, and the Court being sufficiently advised, it is ordered by the Court that said motion be, and the same is hereby, denied.

And the said Wabash Railway Company, having by an order of the Circuit Court of the United States for the Southern District of Illinois, made and entered this day in a certain cause pending therein, wherein the said David J. Tysen, Jr., *et al.*, are complainants, and said Wabash Railway Company *et al.*, are defendants, been required to file in said cause a bond, by the first day of October next, conditioned as in said order directed, is further ordered that the said bond when so filed do stand as security to the complainant in this cause.

It is further ordered that the said company file in this Court on or before the 1st day of October next a statement of the revenue, receipts, and disbursements of said road between the filing of the bill and the 1st of September next.

And afterwards, to wit, on the 3d day of July, 1878, at the May Term of said Court, in recess thereof, the following further proceedings in the above-entitled cause were had, to wit:

On motion of complainants, it is ordered that they have leave to amend their bill of complaint filed in this cause, and make additional parties defendants.

And afterwards, to wit, on the 5th day of August, 1878, at the May Term of Court, in recess thereof, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, Isaac H. Knox and James R. Jessup, as trustees, George I. Seney, as trustee, and the Farmers' Loan
706 and Trust Company, as trustee, by Baker, Hord and Hendricks, their solicitors, and enter their appearance herein.

And said appearance is in the words following to wit:

We hereby enter our appearance as of rule day in August, 1878, for all of the defendants to this suit, except the Wabash Railway Company for which we have heretofore appeared.

BAKER, HORD & HENDRICKS,
Solicitors for Defendants.

And afterwards, to wit, on the 30th day of September, 1878, at the May Term of said Court, before the Honorable Walter Q. Gresham, Judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, the Wabash Railway Company, the Farmers' Loan and Trust Company, Isaac H. Knox and James R. Jessup, trustees, Edwin H. Morgan, trustee, and George I. Seney, trustee, by their respective solicitors, and file their separate answers herein, in the words following, to wit:

And said answer of the Wabash Railway Company is in the words following, to wit:

The Answer of the Wabash Railway Company.

This defendant, now and at all times hereafter saving and reserving unto itself all benefit and advantage of exceptions, which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' original and amended bills of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material and necessary for it to make answer unto, this defendant answering, saith:

This defendant denies that it is insolvent, as alleged in said original and amended bills.

It admits that it owns and controls the Wabash Railway, as described in said bill of complaint, and holds the same subject to the priority and continuance of the several mortgage liens
707 enumerated and set forth in the degree in favor of Valentine H. Ketcham, trustee, to which reference is made in said bill of complaint.

As to all claims and allegations in said bill that complainants or either of them are owners of any of the bonds secured by said mortgage liens, this defendant has neither information nor knowledge as to the facts sufficient to form a belief, and it therefore denies the

same, and insists upon strict proof; and this defendant denies generally all the allegations of said bill so far as the same are inconsistent with this answer.

This defendant denies that the issue of bonds described in said bill as having been made by the Toledo and Wabash Railway Company, on the first day of May, 1863, and known as the equipment bonds, are a lien upon said Wabash Railway or any part thereof, as is alleged in said bill, and it denies the right of holders of said equipment bonds to have the same exchanged for bonds of the Toledo, Wabash and Western Railway Company of the date of February 1, 1876, as alleged in said bill of complaint, or in any other way to become chargeable upon the corporate property of said company.

This defendant moreover avers that the defaults in the payment of interest on said several mortgage bonds which are set out and described in complainants' bill all occurred before it became the owner of said property and that defendant is in no sense answerable for the same.

It further avers that the greater part of such defaulted interest is due to holders of bonds secured by the several first mortgages upon separate original divisions of the entire railway, and that the aggregate amount of such defaulted interest is sufficient to absorb the net earnings of said railway for a long period of time, leaving the current interest thereon as a continuing default except as otherwise provided for by this defendant.

This defendant, further answering, says that the several consolidations set forth in said bill, by which said Wabash Railway has become one continuous and co-operating line, have been made
708 in the common interest of the several original corporations uniting to form said railway, and each of the several roads or lines of railway be consolidated is of most value as a property while serving as a part of such continuous line. None of the mortgages made by the Toledo, Wabash and Western Railway Company, or by the original corporation of which it is composed, and which are recited in complainants' bill, are liens upon said railway property and franchises, as a whole, but only upon distinct and separate parts thereof.

This defendant submits to the Court that it is not competent or within the equitable jurisdiction of this Court, by reason of any default in payment of interest upon any of said bonds, to sell said railway, property and franchises, as an entirety upon the lien of any of said trusts, and subject to the priority and continuance of such as are prior liens thereto.

This defendant further avers that the aggregate amount of the indebtedness secured by mortgages made upon separate and distinct parts of said railway, together with debts secured upon the entire line of railway is so large that it would be impossible in the present condition of trade and business and financial interests for this company to pay the same, and that any proceedings requiring said road to be forced to a sale as an entirety, for cash or for payments other than by the application of the bonds in payment for the same, would,

if such a sale should be possible, destroy the capital stock and interest of the owners thereof, and would sacrifice and destroy a large amount of the junior liens, credits and other interests which are dependent upon the increasing earnings of said railway for their final restoration to full value.

In order, therefore, to save the several holders of said mortgage bonds, stockholders and parties having interest in the preservation of said line from the loss and injury which would result to them from proceedings to foreclose the mortgages and sell said railway, or so much as might by the respective terms thereof be embraced in the several liens or parts thereof, this defendant, with a concurrence of a large majority in interest of the holders of the bonds secured
709 by junior liens, has entered into an agreement with the holders of first mortgage bonds for the extension of time for payment of the said defaulted interest on the same; and this defendant avers that the holders of all of said mortgage bonds, except a small fraction, which does not exceed one-twentieth part in amount thereof, have assented to said extension and secured the same by a deposit of said coupons.

A copy of the said agreement is attached to the original bill herein and exhibited therewith, to which defendant prays reference may be had.

And it avers that all of the remaining holders of said first mortgage bonds and upon that portion of said railway upon which complainant's bonds are alleged to be a lien are actually forbearing the collection of said debt, or any proceedings or suits thereon; and defendant avers that by reason of the agreement aforesaid and its acceptance by the holders of so large an amount of the said bonds, the said first mortgage debt upon those portions of said railway upon which complainant's bonds may be a lien is restored to its par value in the market, whereby the holders are relieved from all occasion for foreclosure.

This defendant further avers that, in consideration of the premises, and of the agreements herein described, and the concurrence therein by so large a proportion of holders of first mortgage bonds, the owners of more than seven-tenths of the bonds secured by junior mortgages as part of the said agreement with first mortgage bondholders, above set forth, have also stipulated to forbear for many years the payment of the principal of their defaulted interest coupons of said date, amount and tenor as those which in said bill of complaint are set forth as belonging to complainants; and this defendant thereupon, in consideration of such extension, has stipulated to pay current interests to such holders of said bonds as entered into said agreement, and current interest also upon such defaulted coupons; and defendant offers a like stipulation to remaining holders of said bonds upon their assent to like terms; and it avers that all the re-
710 maining holders of said bonds, except complainants, have under consideration said agreement, and are not asking foreclosure of their mortgage debt; and that since the bill of complaint in this case was filed certain of the complainants also have voluntarily entered into said agreement; and as to the remainder of complainants

and all others of the holders of said bonds who may not finally assent to said agreement, if the road and property of the company shall at the final hearing of this cause be ordered to be sold, this defendant will seek to redeem its property from the remaining lien of said unfunded bonds by bidding for such property at public sale, for joint account of itself and those holders of said bonds with whom it has agreed; and to that end it prays that, upon proper evidence of the assent of such parties as are so interested, it may obtain from the Court power and authority so to bid and pay the same in the said bonds.

The defendant further states that in order to enable such remaining holders of said bonds as have not yet entered into the aforesaid agreement to intelligently decide upon uniting with the other parties in like interest in their said agreement with complainants, as well as for the purpose of marshalling and enforcing the various liens, by mortgage or otherwise, upon said road and its property, in any final decree which may be rendered herein, it is necessary that the account of the several liens upon said property, which is prayed for in complainant's bill, should include also findings of the amount, priority and extent respectively of the said liens upon all such appurtenances of said railway as do not pertain especially to any of the said several mortgaged premises or may be used in common on said railway as a whole, and that the distribution to be made of the proceeds of any sale that may be ordered should be by said decree established in advance; and, further, that the rights of said holders of the said equipment bonds, if any rights they have, be finally decided in advance of such decree.

This defendant further avers that a large portion of said property lies without the jurisdiction of this Court—to wit, within the
711 Southern District of Illinois and within the Northern District of Ohio. It avers that these complainants have brought suit in equity in the Southern District of Illinois, praying, as they do in this suit, for a foreclosure and sale of the said railway as an entirety, and that upon a sale made under concurrent decrees of that Court and of this a valid title to so much of the said property as lies elsewhere than in the Northern District of Ohio may be made; but this defendant avers that there are upon that portion of said railway lying within the Northern District of Ohio specific mortgage liens covering that portion only of said railway; that a part of the bonds owned by complainants, as alleged in their said bill, are liens also upon the last-named portion of said railway, viz., that which lies within the Northern District of Ohio, as well as upon the part of said railway in Indiana and Illinois. Yet, as defendant is informed and charges, complainants have commenced no suit in the said Northern District of Ohio to enforce the lien of their said bonds.

Whereupon this defendant submits to the Court, that before this cause is further proceeded with, said complainants should be required to produce and file in this Court such of said mortgage bonds as they may own and are seeking to foreclose, and it prays that an order may be made for that purpose, that the account prayed for in said bill of the amounts due upon said several mortgage liens should

include also proper findings as to the amount, priority, and extent of the said several liens upon such of the property and appurtenances upon said railway as are used indiscriminately upon it as a whole; and should include also an appraisement of said railway, its rolling-stock, fixtures and appurtenances, as a whole, and of the parts embraced within and applicable to, or covered by, said several liens respectively; that said decree should also find expressly that the bonds known as equipment bonds, referred to in said bill, are not a lien upon said railway, or upon said railway, or upon any part thereof; and that any decree for sale of the said railway and appurtenances as a whole should take effect only upon the entry
712 of concurrent decrees of the Circuit Court of the United States for the Southern District of Illinois and the Northern District of Ohio, of such tenor and effect that sale can be made jointly upon said decrees of the said railway and appurtenances as a whole, and the proceeds can be distributed to the trustees of the said several mortgage liens, in order and amounts as found concurrently by said decrees; and this defendant therefore prays that this cause shall first be submitted to a Master Commissioner, to be appointed by this Court, with explicit and complete instructions for stating his account in reference to all the foregoing particulars, and that the report of said Master should be submitted to the Court in such time as that the several bondholders, and also the stockholders of the company, may be fully apprised thereof, and have ample opportunity to examine the same before any final decree shall be rendered herein, and that this defendant may have such other and further relief order, and decree as may from time to time be right and needful to its equity herein.

By WAGER SWAYNE, *Solicitor.*

UNITED STATES OF AMERICA, *Southern District of New York:*

James A. Roosevelt, being sworn, says: That he is President of the Wabash Railway Company, defendant above named, and authorized as such to make this affidavit; that he has read the statements of the foregoing answer, and knows the contents thereof to be true, except as therein stated to be on information and belief, and as to those matters that he believes them to be true.

J. A. ROOSEVELT.

Subscribed and sworn to before me this 18th day of September, 1878.

[SEAL.] JAMES H. GILBERT,
United States Commissioner, Southern District of New York.

713 And said answer of the Farmers' Loan and Trust Company is in the words following, to wit:

And now comes the Farmers' Loan and Trust Company of the City of New York, a corporation organized and lawfully existing under the Laws of the State of New York, and one of the defendants

above named, and for answer to so much of the original and amended bills of the complainants in this suit as this defendant is advised to be material and necessary, and not admitting any of the averments of said bills, makes answer and says:

The Lake Erie, Wabash and St. Louis Railroad Company on the first day of August, 1853, being then a corporation organized and lawfully existing under the laws of the State of Indiana, and being lawfully engaged in constructing a railroad from the east line of Allen County, in said State, to the west end of Warren County, in said State, did, by its president and secretary, duly authorized thereto, execute and deliver to this defendant a deed of conveyance in fee simple, and did thereby convey to this defendant all the following property of the corporation above named, that is, its railroad made and to be made from the east line of Allen County, in the State of Indiana, to the west line of Warren County, in said State, including the right of way and the land occupied thereby, together with the superstructure and the tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road, and those to be purchased and paid for with the above-described bonds, and the bridges, viaducts, culverts, fences, depot grounds, and buildings erected or to be erected thereon, and all franchises, rights and privileges of the said corporation of, in, to, or concerning the same.

In trust, nevertheless, for the persons and uses following, that is to say, the several lawful holders, from time to time, of certain interest-bearing obligations of said company, to wit, the bonds of said company of the denomination of one thousand dollars each, and not exceeding twenty-five hundred in number, payable
714 the first day of August, 1865, with interest at the rate of seven per cent., payable semi-annually, both principal and interest being payable at the office of this defendant, in the City of New York. And this defendant avers that all of said bonds are out-standing in the hands of holders of the same for value; and this defendant avers that the lien of its said trust for the repayment of said bonds, and all interest thereon, is the first and best lien upon all that portion of said Wabash Railway which lies within the State of Indiana as aforesaid, and is also the first and best lien upon all the equipment and appurtenances of said Wabash Railway, so far as the same pertain to that portion of said railway, or may otherwise be covered by said lien.

The conditions of said trust were, that if the said Lake Erie, Wabash and St. Louis Railroad Company should fail to pay the principal or any part thereof, or any of the interest on any of said bonds, at any time when the same should become due and payable, according to the tenor thereof, when demanded, then, after sixty days from such default, upon request of the holder of such bond, the said trustee, or its successors, might, by itself or by a duly constituted substitute, enter into, and take possession of, or any part of said premises and property, and have and use the same, and should apply the profits of such use in the payment of the principal and interest of all of said bonds remaining due and unpaid. And said trustee,

in its discretion, might, or on the request of the holders of at least one-half of said bonds then outstanding, should cause said premises, or so much thereof as should be necessary to pay and discharge the principal and interest of all of such bonds as should be then due or unpaid, to be sold at public auction, as provided in said deed. And said trustee should, after deducting from the proceeds of such sale the costs and expenses thereof, and of managing the said property, apply the same in payment of said principal and interest due and unpaid on said bond; and should repay the residue, if any, to said corporation.

715 A true copy of said indenture is attached to the original bill of complaint herein and exhibited therewith, to which this defendant prays that reference may be made.

Afterwards, to wit, on or about said first day of August, 1865, by an agreement duly perfected between the several holders of said bonds and the Toledo, Wabash and Western Railway Company, then holding title to said premises, payment of the principal sum of said bonds was deferred until the first day of August, 1890, and new coupons were issued by the said Toledo, Wabash and Western Railway Company to the several holders of said bonds for the continuing payment of interest on said bonds.

This defendant avers that the Toledo, Wabash and Western Railway Company, on the first day of February, 1875, made default in the payment of said interest, and the instalment which upon that date fell due remains unpaid, together with those which fell due semi-annually thereafter prior to the first day of February, 1877. Payment of the instalment then maturing, and some of those maturing since, has been made by said Wabash Railway Company, defendant herein, to certain holders of said bonds, but this defendant does not know to what extent the same remains unpaid.

This defendant avers that the lien of its said trust as to said property is prior and superior to that of complainants in this suit, and to all other equities and interests therein.

This defendant avers, on information and belief, that all of the holders of said bonds, except perhaps the holders of one-twentieth in amount, have entered into an agreement with said Wabash Railway Company to forbear payment of the said defaulted interest, considering such agreement advantageous to the bonds so held by them, and to the trust estate of this defendant, and that none of the holders of said bonds are asking from it any enforcement of said lien against said Wabash Railway Company.

This defendant adopts the statements of the bill of complaint herein filed as to the successive acts of consolidation whereby the premises above described became part of the railroad of the

716 Toledo, Wabash and Western Railway Company and came afterwards into the possession and ownership of the Wabash Railway Company; but, as to the claims and allegations in said bill of complaint preferred and made, that complainants or any of them are owners of bonds secured by mortgages or trust deeds which are liens upon the premises conveyed to this defendant as above, it has no knowledge, and therefore denies the same; and it denies generally

all the allegations of said bill which may be inconsistent with its answer herein made.

This defendant further states that on or about the first day of August, 1853, the Toledo and Illinois Railroad Company, a corporation of Ohio, then the owner of so much of the present Wabash Railway as lies within said State, conveyed to this defendant its entire line of railroad and appurtenances, to secure to this defendant, as trustee, the payment of the bonds of the said Toledo and Illinois Railroad Company, in the sum of nine hundred thousand dollars, and the interest thereon, as the said bonds and interest are exhibited therein, and that said bonds are still outstanding, and have interest due thereon, and are a lien upon the Wabash Railway and appurtenances, as aforesaid; and that, by reason of the continuity of the said Wabash Railway, it is necessary that in any proceeding to foreclose and sell the same, the lien of its said trust, so executed by the Toledo and Illinois Railroad Company, should be duly protected and enforced.

Whereupon this defendant submits that in any further proceeding in this suit the lien of its said trust, as executed by the Lake Erie, Wabash and St. Louis Railroad Company, should be fully protected and enforced as a first lien upon the railroad and appurtenances, as above described, and should be accompanied by concurrent proceedings in a Court of proper jurisdiction, in Ohio, for foreclosure of said lien, and that said Wabash Railway should be sold only upon such concurrent decrees as may enable the said railway and appurtenances to be sold together as a whole, if such shall prove
717 to be the common interest of both the trust estates of this defendant in the premises.

Whereupon, this defendant prays that it may recover its costs in this behalf incurred, and may have such other and further relief, order and decree as may from time to time be right and needful in behalf of its equity herein.

By BAKER, HORD & HENDRICKS,
H. S. GREENE,
Solicitors for Defendant.

UNITED STATES OF AMERICA.
Southern District of New York, ss:

Robert C. Boyd, being sworn, says he is second vice-president of the Farmers' Loan and Trust Company, defendant above named, and authorized as such to make this affidavit; that he has read the statements of the foregoing answer, and knows the contents thereof to be true, except as therein stated to be on information and belief, and as to those matters that he believes them to be true.

R. C. BOYD.

Subscribed and sworn to before me this 25th day of September, 1878.

[SEAL.]

EDWARD L. OWEN,
United States Commissioner for the Southern District of New York.

And said answer of Isaac H. Knox and James R. Jessup is in the words following, to wit:

And now come the defendants above named, and for answer to the original and amended bills of complaint herein, or so much thereof as defendants are advised is material and necessary, and not
718 admitting any of the averments of said bills, make answer and say:

As to all the claims and allegations in the original bill of complaint and the amended bill herein, setting forth that complainants, or any of them, are owners of any of the bonds of the Toledo, Wabash and Western Railway Company, which are secured by trust estate conveyed to these defendants, they have neither knowledge or information save as derived from said original and amended bills; and, therefore, deny the same.

These defendants admit and further set up and declare that, as alleged in said bill of complaint, the Toledo, Wabash and Western Railway Company, on or about the first day of February, 1867, executed and delivered to these defendants a certain deed of conveyance in fee simple, a true copy whereof (marked B) is attached to and made part of said original bill, and thereby conveyed to them, and the said Isaac H. Knox and James R. Jessup, the following property, to wit:

All the right of way and railroad of the said Toledo, Wabash and Western Railway Company, extending from Toledo, in the State of Ohio, to and through the State of Indiana, and thence into the State of Illinois, to Meredosia, with branch of said road to Naples; and from said Meredosia to Camp Point, in said State of Illinois, and also with branch of said road from Clayton in said State, to the east bank of the Mississippi River at Hamilton, in said State, as then made or as thereafter should be made, and then used or as thereafter should be used, together with all the embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turn tables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all other things, real and personal then owned and used, or that thereafter should be owned or used, by the parties of the first part, in connection with the said railroad, and everything appertaining and appurtenant thereto; and all the franchises, powers, privileges and chartered or other rights of the said Toledo, Wabash and Western Railway Company, together with all the property, real and personal, of
719 said company then acquired or to be thereafter acquired at Quincy, in said State of Illinois, as also a certain contract made between the said company and the Chicago, Burlington and Quincy Railroad Company dated October 26th, 1866, with all the rights and privileges secured by said contracts, to said parties of the first part, and all other contracts.

In trust, nevertheless, for the uses and purposes following, that is to say: The several lawful holders from time to time of certain interest-bearing obligations about to be issued by said company, to wit, fourteen thousand bonds of said company of the sum of one thou-

sand dollars each, consecutively numbered from one to fourteen thousand, and no more, and two hundred bonds of said company of the sum of five thousand dollars each, consecutively numbered from fourteen thousand and one to fourteen thousand and two hundred, all of said bonds bearing date on the first day of February, 1867, and becoming due and payable quarterly on the first day of May, August, November, and February in each year, in the City of New York, and to be all convertible into the common stock of said company at par at the option of the holder at any time within ten years from their date. And the said company further agreed that they would pay the Commissioners named in the said deed of trust at the times and in the manner therein stated in the sum of fifty thousand dollars per year, for the purpose of being applied and used by such Commissioners as a sinking fund for the payment and extinguishment of the principal of all of the bonds issued under and secured by said deed of trust.

And these defendants, further answering, say that they forthwith accepted and entered upon said trust; that said deed was presently thereafter filed for record in the proper offices in the several States of Ohio, Indiana and Illinois, and duly recorded in the manner prescribed by the laws of said States, respectively, and that bonds of said issue to the amount of two million six hundred and ten thousand dollars were thereupon disposed of by said company to divers purchasers in good faith and for full value, and who
720 relied upon said trust for their security.

The conditions of said trusts were, among others, that if the said above-named corporation should well and truly pay the said interest coupons and the principal sum of said bonds as the same should respectively fall due, and the said semi-annual installments of the sinking fund, then the said property so conveyed should be and remain in the undisturbed possession of said company; but if the said corporation should at any time make default for six months in the payment of the said interest coupons, or any of them, or principal of the said bonds, or any of them, or of the said installments of a sinking fund, then, upon the request in writing of a majority in interest of the holders of said bonds outstanding, upon which interest or principal should be unpaid, as aforesaid, the said trustees might and should take actual possession of all and singular the property and effects mortgaged as above, and make all useful and necessary repairs thereto, and should receive the income and profits of the said railroad and mortgaged premises for the security hereinbefore declared.

And if the interest and principal due on said bonds were not paid by the said company within six months, or from the net proceeds of said road, then said trustees should further cause the said mortgaged premises, or so much thereof as shall be necessary to pay and discharge the entire principal and interest, whether due or not, of all of said bonds then unpaid, together with all expenses of sale, to be sold at public auction, as in said deed further provided, and from the proceeds of said sale should pay the entire principal and interest

remaining unpaid on said bonds, the residue, if any, after making such payment and payments of the costs of such trustees and of managing the property, to be by said trustees paid over to the corporation above named.

These defendants aver that the Toledo, Wabash and Western Railway Company, on the first day of May, 1875, made default in the payment of said interest, and the installment which upon
721 that date fell due remains unpaid, together with those which fell due semi-annually thereafter, prior to the first day of May, eighteen hundred and seventy-seven. Payment of the installment then maturing, and of those maturing since, has been made by the Wabash Railway Company, defendant herein, to certain holders of said bonds, but these defendants do not know to what extent the same remains unpaid.

These defendants deny that the issue of bonds described in said bill as having been made by the Toledo and Wabash Railway Company on the first day of May, 1863, and known as the equipment bonds, are a lien upon said Wabash Railway, or any part thereof, as is alleged in said bill, and he denies the right of holders of said equipment bonds to have the same exchanged for bonds of the Toledo, Wabash and Western Railway Company of the date of February 1st, 1867, as alleged in said bill of complaint or in any other way to become sharers with the holders of said bonds in the trust estate of these defendants.

For answer to so much of the said bill of complaint as charges upon these defendants supineness or misfeasance as trustees in the foreclosure proceedings, whereby the said railway and appurtenances were foreclosed, as set forth in complainants' bills, and by which complainants, as holders of bonds secured by said indenture, have been hindered or delayed in the lawful recovery of moneys due them from the sale of said property, these defendants deny all the averments of said bill, and state, upon information and belief, that the complainant David J. Tysen, Jr., by whom alone such complainant is in his original bill preferred, was not at the time of said proceedings the owner of any such bonds which he now holds, but purchased said bonds since said proceedings were had with knowledge of the facts, and for a price less than the par value thereof.

And these defendants further state that in and by the said indenture it is stipulated that, upon default in payment of the interest upon the bonds secured thereby, or in the payment of the
722 sinking fund, or in the payment of the principal of the said bonds when due, and the continuance for six months of such default, in either case, and upon written notice to these defendants, as trustees, from persons holding a majority of the outstanding bonds secured by their lien, then, these defendants, as trustees, should proceed to enforce the same, but that no such demand was ever made of these defendants.

And these defendants further state that at the time of said proceedings the belief was common to themselves and to the beneficiaries of their trust that a sale for money only of said railway and appur-

tenances, and the application of the proceeds of such sale in payment of the liens upon said railway in order of priority, would realize a price less than sufficient to discharge the prior liens thereon, and would result in the total loss of all the interest in said railroad and appurtenances of these defendants as trustees and of the beneficiaries in said trust.

And these defendants are informed and believe that, since the sale complained of in said bills, the Wabash Railway Company, now holding title through said sale, has procured from a majority of the holders of first mortgage bonds consent to forbear the enforcement of their liens for their defaulted interest as found by said decree, for a long period of years, and has obtained permission from the holders of the said first and second mortgage bonds to resume payment of the current interest due to the holders of the bonds secured by lien of these defendants, as trustees, and to apply thereto the revenues of the said Wabash Railway after payment of the current interest on said first mortgage bonds, and in advance of such defaulted interest, whereby said bonds again enjoy their interest-bearing character, and have also increased in value in the market.

These defendants further aver that, prior to the commencement of this suit, none of the holders of said bonds were asking of them, as trustees, enforcement of said lien; that none of said holders, except some of said complainants, have since made such request,
723 and that this suit was begun by complainant Tysen, without consultation with or demand made on these defendants as trustees. Nevertheless, these defendants are ready to proceed to faithfully enforce the legal rights of the complainants upon proof of interest in said trust estate.

And these defendants further state that the just enforcement of the said lien requires also proceedings in some court of proper jurisdiction in Ohio, so that the said railway and appurtenances may, if sold, be offered as a whole; and, inasmuch as the lien of the trust estate of these defendants covers also so much of the said Wabash Railway as lies within said State, these defendants are prepared, if these complainants' rights and ow-ership of bonds shall be established, to commence proceedings in Ohio to procure such sale.

Whereupon these defendants aver their belief that the course pursued by complainants in seeking to enforce at this time the collection of their debt for such defaulted interest, and to include the said equipment bonds as liens of equal right with those secured by the trust lien of these defendants is necessarily and willfully injurious to the trust estate of these defendants in the premises, and to the common interest of all holders of the bonds secured thereby; and these defendants so present that interest to the Court, and pray that if, in the event of sale and distribution made in these proceedings at complainant's instance, the proceeds be insufficient for full satisfaction of the bonds and interest secured to these defendants as trustees, they may have their costs and expenses in these proceedings, including counsel fees, decreed to them against complainants, as between complainants and the other holders of the bonds secured by the same lien.

And these defendants further pray that they may have such other and further and different relief as may from time to time be right and needful to their equities herein.

By BAKER, HORD & HENDRICKS AND
H. S. GREENE,
Solicitors for Defendant.

724 UNITED STATES OF AMERICA,
Southern District of New York, ss:

James R. Jessup, being duly sworn, deposes and says: That he is one of the trustees, defendants above named; that he has read the statements of the foregoing answer, and knows the contents thereof to be true, except as therein stated to be alleged on information and belief, and that as to those matters that he believes them to be true.

JAMES R. JES-UP.

Sworn to and subscribed before me this — day of September, 1878.

[SEAL.] EDWARD L. OWEN,
United States Commissioner for the Southern District of New York.

And said answer of Edwin D. Morgan is in the words following, to wit:

And now comes Edwin D. Morgan, one of the defendants above named, and for answer to so much of the original and amended bills filed by complainants herein as defendant is advised is material or necessary, and not admitting any of the averments of said bill, makes answer and says:

The Wabash and Western Railway Company, on the fifteenth day of October, 1858, being then a corporation organized and lawfully existing under the Laws of the State of Indiana, did, by its president and secretary, duly authorized thereto, execute and deliver to this defendant a deed of conveyance in fee simple, and did thereby convey to this defendant all the following property of the corporation above named, that is to say: Its railroads, made and to be made, extending in the State of Indiana, from State line, in Allen County, to State line city, in Warren County, in said State, including the
725 right of way and the land occupied thereby, together with the superstructure and the tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights and privileges of the said corporation of, in, to or concerning the same.

In trust, nevertheless, for the persons and uses following, that is to say: The several lawful holders, from time to time, of certain interest-bearing obligations about to be issued by said company, to wit, the bonds of said company of the denomination of one hundred,

five hundred and one thousand dollars each, and not exceeding one million five hundred thousand dollars in all, payable the first day of November, 1878, with interest at the rate of seven per cent. per annum, payable semi-annually, both principal and interest being payable at the office of this defendant in the City of New York.

Said deed of trust was presently thereafter filed for record and duly recorded in the Recorder's office of each of the proper counties of the State of Indiana. A true copy of said deed and of all exhibits pertaining thereto is attached to the original bill of complaint and made part thereof, to which this defendant prays reference may be made.

And this defendant further says that all of its said bonds were presently thereafter disposed of by said company to divers purchasers in good faith and for full value, and who relied on said trust for their security.

The conditions of said trust were that if the said Wabash and Western Railroad Company should fail to pay the principal, or any part thereof, or any of the interest on any of said bonds, at any time when the same should become due and payable, according to the tenor thereof, when demanded, then, after sixty days from such default, upon request of the holder of such bond, the said trustee, or his successors, might himself or by a duly constituted substitute enter into and take possession of all or any part of said premises
726 and property, and have and use the same, and should apply the profits of such use in payment of the principal and interest of all of said bonds remaining due and unpaid. And said trustee, in his discretion, might, or on the request of the holders of at least one-half of said bonds then outstanding should, proceed by judicial decree to foreclose and sell the railroad and other property covered by said deed; and said trustee should, after deducting from the proceeds of such sale the costs and expenses thereof, and of managing said property, apply the same in payment of said principal and interest due and unpaid on said bonds; and should repay the residue, if any, to said corporation.

This defendant further says that the lien of said trust is, as to said property, prior and superior to that of the complainants in this cause, and to all other liens upon said property, or equities or interests therein.

Save and except a certain deed of mortgage, covering the same railroad and other property, which last mentioned mortgage was executed and delivered to the Farmers' Loan and Trust Company, also a defendant herein, as trustee of said mortgage, to secure the payment of two millions five hundred thousand dollars of the bonds of the Lake Erie, Wabash and St. Louis Railroad Company, then the lawful owner and holder of said property, and executed by said railroad company on the eighth day of November, 1853, and before the acquisition of said property by the Wabash and Western Railroad Company, the grantor in said trust deed to this defendant.

This defendant avers that The Toledo, Wabash and Western Railway Company on the first day of May, 1875, made default

in the payment of said interest, and the installment which upon that date fell due, remains unpaid, together with those which fell due semi-annually thereafter, prior to the first day of May, 1887. Payment of the installment then maturing, and some of those maturing since, has been made by said Wabash Railway Company, to certain holders of said bonds, but this defendant does not know to what extent the same remains unpaid.

727 This defendant adopts the statements of the bill of complaint herein filed, as to the successive acts of consolidation, whereby the premises above described became part of the railroad of the Toledo, Wabash and Western Railway Company, and came afterwards into the possession and ownership of the Wabash Railway Company; but as to the claims and allegations in said bill of complaint preferred and made, that complainants, or any of them, are owners of bonds secured by mortgages or trust deeds, which are liens upon the premises conveyed to this defendant, he has no knowledge, and therefore denies the same, and he denies generally all the allegations of said bill which may be inconsistent with his answer herein made.

For answer to so much of the said bill of complaint as charges upon this defendant supineness or misfeasance, as trustee, in the foreclosure proceedings, whereby the said railway and appurtenances were foreclosed and sold under the said "gold bond" mortgage of the Toledo, Wabash and Western Railway Company, and whereby complainants, as holders of bonds secured by said indenture have been hindered or delayed in the lawful recovery of moneys due them from the sale of said property, this defendant denies all the averments of said bill, and states upon information and belief that the complainant David J. Tysen, Jr., by whom alone such complaint is in his original bill preferred, was not at the time of said proceedings the owner of any of such bonds which he now holds, but purchased said bonds since said proceedings were had, with knowledge of the facts, and for a price less than the par value thereof.

And this defendant further states that in and by the said indenture it is stipulated that upon default in payment of the interest upon the bonds secured thereby, or in the payment of the principal of the said bonds when due, and the continuance for sixty days of such default in either case, and upon written notice to this defendant, as trustee, from persons holding a majority of the outstanding bonds secured by their said lien, then this defendant, as

728 trustee, should proceed by judicial decree to foreclose and sell the property embraced within said trust; but that such sale should be made subject to the first mortgage made by the Lake Erie, Wabash and St. Louis Railroad Company, as above set forth.

The defendant avers that no such request was made of him by a majority in interest of the holders of said bonds, nor at the time of or during said proceedings was any request whatever made of this defendant, as trustee, to foreclose and sell by any holder of said bonds; nevertheless, this defendant did procure said property to be foreclosed and sold, subject to said first lien of the Lake Erie, Wabash and St. Louis Railroad Company, as provided in said trust, but

that the same depended upon the consent of holders of the bonds of the said last-named company; and this defendant avers that the sale made in said proceedings was by mutual consent, and upon the fullest understanding of the holders generally of the bonds secured upon said railway and appurtenances, including, as this defendant believes, the bonds which this defendant represented as trustee, and such sale was, in the belief of this defendant, for the best interest of his trust estate, as he still believes it to have been.

This defendant avers that no such request as is provided in said deed has yet been made of this defendant, as trustee, to proceed to foreclose and sell said property; yet this defendant is prepared to represent the holders of said bonds in these proceedings, and to faithfully perform all duties of his trust as he may be instructed by the Court.

And this defendant further states that, prior to the commencement of this suit, none of complainants made demand upon him to enforce the lien of said trust, or otherwise advise him about the same; and, further, that the just enforcement of said lien requires also proceedings in some Court of proper jurisdiction in Ohio, so that the said railway and appurtenances may, if sold, be offered as a whole; and this defendant is also trustee of a certain mortgage lien upon so much of the said Wabash Railway as lies within said
729 State, and is prepared, if these complainants' rights and ownership of bonds shall be established, to commence proceedings in Ohio to procure such sale.

And this defendant further states that no holders of said bonds, except complainants, are now requiring the enforcement of the lien of his said trust, but that the holders of the greater part of all said bonds have stipulated with said Wabash Railway Company to forbear collection of their debt for such defaulted interest; and this defendant is advised, and believes, the course of these complainants dangerous and prejudicial to his trust estate; and this defendant submits that in the event that upon the sale of the said railway and appurtenances, as prayed for in complainants' bill, the proceeds of such sale, as applicable to the payment of the bonds secured by the trust liens of this defendant, and applicable also to the costs and reimbursement of this defendants, as trustee, prove insufficient for the same, then this defendant may have all such costs and reimbursement of complainants as between them and the other holders of said bonds.

And this defendant further prays that he may have, from time to time, such further relief, order and decree as may be right and needful in behalf of his equity herein.

By BAKER, HORD, HENDRICKS, AND H. S. GREENE,
Solicitors for Defedant.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Edwin D. Morgan, being sworn, says: That he is the defendant above named; that he has read the foregoing answer, and knows

the contents thereof to be true, except as to the matters therein
730 stated to be upon information and belief, and as to them he believes it to true.

E. D. MORGAN.

Subscribed and sworn to before me this 27th day of September, 1878.

[SEAL.] EDWARD L. OWEN,
United States Commissioner for the Southern Dist. of N. Y.

And said answer of George I. Seney is in the words following, to wit:

And now comes George I. Seney, and being, as trustee, one of the defendants above named, for answer to so much of the original and amended bills of the complainants herein as this defendant is advised is material and necessary he should answer, says:

He admits, and does further set up and declare, that on or about the thirteenth day of January, 1877, the Wabash Railway Company, also a defendant herein, did execute and deliver to this defendant its certain deed of trust or mortgage, and did thereby convey to this defendant the following described property of the corporation aforesaid:

All of the railroad bed and right of way of the party of the first part, extending from the City of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to East St. Louis, on the easterly bank of the Mississippi River; and from Decatur to East Hannibal, and from Bluffs northwesterly to Quincy, and from Clayton to Hamilton, and from East Hannibal to Quincy aforesaid, together with all the embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engines and other houses, depots, turntables, machinery, cars, tools, rolling-stock, lots, lands, buildings and offices, and other
731 things, real and personal, then owned or used, or that thereafter might be owned or used, by the said Wabash Railway Company in connection with the said railroad, and every appurtenant thereto; and all the powers, privileges, franchises, and chartered or other rights of the said Wabash Railway Company, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and all reversions, remainders, tolls, incomes, rents, issues, and profits thereof, and all contracts, leases, and rights then existing or that might thereafter be acquired by said company with other corporations, companies, or individuals, and all the estate, right, title, interest, and demand, as well at law as in equity, of the said company, in and to the same, and to every part thereof, but subject to all prior mortgages which at that time should be outstanding against said property and not released, satisfied or otherwise discharged.

In trust, nevertheless, for the persons and uses following—that is to say, the several holders at any time of certain promissory notes

of the said Wabash Railway Company for various sums, amounting in the aggregate to about the sum of one million twenty-six thousand five hundred and fifty-two dollars and forty-two cents, all bearing interest at seven per cent. per annum, and payable at different times, as in said mortgage described.

And this defendant, further answering, says that he forthwith accepted and entered upon said trust; that said deed was presently thereafter filed for record in the proper offices in the several States of Ohio, Indiana and Illinois, and duly recorded in the manner prescribed by the laws of said States respectively.

A copy of said deed is exhibited herewith, to which this defendant prays that reference may be had for the particulars thereof.

This defendant avers that on or about the first day of January, 1878, the full sum of two hundred and six thousand five hundred and fifty-five and 42/100 dollars ($206,555.42) of the principal sum of said notes, with interest on all of said notes to that
732 date, was paid by said Wabash Railroad Company, but that the remainder of said notes, amounting to the principal sum of eight hundred thousand dollars, with interest thereon at seven per cent. per annum from the first day of January, 1878, are still wholly unpaid, and are a lien upon the entire railway and appurtenances of said Wabash Railway Company by virtue of said mortgage deed to this defendant.

The defendant admits that the several liens by way of deeds of trust or mortgage upon portion of said Wabash Railway, as enumerated in complainants' bill, are prior and superior to the lien of this defendant as trustee upon the same, but as to the averments of the said original and amended bills that complainants, or any of them, own bonds secured by any of said liens this defendant has no knowledge, and therefore denies the same; and this defendant denies that the issue of bonds described in said bill as having been made by the Toledo and Wabash Railway Company on the first day of May, 1863, and known as the equipment bonds, are a lien upon said Wabash Railway, or any part thereof, as is alleged in said bill, and it the right of holders of said equipment bonds to have the same liens exchanged for bonds of the Toledo, Wabash and Western Railway Company of the date of February 1st, 1867, as alleged in said bill of complaint, or in any other way to become chargeable upon the corporate property of said company.

This defendant further avers that a large portion of said Wabash Railway lies without the jurisdiction of this Court—to wit, within the Southern District of Illinois and within the Northern District of Ohio. It avers that these complainants have brought suit in equity in the District of Indiana praying, as they do in this suit, for a foreclosure and sale of the said railway as an entirety, and that, upon a sale made under concurrent decrees of that Court and of this, a valid title to so much of the said property as lies elsewhere than in the Northern District of Ohio may be made, but this defendant avers that there are upon that portion of said railway lying within the

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Northern District of Ohio specific mortgage liens covering
733 that portion only of said railway; that a part of the bonds owned by complainants, as alleged in their said bill, are liens also upon the last-named portion of said railway—viz., that which lies within the Northern District of Ohio—as well as upon the part of said railway in Indiana and Illinois, yet, as defendant is informed and charges, complainants have commenced no suit in the said Northern District of Ohio to enforce the lien of their said bonds.

Whereupon, this defendant submits to the Court that he is entitled to redeem said railway and appurtenances as from the prior liens above set forth, and that before this cause is further proceeded with said complainants should be required to produce and file in this Court such of said mortgage bonds as they may own and are seeking to foreclose; and he prays that an order may be made for that purpose; that the account prayed for in said bill of the amounts due upon said several mortgage liens should include also proper findings as to the amount, priority and extent of the said several lines upon such of the property and appurtenances upon said railway as are used indiscriminately upon it as a whole; and should include also an appraisement of said railway, its rolling stock, fixtures and appurtenances as a whole, and of the parts thereof embraced within and applicable to or covered by said several liens respectively; that said decree should also find expressly that the bonds known as equipment bonds, referred to in said bill, are not a lien upon said railway or any part thereof; and that any decree for sale of the said railway and appurtenances as a whole should take effect only upon the entry of concurrent decrees of the Circuit Court of the United States for the Southern District of Illinois and the Northern District of Ohio of such tenor and effect that sale can be made jointly upon said decrees of the said railway and appurtenances as a whole, and the proceeds can be distributed to the trustees of the said several mortgage liens in order and amounts as found concurrently by said decrees; and this defendant therefore prays that this cause shall first be submitted to a Master Commissioner, to be appointed by
734 this Court, with explicit and complete instructions for stating his account in reference to all the foregoing particulars, and that the report of said Master should be submitted to the Court in such time as that this defendant may fully be apprised thereof, and have ample opportunity to examine the same.

And this defendant prays that he may have from time to time such further relief, order or decree as may be right and needful in behalf of this his equity above set forth.

By BAKER, HORD & HENDRICKS, AND
H. S. GREENE,
Solicitors for Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

George I. Seney, being sworn, says that he is the defendant above named; that he has read the foregoing answer and knows the con-

tents thereof to be true, except as to the matters therein stated to be upon information and belief, and as to them he believes it to be true.

GEORGE I. SENEY.

Sworn to and subscribed before me this 27th day of September, 1878.

[SEAL.]

EDWARD L. OWEN,
United States Commissioner for the Southern District of New York.

And afterwards, to wit, at the November Term of said Court, on the 22nd day of November, 1878, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

735 Comes now the complainant by counsel, and files its replication to the answer of the Loan and Trust Company herein in the words following, to wit:

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifest insufficiencies of the said answer, for replication thereunto, say:

That they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants; without this: that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver and prove as this honorable Court shall direct, and humbly pray as in said bill they have already prayed.

S. A. HUFF,
Solicitor for Complainant.

R. E. WILLIAMS,
C. W. HASSLER, AND
JAMES MATTHEWS,
Of Counsel.

And again comes the complainant, by counsel, and files its replication to the answer of Isaac H. Knox and James R. Jessup, trustees herein, in the words following, to wit:

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say:

That they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insuffi-
736 cient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready

to aver and prove as this honorable Court shall direct, and humbly pray, as in said bill they have already prayed.

S. A. HUFF,
Solicitor for Complainant.

R. E. WILLIAMS,
C. W. HASSLER, AND
JAMES MATTHEWS,
Of Counsel.

Comes now the complainant, by counsel, and files its replication to the answer of Edwin D. Morgan, trustee herein, in the words following, to wit:

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say:

That they will aver and prove their said bill to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true. All which matters and things, and these repliants are, and will be, ready to aver and prove as this honorable Court shall direct, and humbly pray as in said bill they have already prayed.

S. A. HUFF,
Solicitor for Complainant.

R. E. WILLIAMS,
C. W. HASSLER, AND
JAMES MATTHEWS,
Of Counsel.

737 Again comes the complainant, by counsel, and files its replication to the answer of George I. Seney, trustee herein, in the words following, to wit:

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say:

That they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove as this honorable Court shall direct, and humbly pray as in said bill they have already prayed.

S. A. HUFF,
Solicitor for Complainant.

R. E. WILLIAMS,
C. W. HASSLER, AND
JAMES MATTHEWS,
Of Counsel.

Comes now the complainant, by counsel, and files its replication to the answer of the Wabash Railway Company herein. In the words following, to wit:

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say:

That they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer is uncertain, untrue and insufficient.

738 Wherefore these repliants pray as in said bill they have already prayed.

S. A. HUFF,
Solicitor for Complainant.

R. E. WILLIAMS,
C. W. HASSLER, AND
JAMES MATTHEWS,
Of Counsel.

And afterwards, to wit, at the May Term of said Court, on the 6th day of June, 1879, before the Honorable Walter G. Gresham, Judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant by counsel, and files his motion and notice to remand this cause to the Fountain Circuit Court; which motion is in the words following, to wit:

The complainants move the Court for an order remanding the above-entitled cause to the Fountain Circuit Court of Indiana, and assigns the following reason therefor, viz.:

That the several of the complainants are citizens of the State of New York, and that several of the defendants, who are necessary parties to this action, are also citizens of the State of New York.

Dated June 3d, 1879.

CHARLES W. HASSLER,
Of Counsel.

And afterwards, to wit, at the May Term of said Court, on the 16th day of June, 1879, before the Honorable John M. Harlan, one of the Judges of said Court, the following further proceedings in the above-entitled case were had, to wit:

739 The motion herein of the complainants to remand this cause to the State Court for want of jurisdiction in the Court is overruled; to which ruling of the Court the complainant at the time excepted.

And afterwards, to wit, at the May Term of said Court, on the 22d day of July, 1879, before the Honorable Walter Q. Gresham, Judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their solicitors, and thereupon the complainant David J. Tyson, Jr., dismisses his bill herein, and at the

same time Samuel Barton, one of the intervening complainants, also dismissed his bill herein.

And afterwards, to wit, at the November Term of said Court, on the 23d day of January, 1880, before the Honorable Walter Q. Gresham, Judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant by his solicitors, and upon his motion it is ordered that the above-entitled cause be, and the same is hereby, dismissed.

And also come the intervenors, and dismiss their intervening petition herein.

And afterwards, to wit, at the May Term of said Court on the 13th day of July, 1880, before the Honorable Walter Q. Gresham, Judge, as aforesaid, of said Court, the following further proceedings in the above-entitled cause were had, to wit:

Now comes Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, S. M. Whittemore, Townsend Underhill, M. L. Underhill and Thomas W. Mayo, by Charles W. Hassler, their solicitor and counsel, and The Wabash Railway Company, by Baker, Hord & Hendricks, its solicitors; and it appearing to the Court that in the month of May, 1878, one David J. Tyson, Jr., did file his bill in equity in the Fountain Circuit Court, in the State of Indiana, against The Wabash Railway Company and others, defendants, and that on the 13th day of said May the said Edward De Rose and the other persons above named were made parties plaintiff by
740 order of said Court, and that subsequently thereto the cause was removed into this Court.

And it further appearing that on the 22d day of July, 1879, an order was made in this cause dismissing the same as to said David J. Tyson, Jr., and one Samuel J. Barton, an intervenor herein, but not as to any others of the complainants; and it further appearing that an order was made and entered upon the records of this Court on the 23d day of January, 1880, as follows: "Comes now the complainant, by counsel, and upon his motion it is ordered that the above-entitled cause be, and the same is hereby, dismissed. And at the same time come the intervenors, by counsel, and dismiss their intervening petition therein," which order was not moved for or assented to by said De Rose and the other persons, persons above named, or either of them, or by their counsel, as appears from the affidavits of Samuel A. Huff and Charles W. Hassler, filed this day:

It is ordered that the above-recited order, entered on said 23d day of January, 1880, be, and the same is hereby, canceled and made null and void as to said complainants Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, S. M. Whittemore, Townsend Underhill, M. L. Underhill and Thomas W. Mayo.

And now, by leave of Court, the parties file their supplemental and amended bill herein in the words following, to wit:

To the Judges of the Circuit Court of the United States for the District of Indiana:

Your orators, Benjamin F. Ham, a resident and citizen of the State of New Jersey; Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, G. M. Whittemore, Townsend Underhill, residents and citizens of the State of New York, and Thomas Mayo, a resident and citizen of the State of Connecticut, on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit, bring, by leave of Court first had and obtained, this
741 amended supplemental bill of complaint against the Wabash Railway Company, a corporation of the States of Ohio, Indiana and Illinois, and a citizen of said States; the Toledo, Wabash and Western Railway Company, a corporation of the States of Ohio, Indiana and Illinois, and a citizen of said States; the Wabash, St. Louis and Pacific Railway Company, a corporation and a citizen of the States of Ohio, Indiana, Illinois and Missouri, and against Isaac H. Knox, a resident and citizen of the State of Missouri, and James R. Jessup, a resident and citizen of the State of New York, as trustees.

And thereupon your orators complain and say:

First.

That on and prior to the first day of October, 1862, the Toledo and Wabash Railway Company was a corporation duly organized and existing under and by virtue of the laws of the States of Indiana and Ohio, and owning a line of railway extending from the City of Toledo, in the State of Ohio, and passing through the Counties of Lucas, Henry, Fulton, Defiance and Paulding, in the said State, and through the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point in the west line of State Line City, in the said last-named county.

And your orators further show that on or about the said first day of October, 1862, the board of directors of said company, in pursuance of the power and authority in them by law vested, resolved that the president of said company be authorized and directed to cause to be prepared bonds of said company to an amount not exceeding six hundred thousand dollars ($600,000), for the purpose of providing further equipment, and satisfying other requirements of the company, such bonds to bear date November 1st, 1862, and the principals thereof to be payable to a trustee, or the bearer, in the City of New York, on the 1st day of May, 1863, and to bear
742 interest at seven per cent., payable semi-annually, at the same place, said interest to be represented by coupons; the bonds so to be issued to be executed in the usual manner, and under the corporate seal of the company, and to be convertible into the common stock of the company at par at any time within five years from the date thereof, but should not be entitled to a dividend for

any time during which the holder thereof should have received interest; and that the Executive Committee of said Company be authorized to issue, sell and dispose of said bonds in such manner and upon such terms as they should deem to be for the best interests of said company, all of which will more fully and at large appear by reference to a copy of said resolutions hereto annexed, marked "Exhibit A," and which your orators pray may be taken and received as part of this complaint.

And your orators further show that, in accordance with said resolutions, and the terms thereof, there were prepared, issued, sold and disposed of the six hundred thousand dollars ($600,000) of said bonds, known as equipment bonds, a copy of one of which said bonds is hereto annexed, marked "Exhibit B," which your orators pray may be taken and received as part of this complaint (all the others of said bonds being similar in form and contents, with the exception of amounts and numbers), and said bonds have come, by transfer and delivery, into the hands of a large number of persons, most of whom are unknown to your orators, and are too numerous to be made parties to this action. And your orators are holders for value of certain of said bonds in amounts as follows: Benjamin F. Ham, twenty thousand and five hundred dollars; Edward De Rose, eighteen thousand dollars; Henry A. Mott, seventeen thousand dollars; John W. Ferdon, ten thousand dollars; Thomas Mayo, five thousand dollars; G. M. Whittemore, two thousand dollars; Townsend Underhill, nine thousand dollars, and Charles Jackson, thirty-two thousand dollars, all of which said bonds so owned have attached all the coupons maturing on and after first day of May, 1875.

743 And your orators further show that each of said bonds had coupons on interest warrants attached thereto, payable as in said bonds set forth, a copy of one of which coupons or interest warrants is hereunto annexed, marked "Exhibit C," all the other of said coupons or interest warrants being similar in form, with the exception of amounts, dates and numbers.

And your orators further show that the coupons or interest warrants on said bonds were paid by said Toledo and Wabash Railway Company up to and including that falling due on the 1st day of May, 1865.

Your orators show that in the early part of the year 1864 the fifth annual report of the Toledo and Wabash Railway Company to the stockholders for the fiscal ending December 31st, 1863, was issued and said report, being authenticated by the president of said company, contained the following statements:

"The capital has been increased during the present fiscal year by the issue of 18,510½ shares of general stock and 1,134 shares of preferred stock, and also by the issue of $600,000 of equipment bonds. Of this increase of capital 450½ shares of the general stock were issued to holders of stock in the late Toledo, Wabash and Western Railroad Company, and 334 shares of preferred stock to holders of evidences of indebtedness against that company, as they have from time to time been presented for redemption, and in strict conformity to the agreement hitherto made in that behalf. Other-

wise the increase of the capital was made by authority of the stockholders for the expressed purpose of completing the construction of the road, the erection of freight buildings, machine shops, the procurement of locomotives, cars and other equipments, which were imperatively demanded for the safe and successful operation of the road, and also for the further object of reimbursing the operating income department of the road, which had been largely overdrawn for construction expenses, and which were properly chargeable to the capital of the company."

And to said report was attached a summary statement, showing the receipts and expenditures of the year 1863, from which
744 it appeared that the company had, under the head of construction account, "received for equipment bonds issued, $513,046.83."

Second.

And your orators further show that on or about the twenty-ninth day of May, 1865, by an agreement, signed by its president and secretary, and sealed with its corporate seal, the said Toledo and Wabash Railway Company agreed to consolidate its road, property and capital stock of the following-named railroad corporations of the State of Illinois, viz.: The Great Western Railroad Company of 1859, the Quincy and Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company, and the new corporation formed by such consolidation became known as the Toledo, Wabash and Western Railway Company.

And your orators further show that by the terms of agreement for such consolidation the said Toledo and Wabash Railway Company entered therein on the basis of three million four hundred thousand dollars ($3,400,000), first mortgage bonds; two million five hundred thousand dollars ($2,500,000), second mortgage bonds; and six hundred thousand dollars ($600,000), convertible equipment bonds; three million five hundred thousand dollars ($3,500,000), stock. And it was especially provided that all rights, franchises, property, real and personal, debts and choses in action of the respective companies, parties to said agreement of consolidation, should vest in the consolidated company, and that all bonds and other debts therein specified should be protected by said consolidated company. And said agreement was ratified by the stockholders of said Toledo and Wabash Railway Company on the twenty-eighth day of June, 1865; and the said Toledo, Wabash and Western Railway Company thereupon afterwards paid the coupons or interest warrants on said equipment bonds as the same matured, up to and including that falling due May 1st, 1870.

745 Third.

Your orators further show that on or about the first day of February, 1867, the Toledo, Wabash and Western Railway Company was indebted to various persons in large sums of money, and said debts were evidenced by certain bonds made by said company, or

by one of the companies of which it was a successor, wherein and whereby repayment of the sum therein named was promised to the holder thereof, and also interest thereon until such repayment should be made. And said bonds were written obligations under the seals of the companies by which they were issued, and the Toledo, Wabash and Western Railway Company was on the date aforesaid liable for the repayment of all the several sums so evidenced, in accordance with the terms of said several bonds, and aggregating the sum of ($13,300,000) thirteen million and three hundred thousand dollars. Of the said aggregate amount the sum of ($11,700,000) eleven million and seven hundred thousand dollars was secured by mortgage upon the portions of the line of railway controlled by said company, and the sum of ($1,600,000) one million and six hundred thousand dollars was not so secured, and the several debts evidenced by said bonds became due at various times. And on or about the said date the said company, being desirous of borrowing a further sum of money for its corporate purposes, namely, the sum of ($1,700,000) one million seven hundred thousand dollars, and it being deemed for the interest of said company, as well as for the benefit of the holders of all the various classes of bonds evidencing the indebtedness then outstanding as aforesaid, and all the same should be consolidated into one and the same mortgage debt, it was by said company resolved to execute a mortgage to secure the sum of (15,000,000) fifteen million dollars of bonds, all of like tenor, all dated the first day of February, 1867, and made and issued to retire all the various classes of bonds then evidencing the funded debt of said company, and the payment of all said bonds being
746 secured by the deed of trust or mortgage therein referred to.

That said Toledo, Wabash and Western Railway Company, on or about the first day of February, 1867, made its certain mortgage or trust deed, to secure the payment of the said bonds, amounting in the aggregate to the sum of fifteen million dollars ($15,000,000), and no more, with interest at the times and in the manner therein mentioned and set forth, as well as to secure the payment of the sinking fund as therein mentioned, dated on that day to the defendants Isaac H. Knox and James R. Jessup, as trustees, and which said mortgage or trust deed was duly sealed with the corporate seal of said company, and subscribed by the president and secretary thereof, and duly acknowledged by the said president and secretary, who made at the same time due proof of said corporate seal; and said company, on or about said date, delivered the said mortgage or trust deed to the said trustees therein named, who accepted the trusts therein contained.

That in and by the said indenture the said company, party of the first part thereto, for and in consideration of the sum of one dollar, paid to the said company by the said trustees, parties thereto of the second part, granted, bargained, sold, transferred and set over unto said Isaac H. Knox and James R. Jessup, as trustees, and their successors in the trust and assigns forever, "all the right of way and railroad of the said company, extending from Toledo, in the State of Ohio, to and through the State of Indiana, and thence in the State

of Illinois to Meredosia, with branch of said road to Naples, and from said Meredosia to Camp Point, in said State of Illinois, and also with branch of said road from Clayton to the east bank of the Mississippi river, at Hamilton, in said State, as then made, or as thereafter might be made, and as then used, or as thereafter might be used, together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine and other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices, together with all other things, real and per-
747 sonal, then owned and used, or that might hereafter be owned and used, in connection with the said railroad, and everything appertaining and appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said company, together with all the property, real and personal, of said company then owned, or thereafter to be acquired, at Quincy, in the State of Illinois; as also a certain contract made between said company and the Chicago, Burlington and Quincy Railroad Company, dated October 26, 1866, and all other contracts," all of which, together with the full terms of the deed of trust or mortgage, will more fully and at large appear by reference to a copy of said deed of trust or mortgage hereunto annexed, marked "Exhibit D," and which your orators pray may be taken and received as part of this complaint.

That in said mortgage or deed of trust it was recited that the said Toledo, Wabash and Western Railway Company was at the date thereof, February 1st, 1867, a corporation duly formed under the statutes of the several States of Ohio, Indiana and Illinois by the consolidation of the stock, property, rights, franchises and interests of the several railroad companies, known as the Toledo and Wabash Railway Company, the Great Western Railway Company of 1859, the Quincy and Toledo Railroad Company and the Illinois and Southern Iowa Railroad Company.

That in said mortgage or trust deed it was further alleged that the funded debt of said Toledo, Wabash and Western Railway Company, including that secured by mortgage liens as well as that not so secured, amounted in the aggregate to the sum of thirteen million three hundred thousand dollars ($13,300,000), besides interest, and that said funded debt was represented and made up as follows, viz.:

First mortgage bonds of the Toledo and Illinois River Railroad Company, for the sum of nine hundred thousand dollars ($900,000), secured upon that part of the road and property of said company lying within the State of Ohio.

748 Second mortgage bonds of the Toledo and Wabash Railroad Company, for the sum of one million dollars ($1,000,000), secured upon the same property within the State of Ohio.

First mortgage bonds of the Lake Erie, Wabash and St. Louis Railroad Company, for the sum of two million five hundred thousand dollars ($2,500,000), secured upon that part of the road and property of said company lying within the State of Indiana.

Second mortgage bonds of the Wabash and Western Railway Company, for the sum of one million five hundred thousand dol-

lars ($1,500,000), secured upon the same property within the State of Indiana.

First mortgage bonds of the Great Western Railroad Company of 1859, for the sum of two million five hundred thousand dollars ($2,500,000), secured upon property within the State of Illinois.

Second mortgage bonds of the Great Western Railroad Company of 1859, for the sum of two million five hundred thousand dollars ($2,500,000), secured upon the same property within the State of Illinois.

First mortgage bonds of the Illinois and Southern Iowa Railway Company, for the sum of three hundred thousand dollars, ($300,000), secured upon property within the State of Illinois.

First mortgage bonds of the Quincy and Toledo Railroad Company, for the sum of five hundred thousand dollars ($500,000), secured upon property within the State of Illinois.

Bonds of the Toledo and Wabash Railway Company, for the sum of six hundred thousand dollars ($600,000), and known as equipment bonds.

Bonds of the Toledo, Wabash and Western Railway Company, for one million dollars ($1,000,000), and known as sinking fund bonds.

That in said mortgage or trust deed it was further recited that it was deemed for the interest of the said party of the first part, as well as for the benefit of the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt, upon equitable principles, and that
749 for the purpose aforesaid, and the objects therein stated, the said company had resolved to make and issue its bonds to the extent of fifteen million dollars; and that of bonds so to be made and issued, to the amount in the aggregate of the said sum of fifteen million dollars, there should be retained thirteen million three hundred thousand dollars ($13,300,000), to retire in such manner and upon such terms as the directors of said company might, from time to time, prescribe a like amount of the bonds of the various companies hereinbefore enumerated and described, and representing the aforesaid funded debt, and that the balance of bonds, to wit, one million seven hundred thousand dollars ($1,700,000) thereof should be used for obtaining additional equipment and improvements, and for such additional purposes as the directors might deem advisable, all of which fifteen million dollars of bonds should stand equally secured by the said mortgage.

And in said mortgage or deed of trust it was provided that the same was upon the express condition and limitation that upon the payment and satisfaction of the principal and interest of each and every of said bonds, and the payment of the expenses of the trust, then the estate thereby granted should immediately be reinvested in the party of the first part.

That said mortgage or trust deed was presently thereafter filed for record, and duly recorded in the manner required by law, in the several offices in the counties in the States of Ohio, Indiana and Illinois, in which the property then owned by said company was

then situated, and now remains on the records in said several counties.

That said company made its several bonds in the form and for the amounts mentioned in said mortgage or deed of trust, and sealed the same with the corporate or common seal of said company, and caused the names of the president and treasurer to be thereto affixed, all of which bonds were equally secured by the said mortgage to said trustees, and interest warrants or coupons for the payment of said interest at the time above mentioned were annexed to each of
750 said bonds. And in each of the several bonds it was recited that said bond was one of a series of bonds, the whole amounting in the aggregate to fifteen million dollars, and no more, all of like tenor, and all dated February 1st, 1867, and made and issued to retire all the various classes of bonds and securities then composing the funded debt of said company, and to provide means for additional equipment, and the payment of all of said bonds being secured by the deed to Knox and Jessup as aforesaid. A copy of one of said bonds is fully set forth in the mortgage, a copy of which is hereto annexed, marked "Exhibit D."

That ninety thousand dollars ($90,000) par value of said bonds, purchased for about seventy-five thousand dollars ($75,000) cash, have been transferred to the sinking fund as provided in said mortgage or deed of trust, but no other installments of a sinking fund have been paid, and the same still remains otherwise due and unpaid.

That the said Toledo, Wabash and Western Railway Company did dispose of one million dollars ($1,000,000) in bonds, secured by the consolidated mortgage aforesaid, and did therewith retire a like amount of certain of the bonds previously issued, and which bonds are enumerated in the said consolidated mortgage or trust deed, viz., bonds of the Toledo, Wabash and Western Railway Company, known as sinking fund bonds, amounting in the aggregate to the said sum of one million dollars ($1,000,000), and that said one million dollars of said consolidated bonds so issued are now outstanding, except as the same may have been purchased for the sinking fund as hereinbefore stated, and that there now are bonds of said issue outstanding amounting to the sum of two million six hundred and ten thousand dollars ($2,610,000), which have come by transfer, sale, and delivery into the possession of and are now held by a large number of individual, partnerships, and corporate bodies, who are now the owners thereof, and are entitled to the moneys therein mentioned and agreed to be paid, but whose names are unknown to your orators.

751 And your orators show that in the year 1867 the Toledo, Wabash and Western Railway Company issued to the stockholders a report for the eighteen months ending December 31st, 1866, which report, signed by the president of said company, contained the following statement:

"It being deemed for the interest of all parties concerned that the various classes of bonded securities issued by and bearing the titles of the several corporations, now represented by this company, should

be consolidated into one and the same mortgage debt, the Board of Directors have decided to create and issue its coupon bonds, entitled 'Consolidated mortgage sinking fund convertible bonds,' of sufficient amount, and for the purpose of retiring all of the said outstanding securities. * * * The time and conditions for the exchange of these consolidated bonds for those outstanding will soon be made known."

Fourth.

And your orators further show that afterwards, to wit, on or about the tenth day of August, 1870, the Decatur and East St. Louis Railroad Company was a corporation of the State of Illinois, and that on or about said date it became consolidated with the said Toledo, Wabash and Western Railway Company, the consolidated company retaining the name of the latter, and being thereafter known thereby.

That, by the terms of the agreement for such consolidation, the said Toledo, Wabash and Western Railway Company became the owner of the line of said Decatur and East St. Louis Railroad Company's railroad, with all the appurtenances and all other property thereto belonging, subject to the lien of a certain mortgage or trust deed, executed by said Decatur and East St. Louis Railroad Company, on or about the third day of June, 1869, to Isaac H. Knox, as trustee, to secure an issue of bonds amounting to the principal sum of two million seven hundred thousand dollars ($2,700,000),
752 and also expressly subject to the payment of the principal and interest of the bonds secured by said mortgage or trust deed.

That by the terms of the agreement for such consolidation it was further provided that all rights, franchises, privileges, property and appurtenances of every description, choses in action, debts, dues and demands of the companies parties thereto, should vest in the consolidated company, and that the terms of the articles of consolidation, hereinbefore mentioned, whereby the said Toledo, Wabash and Western Railway Company was formed, should be and remain in full force and be binding upon the consolidated company, so far as the same could be applicable, and so far as they were not in conflict with the specific provisions thereof. And the said Toledo, Wabash and Western Railway Company thereupon, afterwards, paid the coupons or interest warrants on the equipment bonds aforesaid, as the same matured, up to and include that falling due November 1st, 1874, since which time the coupons or interest warrants maturing on said equipment bonds have remained wholly unpaid, and the several railway companies, defendants herein, have each for itself declined and refused to pay said coupons or interest warrants.

Fifth.

And your orators further show that on or about the first day of April, 1873, the said Toledo, Wabash and Western Railway Company, as parties of the first part, and Isaac H. Knox and James R. Jessup, as trustees named in the consolidated mortgage or deed of

trust aforesaid, as parties of the second part, made and executed a certain indenture and deed of further assurance, wherein the said railway company expressly covenanted and agreed with the said parties of the second part, and with all persons whom said mortgage might in anywise concern, that whereas the party of the first part did, theretofore, execute a mortgage of all its property as aforesaid, in order to secure the payment of bonds to the amount alto-
753 gether of fifteen million dollars; and whereas of the said bonds to be made and issued under and secured by the said mortgage thirteen million and three hundred thousand dollars were reserved for the purpose of being used to retire a like amount of certain other bonds enumerated and described in the said mortgage, which were outstanding at the time said mortgage was given, and then constitute the funded debt of the party of the first part; and whereas of the said funded debt one million dollars in amount had, since the execution of said mortgage, matured and been retired, and for that purpose an equal amount of the said reserved bonds had been issued, leaving them unissued, and reserved, for the purpose of being used to retire the remainder of the said funded debt, the amount of twelve millions three hundred thousand dollars of the said fifteen million dollars of bonds originally secured by the said indenture of mortgage; and whereas it was the desire of both the parties to said instrument, by more express and specific stipulations, to give assurance to all persons whom it might in anywise concern that the said reserved bonds should not, nor should any or either of them, be used for any other purpose than the retiring of the said funded debt or some part thereof, the party of the first part did by said indenture covenant and agree with the parties of the second part, and with all persons whom it might in anywise concern, that the party of the first part would not make, issue, or attempt to make or issue, any of the then remaining twelve million three hundred thousand dollars ($12,300,000) of reserved bonds secured by the mortgage theretofore executed, except for the purpose of, and subsequent to, or simultaneously with the retiring of an equal amount of the balance then remaining of the funded debt enumerated in said consolidated mortgage aforesaid, so that when all of the said reserved bonds shall have been issued the whole of the balance of said funded debt shall have been extinguished and discharged; and it was in said indenture and deed of further assurance further covenanted with said trustees, and with all persons whom it might in anywise concern,
754 that the covenants therein contained should be supplementary to and constitute a part of the indenture of mortgage aforesaid, and be of the same effect to all intents and purposes, as if they had been inserted therein. And the said indenture and deed of trust was duly signed, sealed and delivered by the parties thereto, and a copy thereof is hereunto annexed, and marked "Exhibit E," which your orators pray may be taken and received as part of this complaint.

Sixth.

And your orators show that a demand was made upon the directors of the Toledo, Wabash and Western Railway Company, by the holders of certain of the equipment bonds aforesaid, in behalf of themselves and all others like situated, for the exchange of the said bonds for the same amount of the bonds secured by the consolidated mortgage hereinbefore set forth, and the said demand was refused, and the said Wabash Railway Company and the said Wabash, St. Louis and Pacific Railway Company also declined to mke such exchange.

Seventh.

Your orators further show that on the first day of February, 1875, Jacob D. Cox, the president of the said Toledo, Wabash and Western Railway Company, did issue a circular to the holders of the several classes of bonds heretofore herein described, in which they were requested to fund certain specified coupons; and in said circular the holders of equipment bonds were asked to fund two years' coupons into funding certificates bearing seven per cent. interest, and the principal payable at the pleasure of the company after five years, and not longer than ten years, from their date.

And your orators show that said scheme for funding certain coupons so proposed in said circular, dated the first day of February, 1875, did not meet with the immediate approval of bondholders, and that on the twenty-second day of said month the proceedings
755 hereinafter stated were instituted at the instance of the Metropolitan National Bank of the City of New York, and others, claiming to be holders of certain promissory notes executed by said company for money borrowed, and for which notes certain bonds, called gold bonds, had been pledged as collaterals, as hereinafter set forth.

Eighth.

Your orators further show that on or about the first day of February, 1873, the said Toledo, Wabash and Western Railway Company made and delivered its deed of trust or mortgage upon the entire line of railroad then belonging to it, and upon other property, to secure the payment of five million dollars ($5,000,000), payable in gold, which mortgage was made to the New York Guaranty and Indemnity Company as trustee. That said New York Guaranty and Indemnity Company afterwards resigned said trust created thereby and one Valentine H. Ketcham was duly appointed trustee in the place and stead, and accepted the trusts created thereby. That bonds were issued under said last-named deed of trust or mortgage to an amount as found and determined in the actions and proceedings hereinafter mentioned.

That said Toledo, Wabash and Western Railway Company was in possession of said continuous line of railroad and of the other property described in the several deeds of trust or mortgages hereinbefore set forth on or about the 22d day of February, 1875, and that on said day a petition was held in the Court of Common Pleas, Lucas County,

Ohio; and on the 24th day of February, 1875, a complaint was filed in the Cass County Circuit Court, State of Indiana; and on the said 24th day of February, 1875, a complaint was filed in the Vermillion County Circuit Court, Illinois, all by the Metropolitan National Bank of the City of New York and others, complainants, against said Toledo, Wabash and Western Railway Company and others;
756 and in the suits so commenced as aforesaid in each said States of Ohio, Indiana and Illinois, Jacob D. Cox, president of the company, appointed Receiver, the railway company appearing, and not denying but admitting the allegation of the plaintiffs, and a cross-petition was filed by the said Valentine H. Ketcham, as trustee, praying that the property covered by the mortgage as aforesaid might be sold to satisfy the amounts due the holders of the bonds secured thereby; and in the suit so as aforesaid instituted in the State of Ohio, a decree was, on or about the 14th day of December, 1875, entered in the said Court of Common Pleas, Lucas County, Ohio, by which it was ordered, adjudged and decreed that the several deeds of trust or mortgages hereinbefore set forth, including and specifying the consolidated mortgage aforesaid, were each and all of them duly and legally made and recorded in pursuance of the laws of the several States of Ohio, Indiana and Illinois, and as such were liens upon the said railroad and parts of the same prior to the lien of said mortgage trust deed dated said first day of February, 1873, while the equipment property and franchises thereof, as more particularly is set forth in the said decree.

That in and by the said decree it was further found and adjudged that the liens of said deeds of trust or mortgages could not be charged upon said property otherwise than as a whole; but said decree reserved, however, to all parties such legal and equitable rights of lien or otherwise on the whole or any part of such property as might in any proceedings to foreclose and sell under either of said several deeds of trust or mortgages be found secured to them by the facts and the terms thereof. That in and by the said decree, by consent of said Valentine H. Ketcham, as trustee, and of the parties plaintiff in said suits, and the several defendant trustees, including Isaac H. Knox and James R. Jessup, defendants hereto, not objecting, and in order to enforce the provisions of the deed of trust or mortgage as aforesaid, it was ordered that the road, property, equipments and franchises and the right and franchise to be a corporation,
757 as an entirety, of the said Toledo, Wabash and Western Railway Company should be sold subject to the liens of all deeds of trust or mortgages prior to the said deed of trust or mortgage dated February 1st, 1873, and that the aforesaid prior deeds of trust or mortgages should remain liens upon the property in the order of their priority, and that such sale should be made subject to the priority and continuance of said several mortgage liens and without prejudice to any claim that may be made by the holders of the bonds called the equipment bonds, referred to in the petition in said actions, as to which all questions arising were left open.

That subsequently, and at the February Term, 1876, of the said Circuit Court of Cass County, Indiana, and of the Circuit Court of

Vermillion County, Illinois, decrees were made between the same parties in the aforesaid suits, in all particulars adopting the said decree of the said Court of Common Pleas of Lucas County, Ohio, as the decree of said several Courts respectively.

And in the order appointing said Cox Receiver it was by the Court decreed that he (the said Receiver) should pay from and out of the earnings and increase of said railroad all sums of money then due and owing to agents, attorneys, servants and laborers theretofore employed in and about the operation, care and management thereof, and also all sums of money due and owing for supplies theretofore purchased by said company. And in the decree of sale aforesaid it was provided that, whereas there was at the date of said decree still due and unpaid the sum of $350,000 for services and supplies furnished for said Toledo, Wabash and Western Railway Company, it was ordered that said amount should remain a lien upon the property, income and earnings of said road until said services and supplies should be fully paid.

Ninth.

That in pursuance of the said decrees and all of them a sale was had of the said property, effects, rights and franchises of the
758 said Toledo, Wabash and Western Railway Company in the City of Toledo, on the 10th day of June, 1876, to John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, hereinafter named, as joint tenants, and that subsequently and on or about the first day of January, 1877, a proper deed of conveyance was made, executed and delivered to the said John W. Ellis and others by Jacob D. Cox, who had been appointed by said decrees Special Master Commissioner to execute the same, and who had made said sale whereby was conveyed and assured to the said John W. Ellis and others, all and singular the entire property, rights, equipments and franchises then belonging to the said Toledo, Wabash and Western Railway Company, together with the franchises of said railway company and of the several original companies of which it is composed and the right and franchise to be a corporation, together with all corporate franchises of said company and of the said companies severally, including the rights and franchises of said several companies to be and act as a corporation as in said deed set forth; to have and to hold the same, with the appurtenances, unto the said John W. Ellis and others as joint tenants, and not tenants in common, and to the survivors and survivor of the said parties, and to their assigns, and to the heirs of the last survivor of the said parties, forever.

That said John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post did, by their certain deed dated the 12th day of January, 1877, convey to the defendant the Wabash Railway Company the property theretofore conveyed to them by the said Jacob D. Cox, as Special Master Commissioner, as in said deed by said Cox especially set forth and referring thereto.

Tenth.

That on and prior to the sixth day of January, 1877, the Wabash Railway Company was a corporation of the State of Indiana,
759 organized within said State by John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and H. A. V. Post, who are designated in the articles of association as the purchasers at a judicial sale of the railroad property of the Toledo, Wabash and Western Railroad Company, made by virtue of the concurrent decrees of the several Courts as therein recited, and as the parties to whom the deed for said property had been delivered and the possession thereof transferred.

And in said articles of association it is further recited that the same were entered into by the parties thereto for the purpose of forming a corporation under the laws of the State of Indiana, approved March 3d, 1865, entitled "An Act to authorize and confirm the sale of railroads and enable purchasers of the same to form corporations and to exercise corporate powers and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads and to operate and maintain the same," and the acts supplemental thereto and amendatory thereof.

And your orator further shows that the defendant The Wabash Railway Company became a consolidated corporation under and by virtue of the laws of Indiana, Ohio and Illinois, and was formed by a consolidation of the Wabash Railway Company of Indiana, the Wabash Railway Company of Ohio, and the Wabash Railway Company of Illinois, corporations organized and existing on and prior to the sixth day of January, 1877, within each of said States.

That said Wabash Railway Company forthwith entered into possession of the said property, rights, equipment and franchises conveyed to them as aforesaid, but the said Wabash Railway Company and the consolidated St. Louis, Wabash and Pacific Railway Company, defendants herein, claim that they have never agreed to or assumed to pay the amounts due the holders of any of the bonds named in the consolidated mortgage aforesaid, either for the principal or interest of their bonds, and that they are not liable for such payments.

760 Eleventh.

And your orators further show that on the 19th day of January, 1877, the said Wabash Railway Company executed and delivered to George I. Seney, as trustee, its certain mortgage or deed of trust to secure certain promissory notes, payable at various times, and amounting in all to one million twenty-six thousand five hundred and fifty-five dollars and forty-two cents, with interest thereon. And said defendant Railway Company has made certain large payments on account of the principal and interest of said notes, the amounts whereof are unknown to your orators.

And on or about the 17th day of May, 1879, the said defendant Railway Company made and executed its certain mortgage or deed of trust to secure its bonds to the amount in the aggregate of two

millions dollars, and said defendant has made certain payments on account of the interest accrued upon said bond, the amount whereof is unknown to your orators.

Twelfth.

And your orators further show that the Wabash Railway Company proposed to pay, and has paid, to the holders of certain of the bonds enumerated and described in the consolidated mortgage or trust deed aforesaid certain of the coupons for interest matured thereon in accordance with a certain scheme for funding certain overdue interest. But the said defendants the Wabash Railway Company and the consolidated St. Louis, Wabash and Pacific Railway Company have not proposed, but refuse to propose, any scheme for funding any of the coupons for interest which have become due and payable since the first day of November, 1874, aforesaid, upon the said equipment bonds, and do not offer to pay, but decline and refuse to pay, any of the interest which has matured since the said date upon said equipment bonds named and specified in said consolidated mortgage hereinbefore recited, although they have offered to fund,
761 and have funded, into an interest-bearing scrip a very large amount of the interest overdue upon all the other bonds now outstanding and in said deed subscribed, and have paid in full interest to a very large amount all the holders of said other bonds who accepted the funding scheme proposed, and no proposition whatever has been made to fund any interest due upon said equipment bonds, except the proposition made as hereinbefore stated in the circular issued by said Cox as president of the Toledo, Wabash and Western Railway Company, and dated first day of February, 1875.

Thirteenth.

And your orators further show that since the institution of this action, in accordance with the terms of a certain agreement adopted by the Board of Directors of the defendant The Wabash Railway Company on or about the fourteenth day of August, 1879, and a certain supplemental agreement adopted by said Board of Directors on or about the tenth day of October, 1879, which was approved by the stockholders of said company, at a special meeting held in the City of Toledo, Ohio, on the fourteenth day of October, 1879, the said defendant became consolidated with the St. Louis, Kansas City and Northern Railway Company, a corporation of the State of Missouri, and the consolidated corporation became and is known as the Wabash, St. Louis and Pacific Railway Company, and is a consolidated corporation of the States of Ohio, Indiana, Illinois and Missouri, in possession of, operating and enjoying the line of railway described in the consolidated mortgage aforesaid, and other lines of railway not in said mortgage mentioned.

Your orators are informed and believe that the said Wabash, St. Louis and Pacific Railway Company has the custody of the bonds mentioned in the consolidated mortgage aforesaid, and in the deed

of further assurance, as hereinbefore recited, which have been retained for the purpose of being used to retire a like amount of
762 the several issues of bonds in said mortgage enumerated, and including the equipment bonds therein mentioned, and that the amount of such bonds now unissued and reserved for the purpose of being used to retire the remainder of the funded debt aforesaid is twelve million three hundred thousand dollars, being the full amount named in said consolidated mortgage deed, except one million dollars which have been issued to retire an equal amount of other bonds in said mortgage deed described, and as has been hereinbefore set forth.

Fourteenth.

Your orators further show that James R. Jessup and Isaac H. Knox, the trustees named in said consolidated mortgage, were made parties defendants in the aforesaid action of the Metropolitan National Bank, and filed their answer and cross-petition therein, in which they set forth, among other things, the execution of the consolidated mortgage trust deed, and the acceptance by them of the trust therein created, and referred to a copy of said mortgage for specific proof thereof. And in their said cross-petition the said trustees alleged that the said Railway Company had defaulted in the payment of the sinking trust in said mortgage fund deed provided for and in the payment of certain installments of interest upon the then issued consolidated mortgage bonds, and that by reason of the said defaults they, as trustees, were entitled to the use, income, and profits of the property included in said trust deed, and that the lien of their said trust was as to said property a first lien on about six miles of said railroad and subject as to the rest of said railroad and property to other liens amounting to the sum of $11,700,000, but that nevertheless the lien of their trust was as to the whole of said property prior and superior to that of the plaintiffs in said cause. But said trustees did not pray any relief to the holders of the equipment bonds, nor in any manner refer to them, nor pray any relief on their behalf, although the debt represented by said bonds, and which it was in said mortgage especially recited it
763 was the purpose thereof to consolidate into one and the same mortgage debt, was then wholly unpaid and interest thereon was in default, and although the same were fully set forth in the consolidated mortgage in which they, the said Jessup and Knox, were trustees, and although a large amount of the bonds of said issue of $15,000,000 (namely the sum of $12,300,000), were then held in reserve for the purpose of retiring all the said funded debt as specified in said mortgage and said consolidated mortgage bonds, and including said equipment bonds, and as had been set forth in the certain indenture and deed of further assurance hereinbefore recited, in which said last indenture the said last-named amount of bonds had been described and particularly specified as being "secured by said indenture of mortgage," and as being "unissued and reserved for the purpose of being used to retire like amount of certain

other bonds enumerated and described in the said indenture of mortgage."

And in the said proceedings instituted by the said Metropolitan National Bank the trustees of the several other mortgage deeds specified in the consolidated mortgage aforesaid were made parties defendant, and filed their several answers and cross-petitions by the aforesaid James R. Jessup, their attorney.

And your orators show that the interest rights and claims of the holders of equipment bonds were not properly represented in the aforesaid proceedings, and that none of said holders were *bona fide* parties thereto.

Fifteenth.

And your orators further show that prior to the institution of the proceedings begun by the Metropolitan National Bank, of the City of New York, against the Toledo, Wabash and Western Railway Company, that corporation was the holder of notes executed by the said railway company for the sum of four hundred thousand dollars, or thereabouts, and for collateral security held $1,100,000 of
764 the gold bonds dated the first day of February, 1873, aforesaid. That the then cashier of said bank, George I. Seney, was a director of said railway company, and that upon the sale, as hereinbefore stated, of the property of said company, the said Seney became one of the purchasers thereof, and was one of the corporators of the Wabash Railway Company, to which company the property purchased was conveyed. That the said Seney is the person named as trustee in the mortgage executed on the 19th day of January, 1877, by the Wabash Railway Company to secure the payment of certain promissory notes, and that a large number, the exact amount whereof your orators are unable to state, of said notes so secured were given to the said Metropolitan National Bank, of which the said Seney was then the cashier, and at the said time was a director of said Wabash Railway Company, said notes being by it accepted in lieu of the principal and interest of the notes of the railway company previously held by them.

And your orators show that a large amount of said notes of said Wabash Railway Company so held by said bank have been paid in cash, or have been exchanged for bonds issued by said company under the mortgage dated the 17th day of May, 1879, executed to secure an issue of bonds to the amount of two million dollars.

Your orators show that James F. D. Lanier was one of the plaintiffs in the action brought by the Metropolitan National Bank, of the City of New York, and that he was then a member of the firm of Winslow, Lanier & Company; that John W. Ellis was and is a member of said firm, and that said Ellis was a director of the Toledo, Wabash and Western Railway Company; and that said firm were the owners of certain promissory notes executed by the Toledo, Wabash and Western Railway Company for the sum of thirty-three thousand dollars, or thereabouts, and for collateral security held $91,000

of the gold bonds dated the first day of February, 1873, aforesaid, a[illegible] that upon the sale, as hereinbefore stated, of the property of said company the said Ellis became one of the purchasers thereof,
765 and was one of the corporators of the Wabash Railway Company, to which company the property purchased was conveyed, and was a director of said company. That a large number, the exact amount whereof your orators are unable to state, of the notes secured by the mortgage executed the 19th day of January, 1877, by the Wabash Railway Company to George I. Seney, were given to Winslow, Lanier & Co., said notes being by them accepted in lieu of the principal and interest of the notes of the railway company previously held by them. And your orators are informed and believe that said notes have been paid in cash or exchanged for the bonds secured by the mortgage dated the seventeenth day of May, 1879, executed to secure an issue of bonds to the amount of two million dollars.

Your orators further show that Alexander M. White was a director of the Toledo, Wabash and Western Railway Company, and at the same time, the date of the institution of the proceedings aforesaid he was the holder of notes of said company amounting to the sum of eighty-three thousand dollars, or thereabouts, and for collateral security held $229,000 of the gold bonds aforesaid; that the aforesaid Alexander M. White was at the same time one of the trustees named in a certain indenture of mortgage executed on the 25th day of May, 1863, by the Great Western Railway Company of 1859, to secure an issue of bonds to the amount of two million five hundred thousand dollars, as in the consolidated mortgage trust deed enumerated; that said White appeared as a defendant in said proceedings as such trustee, and filed an answer and cross-petition therein, admitting the allegations contained in the complaint filed by said Metropolitan Bank; and that upon the sale of the property of said company said White became one of the purchasers thereof, and was one of the corporators of the Wabash Railway Company, and that a large number, the exact amount whereof your orators are unable to state, of the notes secured by the mortgage to George I. Seney as aforesaid, were given to said White and by him accepted in lieu of the principal and interest of the
766 notes of the railway company previously held by him. And your orators are informed and believe that said last-named notes have been paid in cash.

And your orators further show that the Union National Bank, of the City of New York, was, at the date of the proceedings aforesaid, the holder of notes of said Toledo, Wabash and Western Railroad Company, amounting to the sum of one hundred and twenty-five thousand dollars, and for collateral security thereto held $346,000 of the gold bonds aforesaid, and said bank was one of the plaintiffs in the action aforesaid. At the time the debts were incurred, for which the notes aforesaid were given, John T. Martin was a director of said bank, and also a director of said railway company, and as such director represented the interest of said bank in the direction

of said railway company; and upon the sale of the property of said company said Martin became one of the purchasers thereof, and was one of the corporators of the Wabash Railway Company, and was a director thereof. That a large number, the exact amount whereof your orators are unable to state, of the notes secured by the mortgage to George I. Seney as aforesaid, were given to said Union Bank, and by it accepted in lieu of the principal and interest of the notes of the railway company previously held by it. And your orators are informed and believe that said last-named notes have been paid in cash.

Your orators further show that Charles L. Perkins, Edward Livingston, and Henry A. V. Post, as partners by the name of Perkins, Livingston, Post & Company, were plaintiffs in the action brought by the Metropolitan National Bank, and they were the owners of a certain promissory note executed by the Toledo, Wabash and Western Railway Company for the sum of eight thousand dollars, and held as collateral thereto $22,000 of the gold bonds aforesaid; that upon the sale of the property in accordance wih the decree in said action said Henry A. V. Post became one of the purchasers thereof, and was one of the corporators of the Wabash Railway
767 Company, and was a director thereof; that several of the notes secured by the mortgage to George I. Seney, as aforesaid, were given to said Perkins, Livingston, Post & Company, and by them accepted in lieu of the principal and interest of the notes of the railway company previously held by them. And your orators are informed and believe that said last-named notes have been paid in cash.

And your orators show that the said John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post represented in the aggregate debts, as above stated, of the said Toledo, Wabash and Western Railway Company to the amount of $649,000, for which gold bonds of said company to the amount of $1,798,000 had been pledged as collateral security; and the total amount of all the notes represented in the action aforesaid were for the sum of $902,000, for which there had been pledged as collateral security bonds to the amount of $2,497,000. And said Ellis, White, Martin, Seney and Post, in fact, acted for all the holders of said notes in said proceedings represented, and in their behalf became the corporators of the Wabash Railway Company as aforesaid.

And your orators show that by the actings and doings of the said Ellis, White, Martin, Seney and Post, the debts due by the said Toledo, Wabash and Western Railway Company, as evidenced by the notes of said company, have been discharged with the interest thereon; but your orators show that the interest upon the equipment bonds held by them, and specified in said consolidated mortgages, have been wholly unpaid, and payment thereof has been refused, and your orators have been damaged thereby; whereas the debt of said railway company, incurred long subsequent to the issue of said equipment bonds and the making of the consolidated mortgage, and the execution of the covenant for further assurance aforesaid, has been discharged.

Sixteenth.

Your orators further show that shortly after the institution
768 of the proceedings by the Metropolitan National Bank as aforesaid a committee was formed for the purpose of protecting the stockholders of the Toledo, Wabash and Western Railway Company, which committee was called the protective committee, and one Ossian D. Ashley was chairman thereof. Numerous circulars and advertisements were issued by said Ashley as such chairman, and many of the stockholders paid to him a contribution for the purpose of assisting in preventing a consummation of foreclosure in said proceedings. Among the advertisements issued by said Ashley, chairman, and published in newspapers of wide circulation, was one addressed "To the bondholders of the Toledo, Wabash and Western Railway Company," and containing the following:

"We consider it due to you to state that the stockholders intend to oppose in every legal way in their power the consummation of this great wrong.

"Of the $5,000,000 gold bonds $503,000 were practically given away to relieve the company of a burdensome lease—not a dollar in money having been received therefor—and $2,497,000 were pledged and are still outstanding as collateral security for loans amounting to $902,000. The company thus received in cash but $2,602,000 for $5,000,000, or about 52 per cent. of the par value thereof. The disposition of some of these bonds is therefore of questionable legality.

"The complaint was filed and the answers were given by substantially the same persons, some of the directors serving upon the 'foreclosure committee.'

and as trustees for the stockholders at the same time. This anomalous administration of a trust, which has enabled these gentlemen to serve as plaintiffs and defendants in the same case, has made the work of foreclosure thus far comparatively easy. Deprived in this way of the aid of their directors the stockholders have endeavored to obtain an equitable compromise, and have offered to attempt to raise more than a million and a half of dollars towards payment of the floating debt and interest arrears, but the Foreclosure Committee
769 have declined the proposition, and now ask your approval of a measure which contemplates the absolute extinction of $16,000,000 stock, $600,000 equipment bonds, and lease obligations and contracts equivalent to interest on $4,500,000."

Said Protective Committee, by said Ashley, continuing their opposition to the aforesaid proceedings, obtained an order staying the sale of the property, but said order was obtained too late to prevent said sale; and subsequently thereto such opposition was continued until a compromise was arrived at between the said Protective Committee and John W. Ellis, and others hereinbefore named, which compromise was in accordance with a certain agreement, dated the ninth day of November, 1876, and was announced to the stockholders in an advertisement signed by said Ashley, as chairman for the Protective Committee. In said advertisement it was stated that "opposition to the confirmation of the sale has been withdrawn. The

condition of this withdrawal is that the stockholders of the old company shall have the right to subscribe for stock of the new corporation to be organized, at the rate of $10 per share, payable in instalments of $2 per share at intervals of three months, commencing February 1, 1877, with interest from November 1, 1876. The gold bond mortgage of $5,000,000 under this arrangement will be paid off and cancelled.

"The Protective Committee, having now fully discharged the trust confided to it, congratulates the stockholders upon this successful termination of a tedious and expensive lawsuit, and earnestly advise them to avail of the option thus secured."

In another advertisement it was announced that—

"In compliance with the terms of settlement * * * shareholders of the Toledo, Wabash and Western Railway Company have the option of subscribing for stock in the new company upon the following terms and conditions: First, surrender the old certificates. * * * The gold bond mortgage will be paid off and cancelled by the $1,600,000 subscribed, and the bank debt will be extended over a period of five years. * * * Thus reconstructed and relieved of the difficulties against which the old company has
770 so long struggled, it is safe to anticipate a prosperous future for the Wabash Railway Company."

Your orators show that the "bank debt" above referred to was the debt due Metropolitan National Bank and others, and for the principal and interest of which were issued the notes secured by the Seney mortgage, all as hereinbefore set forth, and which said notes were subsequently accepted in payment of said debt.

Your orators show that the $1,600,000 to be paid in were to be received on condition of a surrender of the certificates of stock held by the party so paying, and that the payment so to be made was ten per cent. on the par value of each surrendered certificate of the common or preferred stock of the Toledo, Wabash and Western Railway Company.

And your orators show that the sum of $1,600,000 was paid in, and the same was used to pay off and cancel*led* all the gold bonds, except those held as collateral security by the parties to whom the bank debt aforesaid was due.

Your orators further show that shortly after the publication of the advertisement above last referred to, and during the period when the stockholders of the Toledo, Wabash and Western Railway Company were surrendering their certificates of stock and paying ten per cent. on par value thereof to a committee of which O. D. Ashley, aforesaid, was chairman, the said Ashley issued, as chairman of the Protective Committee, a circular pamphlet entitled "A statement to the stockholders of the Toledo, Wabash and Western Railway Company," in which is the following: "It is well known that in the month of January, 1875, the T. W. & W. R. Co. became financially embarrassed, and that soon after February 1st of that year, the holders of the gold mortgage bonds, upon which interest was in default, concluding that the stockholders were indifferent to the fate of the property, commenced foreclosure proceedings, and procured

the appointment of a Receiver. But for the resistance of some of the stockholders, through a protective committee developed
771 little more—a year since, this valuable property would have been forever lost to them."

Your orators show that all the expenses incurred by the said Protective Committee, of which said Ashley was chairman, and by said other committee, of which said Ashley was also chairman, and by the said Ellis and others, were paid by the Wabash Railway Company out of the earnings of the line of railroad controlled by it, except a small part of those of the first-named committee, which were paid by the assessments paid by stockholders to said Ashley as chairman thereof. And your orators show, upon information and belief, that said Ashley received large compensation from said Wabash Railway Company for all his services in behalf of the stockholders of the Toledo, Wabash and Western Railway Company; and he is now an officer of the defendants, the Wabash, St. Louis and Pacific Railway Company, and in the employment and pay thereof.

Your orators verily believe and so charge that the so-called subscriptions made by the stockholders of the Toledo, Wabash and Western Railway Company were in fact an assessment upon them at the rate of ten per centum on the par value of their stock, and that by such payment, and the authorizing the Seney notes and mortgage, they, the said stockholders in fact, paid off and cancelled a debt of the Toledo, Wabash and Western Railway Company, and continued in the ownership of the property covered by the gold mortgage aforesaid, and that the Wabash Railway Company was liable for all the debts of the said Toledo, Wabash and Western Railway Company, and the Wabash, St. Louis and Pacific Railway Company, is now liable for all such debts.

Wherefore and inasmuch as your orators have no sufficient remedy in the premises, save in this your Honor's Court of Equity, where matters of this kind are properly cognizable and relievable, your orators pray that the said Wabash Railway Company, the Wabash, St. Louis and Pacific Railway Company, the Toledo, Wabash and Western Railway Company and the said James R. Jessup
772 and Isaac H. Knox, as trustees, may be made parties hereto, and be required to answer the same on their several oaths as fully and particularly as if specially interrogated in relation to the matters herein alleged.

That this Honorable Court may order, adjudge and decree that the equipment bonds held by your orators shall, at their par value, be exchanged for the like amount of their bonds secured by the consolidated mortgage aforesaid, and that the defendants herein, or either of them, make and execute any and all bonds, contract, other agreements necessary and proper thereto, and do make such exchange when requested so to do by your orators, or either of them, and that the defendant the Wabash, St. Louis and Pacific Railway Company, to pay to your orators the interest due upon their said bonds since the first day of November, 1874.

That your orator may have such other and further or different

relief in the premises as to your Honors may seem meet and just, and in accordance with the rules of this court.

May it please your honors to grant unto your orators the writ of subpœna of the United States of America, to be directed to the said Wabash Railway Company, the Wabash, St. Louis and Pacific Railway Company, the Toledo, Wabash and Western Railway Company, and the said James R. Jessup and Isaac H. Knox, as trustees, respectively, therein and thereby commanding them on a day certain to be named, and under a certain penalty, to be and appear before this Honorable Court then and there to answer all and singular the premises, and stand to, perform, and abide by such orders and decrees as may be made against them, and as shall seem meet and agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, &c.

CHARLES W. HASSLER,
Solicitor and Counsel for Complainants.

773 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Benjamin F. Ham, being duly sworn deposes and says: That he is one of the complainants above named; that he has read this amended and supplemental bill of complaint and knows the contents thereof to be true, except as to the matters therein stated to be upon information and belief, and as to those he believes it to be true.

BENJAMIN F. HAM.

Subscribed and sworn to before me this 10th day of May, 1880.

JAMES J. THORNLEY, JR.,
Notary Public, Kings County, N. Y.

Cert. filed in New York Co.

EXHIBIT A (HAM RECORD).

"Resolved, that for the purpose of providing further equipment and satisfying other requirements of the company, the president be authorized and directed to have prepared bonds of this company of denominations of one hundred, five hundred and one thousand dollars each, or of such other denominations as may be deemed advisable, to an amount not exceeding six hundred thousand dollars ($600,000); said bonds to bear date November 1st, 1862, and the principal made payable to a trustee or bearer in the City of New York, on the first day of May, 1883, and bear interest at 7 per cent., payable semi-annually at the same place, said interest to be represented by coupons; and the bonds so to be issued shall be executed in the usual manner and under the corporate seal of the company, and they shall be convertible into the common stock of the company at par, at any time within five years from the date thereof,
774 but shall not be entitled to a dividend for any time on which the holders have received interest.

"Resolved, That the executive committee be authorized to issue, sell, and dispose of the said bonds in such manner and upon such terms as they deem for the best interest of the company."

EXHIBIT B (HAM RECORD).

(Copy of equipment bonds printed *ante* p. 386.)

EXHIBIT D (HAM RECORD).

(Copy of consolidated mortgage printed *ante* p. 485.)

EXHIBIT E (HAM RECORD).

(Printed *ante* p. 501.)

And afterwards, to wit, at the November Term of said Court, on the 12th day of November, 1880, before the Honorable Walter Q. Graham, Judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant The Wabash, St. Louis and Pacific Railway Company by its solicitors, and files its separate answer to amended and supplemental bill herein, in the words following, to wit:

This respondent, saving and reserving to itself all benefit and advantage that may or can be taken of the many and manifest errors, misstatements, and insufficiencies of the said bill of com-
775 plaint, for answer to so much therof as it is advised is material and necessary to be answered unto, answering, says:

That it is true that the Wabash Railway Company was a corporation of the States of Ohio, Indiana and Illinois, and the Toledo, Wabash and Western Railway Company was also a corporation of said States; but this respondent does not admit that said railway companies are now existing corporations or citizens of any State or States, as they have become merged by consolidation in the corporation of this respondent. This respondent admits that on the first day of October, 1862, the Toledo and Wabash Railway Company was a corporation owning a railroad, as stated in the bill of complaint, and that said corporation did execute and sell its equipment bonds to the amount stated in the bill, but this respondent does not know whether complainants, or any of them, hold or own any of said bonds, and, as to the allegations of such ownership, as contained in said bill, respondent calls for full proof.

This respondent admits that Exhibits "A," "B" and "C" attached to the bill of complaint are true copies of the resolution authorizing the issue of said bonds, of one of said bonds, and of one of the interest coupons thereto attached.

Respondent, on information and belief admits that the Toledo and Wabash Railway Company paid such interest warrants up to

the first day of May, 1865, and it is also true that the report of the president of said company for the fiscal year ending December 31st, 1865, contained the statements set forth in folios fourteen, fifteen and sixteen of the printed bill.

Further answering, respondent admits that said Toledo and Wabash Railway Company did, about the time stated in the bill, agree to consolidate its railroad, property and capital stock with the road, property and capital stock of the Great Western Railroad Company of 1859, the Quincy and Toledo Railroad Company and the Illinois and Southern Iowa Railroad Company, all corporations of the State of Illinois.

It is also true that the said agreement was, in substance,
776 as stated in the bill of complaint, on the fifth page of the printed copy thereof, but respondent refers to the said agreement itself as best showing its own terms, if the same shall be any way material or relevant to this cause.

It is true, as stated in the bill, that the corporation formed by said consolidation became known as the Toledo, Wabash and Western Railway Company, and that said company paid the coupons or interest warrants maturing on said equipment bonds up to and including that falling due May 1st, 1870.

This respondent, further answering, says it is true that on or about the first day of February, 1867, the Toledo, Wabash and Western Railway Company, being largely indebted, and there being large incumbrances on portions of its railroad, and being desirous of borrowing a further sum of money for its corporate purposes, resolved to issue its bonds to the amount of fifteen millions of dollars, and to that end did execute to Isaac H. Knox and James R. Jesup, as trustees, a mortgage or deed of trust upon all the property and franchises then owned by said company to secure such of the included issue of bonds as should be thereafter executed and negotiated.

Respondent admits that a true copy of said mortgage is attached to the bill of complaint, marked "Exhibit D," to which this respondent refers as best showing the terms thereof, and respondent has no knowledge of any purpose which the said Railway Company had in executing said mortgage, or any of the bonds secured thereby, except so far as is shown on the face of the instruments themselves.

It is also true, as this respondent is informed and believes, that a large number of the bonds secured by said mortgage or deed of trust were issued and disposed of, and that of the amount so issued about ninety thousand dollars in amount were afterwards purchased by said company for the sinking fund, as provided in said mortgage, and that said company did dispose of one million dollars in the bonds secured by said mortgage, and with the proceeds thereof retired a like amount of sinking fund bonds.

777 Respondent admits it to be true that of the bonds so secured by the consolidated mortgage there are now outstanding about the sum of two million six hundred and ten thousand dollars, and that the same are held by large numbers of persons, firms or corporations.

Respondent admits that in the year 1867 the president of said

company issued to the stockholders thereof a report for the eighteen months ending December 31st, 1866, which contained the passages quoted on page 12 of the printed copy of the bill of complaint.

Respondent admits that the Decatur and East St. Louis Railroad Company was consolidated with the said Toledo, Wabash and Western Railway Company at the time stated in the bill, the last-mentioned title having been retained by the consolidated company. It is true, as respondent is informed and believes, that said consolidation was effected on the terms stated on page 13 of the printed copy of the bill of complaint.

This respondent further admits that about the 1st day of April, 1873, the Toledo, Wabash and Western Railway Company and said Isaac H. Knox and James R. Jessup, as trustees, did execute the instrument, a copy of which is attached to the bill of complaint and marked "Exhibit E," but respondent denies that said instrument took effect as a covenant or agreement except as to such persons interested therein as afterwards availed themselves of the benefits thereof and accepted its terms.

The respondent denies that demand was made upon the directors of the Toledo, Wabash and Western Railway Company by the holders of certain of said equipment bonds, on behalf of themselves and all others like situated, for the exchange of said bonds for a like amount of bonds secured by said consolidated mortgage, until the lapse of several years after said mortgage was executed, and until the said directors had lost all power or right to make such exchange for the reasons hereinafter stated.

This respondent admits that on the first day of February, 1875,
Jacob D. Cox, then president of said Toledo, Wabash and
778 Western Railway Company, did issue a circular as stated in
the seventh paragraph of the bill; that the proposal therein contained was not immediately approved by bondholders, and that on the 22d day of said month proceedings were instituted by the Metropolitan National Bank of the City of New York, claiming to be holders of certain promissory notes executed by said company, for the security of which certain bonds, called gold bonds, had been pledged, and praying for a foreclosure of the mortgage executed by said Toledo, Wabash and Western Railway Company upon all its property, railroad, and franchises to secure the payment of said gold bonds.

It is true that said Toledo, Wabash and Western Railway Company, on or about the 1st day of February, 1873, made and delivered its deed of trust upon the entire line of railroad then owned by it and upon other property, to secure the payment of bonds intended to amount to five millions of dollars, payable in gold; and that the New York Guaranty and Indemnity Company was named as trustee in said deed of trust, but said company afterwards resigned as trustee and Valentine H. Ketcham was duly appointed trustee under said deed.

It is also true that proceedings were had in the Court of Common Pleas of Lucas County, Ohio; the Circuit Court of Cass County, Indiana, and the Circuit Court of Vermillion County, Illinois, as stated

in the bill. That Jacob D. Cox was, by order entered in said Courts in February, 1875, duly appointed by said Courts Receiver of all the railroad and property of said Toledo, Wabash and Western Railway Company, and decrees were rendered by said Courts for the sale of said railroad and property.

But this respondent does not admit that the substance of said proceedings and decrees are truly stated in the bill, but refers to the records of said Courts as showing the said proceedings, and more particularly the terms and conditions of said decrees of sale.

This respondent admits that under and by virtue of said decrees of sale said railroad and all the property and franchises of
779 the said Toledo, Wabash and Western Railway Company was sold, as stated in the bill of complaint, and was purchased by John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, and that said purchasers afterwards conveyed all said railroad property and franchises to the Wabash Railway Company.

Respondent admits that on the 6th day of January, 1877, the Wabash Railway Company was a corporation of the State of Indiana, organized within said State by said Ellis, White, Martin, Seney and Post, who are designated in the articles of association as purchasers at a judicial sale of said railroad property. That said articles of association contained the passage quoted on page 20 of the printed bill of complaint. It is also true that said railway company became a consolidated corporation of Indiana, Ohio and Illinois, and was formed by the consolidation of the Wabash Railway Company of Ohio, the Wabash Railway Company of Indiana and the Wabash Railway Company of Illinois, said several corporations existing prior to the sixth day of January, 1877.

The said Wabash Railway Company did take possession of all said railway property, equipment and franchises, and did, as this respondent now does, deny that either said Wabash Railway Company or this respondent ever agreed to or assume to pay the amounts due the holders of any of the bonds secured by the consolidated mortgage aforesaid, or ever became liable therefor.

It is also true that on the nineteenth day of January, 1877, said Wabash Railway Company executed and delivered to George I. Seney a deed of trust or mortgage as trustee to secure certain promissory notes, amounting to one million twenty-six thousand five hundred and fifty-five dollars and forty-two cents, with interest; and it is also true that large sums had been paid on account of said notes.

It is also true that about the 17th day of May, 1879, the said company also executed a certain other mortgage upon its property to secure its certain bonds, amounting in the aggregate to two millions of dollars, and that certain payments have been made on ac-
780 count of the interest on said bonds.

Further answering, this respondent admits that a number of coupons attached to certain of the bonds secured by the consolidated mortgage aforesaid have been paid in accordance with a funding scheme proposed by the Wabash Railway Company, and respondents also admits that neither said Wabash Railway Company

nor this respondent has paid or offered to pay, or funded or offered to fund, either the principal or interest of the equipment bonds aforesaid; on the contrary, said Wabash Railway Company and this respondent now and at all times deny their liability upon said bonds, any part thereof, and not being liable to pay the same, now and at all times decline to do so.

This respondent admits the consolidation of the said Wabash Railway Company with the Saint Louis, Kansas City and Northern Railway Company, as alleged in the bill of complaint, and that this respondent became a body corporate by virtue of such consolidation.

This respondent admits that it has in possession the unissued bonds secured by the consolidated mortgage aforesaid, intended to be used in retiring the bonds enumerated in said mortgage.

It is true that James R. Jessup and Isaac H. Knox, the trustees named in said consolidated mortgage, were made parties defendant in the aforesaid action of the Metropolitan National Bank, and filed their answer and cross-bill therein, setting forth the execution of the consolidated mortgage, and their acceptance of the trust therein created. And by their said answer and cross-bill said trustees called upon said Courts to protect the interest of all persons having rights under said consolidated mortgage, but said trustees did not pray for any relief for the holders of said equipment bonds, it being no part of their duty so to do.

It is true, as in said bill alleged, that in said proceedings so instituted by the Metropolitan National Bank the trustees of the several other mortgages specified in said consolidated mortgage were made defendants and filed their answers thereto.

781 But this respondent denies the allegation of said bill that "the interests, rights and claims of the holders of equipments bonds were not properly represented in the aforesaid proceedings." This respondent does not know whether any of the holders of said bonds were personally made parties to said proceedings, but all persons entitled to the benefits of said consolidated mortgage were fully represented by said trustees.

Further answering, respondent admits prior to the institution of the proceedings begun by the Metropolitan National Bank aforesaid against the Toledo, Wabash and Western Railway Company, said bank was the holder of promissory notes executed by said Railway Company for the sum of four hundred thousand dollars, or thereabouts, and for collateral security held one million one hundred and nine thousand dollars of the gold bonds aforesaid, dated February 1st, 1873; that George I. Seney, cashier of said bank, was then a director of said Railway Company, and upon the sale thereof as aforesaid said Seney became one of the purchasers thereof; that said Seney was one of the corporators of the Wabash Railway Company, to which said property was conveyed, and is the trustee named in the mortgage aforesaid executed on the nineteenth day of January, 1877, by the Wabash Railway Company.

Respondent does not know, and therefore neither admits nor denies the averment of the bill of complaint, whether said Seney was

cashier of said bank when the notes aforesaid of the Wabash Railway Company were given to said bank. Respondent admits it to be true that a large amount of said notes have been paid or exchanged for bonds secured by said mortgage, dated May 17th, 1879.

Respondent admits that James T. D. Lanier was one of the complainants in the aforesaid action brought by said Metropolitan National Bank; that he was then a member of the firm of Winslow, Lanier & Company; that said firm were the owners of certain promissory notes executed by the Toledo, Wabash and Western Railway Company for about thirty-three thousand dollars, and held
782 as collateral security therefor ninety-one thousand dollars of the gold bonds dated the 1st day of February, 1873, and at the sale of said railroad and property as aforesaid said Ellis became one of the purchasers thereof, and became an incorporator and director of the Wabash Railway Company.

This respondent, on information and belief, admits that some of the notes secured by the mortgage executed the 19th day of January, 1877, by the Wabash Railway Company were given to Winslow, Lanier & Company, and were by them accepted in lieu of the principal and interest of the notes of the Railway Company previously held by said firm.

It is true, as in said bill stated, that Alexander M. White was a director of the Toledo, Wabash and Western Railway Company at the time said foreclosure proceedings were initiated, and was also the holder of the notes of said last-named company for the sum in the bill stated; that said White was at the same time one of the trustees named in the mortgage executed on the 25th day of May, 1863, by the Great Western Railway Company of 1859, and said White appeared as a defendant as such trustee, and filed an answer and cross-petition therein, admitting the allegations contained in the complaint filed by the Metropolitan National Bank. That upon the sale of said railroad and property said White became one of the purchasers thereof, and was one of the corporators of the Wabash Railway Company. It is also true that certain notes, secured by the aforesaid mortgage, made by George I. Seney, were given to said White in exchange for certain other notes of the Railway Company previously held by him.

It is also true, as respondent is informed and believes, that the Union National Bank, of the City of New York, was, at the date of said proceedings, the holder of notes of the Toledo, Wabash and Western Railway Company, the amount of which is not known to respondent; and that said Union National Bank held as security for said notes three hundred and forty-six thousand dollars of said gold bonds, and said bank was one of the plaintiffs in the
783 action aforesaid. That said Martin was at said time a director of said bank, and also was a director of said railway company, and, upon the sale of said property, became one of the purchasers thereof, and one of the corporators and directors of the Wabash Railway Company. That a large number of the notes secured by said mortgage, made as aforesaid, to George I. Seney, were given to

said Union National Bank in exchange for the notes of said company previously held by said bank.

Respondent admits that Charles L. Perkins, Edward Livingston and Henry A. V. Post were partners, and were plaintiffs in the action aforesaid, and held a note or notes of the Toledo, Wabash and Western Railway Company for some amount unknown to this respondent. That, upon said sale being made, said Post became one of the purchasers of said property, and also became one of the corporators of said Wabash Railway Company, and a director thereof. Respondent does not know whether any such exchange of notes as that stated in the bill was ever made with said last-named firm.

This respondent does not know what was the aggregate of the debts of the said Toledo, Wabash and Western Railway Company represented by said Ellis, White, Martin, Seney and Post, but believes it was substantially as stated in the bill, and that gold bonds of said railway company to the amount of about $1,789,000 had been pledged as collateral security, and that the total amount of notes represented in said action was about $902,000, for which there had been pledged as collateral security bonds to the amount of about $2,497,000.

It is further true that shortly after the institution of said proceedings by the Metropolitan National Bank a committee was formed for the purpose of protecting the interest of the stockholders of the Toledo, Wabash and Western Railway Company, of which committee Ossian D. Ashley was chairman. Respondent does not know whether numerous circulars and advertisements were or were not issued by said committee. Respondents admits that among the advertisements so published in newspapers of wide circula-
784 tion by said committee was one addressed to the bondholders of the Toledo, Wabash and Western Railway Company, containing the passage quoted on pages thirty and thirty-one of the printed bill of complaint. But this respondent denies that any such advertisements, circulars or statements are in any way pertinent of relevant in this case, or that such advertisements, circulars or statements are in any way binding upon this respondent or are evidenced against it.

This respondent, further answering, says: That it has no knowledge of any compromise being effected between said committee and John W. Ellis and others, the purchasers of said railroad and property as aforesaid, nor does this respondent know that there was any controversy to be compromised between said parties. Respondent admits it to be true that after said purchasing committee had purchased said railroad and property under said decree of sale, and after the sale thereof had been approved by said Courts, the parties for whose benefit said purchase had been made gave to the holders of shares of stock of the Toledo, Wabash and Western Railway Company the option to subscribe to the stock of the Wabash Railway Company on special terms; that said option was so given by said purchasers as a matter which they had a right to do or not to do, and which did not and does not in any way concern the complainants in this case or any of them.

Your orator admits that such holders of the shares of stock of the Toledo, Wabash and Western Railway Company as elected to avail themselves of the option aforesaid were permitted to receive shares of stock of the Wabash Railway Company, by paying to said company ten per cent. of the par cash value of each surrendered share, and the proceeds arising from such payments, amounting to $1,600,000, were used to pay off and cancel the gold bonds aforesaid, except those held as collateral security by the parties to whom the bank debt aforesaid was due.

This respondent does not know whether the committee, of which said Ashley was chairman, ever issued the alleged statement set forth on page thirty-two of the printed bill of complaint, but if such
785 statement was published respondent denies that it has, or can have, any relevancy or bearing in this cause.

This respondent does not know whether any part of the expenses of said protection committee were paid by said Wabash Railway Company, nor does it know whether said Ashley received compensation from said railway; but respondent admits that said Ashley had not then ever been an employee of this respondent.

Respondent expressly denies that the subscriptions made by the stockholders of the Toledo, Wabash and Western Railway Company, or such of them as avail themselves of the option given as aforesaid, were in fact assessments upon them or upon the certificates of stock which they surrendered. And respondent expressly denies that the owners of the stock of the Toledo, Wabash and Western Railway Company were, by an arrangement, continued in the ownership of the property covered by the gold bond mortgage.

This respondent also expressly denies that said Wabash Railway Company was liable for the debts of the Toledo, Wabash and Western Railway Company, or that these respondents now are liable.

Respondent avers the fact to be that, when said equipment bonds were executed and sold by the Toledo and Wabash Railway Company, they were not intended or understood, either by the said company or by the persons who purchased them, to be secured in any way, but to be unsecured debts of said last-named company.

That when the Toledo, Wabash and Western Railway Company by the consolidation aforesaid succeeded to the rights, powers and liabilities of the Toledo and Wabash Company, the equipment bonds aforesaid remained unsecured claims, which the Consolidated Company desired to embrace with all other unsecured debts, and all claims that were liens on its property in a general funding scheme, on such terms, however, as said company might by its directors thereafter determine and propose, and as the holders of such claims might accept.
786 That when said consolidated mortgage was executed, and the bonds to be secured thereby were also executed, the said bonds were only to be exchanged for the bonds enumerated in said mortgage upon such terms as the directors of said Toledo, Wabash and Western Railway Company should prescribe, said last-mentioned company keeping thereby within its own control the entire matter of such exchange until the terms thereof should be prescribed and accepted.

That said directors never did prescribe the terms on which said consolidated bonds should be exchanged for said equipment bonds, nor was it the duty of said directors to do so, except upon the request or direction of said Toledo, Wabash and Western Railway Company.

That the holders of said bonds did not, nor did any of them, demand such exchange, or require the terms of such exchange to be fixed, or to give any notice of their desire or intention to make such exchange, until long after the commencement of the proceedings aforesaid instituted by the Metropolitan National Bank and the appointment of a Receiver for said railroad, and all the property of said Toledo, Wabash and Western Railway Company; that after the execution of said consolidated mortgage, the holders of said equipment bonds continued to retain the same as subsisting obligations, and to receive interest thereon as long as the same was paid by the said Toledo, Wabash and Western Railway Company; that it was not until after such suit had been instituted, and the said railway company and its directors had lost all power and control over the property and securities of said company by means of the appointment of a Receiver as aforesaid, that the holders of said equipment bonds, or any of them, demanded an exchange under the terms of said consolidated mortgage.

This respondent avers that from the time when said equipment bonds were issued up to this time said bonds were not secured by any lien on any part of the railroad or property that came to this respondent through and under the judicial sale aforesaid, and this respondent is not liable, nor is any of its property liable, for
787 the money specified in the equipment bonds or any part thereof.

And now, having fully answered, this respondent prays to be hence dismissed, with its costs in this behalf expended.

[SEAL.] JAMES F. HOW, *Secretary.*

CITY, COUNTY AND STATE OF NEW YORK, *ss:*

A. L. Hopkins, being duly sworn, on his oath says: That he is the first Vice-President of the Wabash, St. Louis and Pacific Railway Company, and as such, authorized to make this affidavit; and that the statements contained in the foregoing answers are true, except such as are stated on information and belief, and as to such statements the same are true, as he is informed and verily believes.

A. L. HOPKINS.

Attest:

JAMES F. HOW, *Secretary.*

Subscribed and sworn to before me this fourth day of November, 1880, at the City of New York.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal the day and year last aforesaid.

[SEAL.] WM. J. HARDING,
Notary Public, Kings County, New York.

Cert. filed in New York County.

788 And afterwards, to wit, at the November Term of said Court, on the 2d day of December, 1880, before the Honorable Walter Q. Gresham, Judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by C. W. Hassler, Esq., their solicitor, and file their replication to the answer of the defendant Wabash, St. Louis and Pacific Railway Company herein, in the words following, to wit:

These repliants, saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants.

Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not otherwise and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

CHARLES W. HASSLER,
Solicitor and of Counsel for Complainants.

And afterwards, to wit, at the May Term of said Court, on the 21st day of June, 1881, in recess thereof, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties and file their stipulation herein in the words following, to wit:

789 It is hereby stipulated that this cause be put over to the November Term of the Court.

Dated June —, 1881.

CHARLES W. HASSLER,
Solicitor for Complainants.
WAGER SWAYNE,
Solicitor for Defendants.

And afterwards, to wit, at the November Term of said Court, on the 16th day of November, 1881, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants by C. W. Hassler, their solicitor, and file their motion for a decree herein, in the words following, to wit:

Now come the plaintiffs and pray the Honorable Court that a decree may be made in this cause in accordance with the prayer of their amended and supplemental bill herein.

CHARLES W. HASSLER,
Solicitor for Plaintiffs.

And afterwards, to wit, at the November term of said Court, on the 9th day of April, 1883, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This cause coming on to be heard on the pleadings herein, Charles W. Hassler, Esq., appearing for the plaintiffs, and Wager Swayne, Esq., and Messrs. Baker, Hord and Hendricks appearing for defendant The Wabash, St. Louis and Pacific Railway Company, and the Court being advised in the premises as to the matters hereinafter stated, but not being ready to make or enter a final decree in the cause now here, pronounces the following opinion and makes the following findings as the basis of a decree to be hereafter made and entered, to wit:

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No lien of any kind existed in favor of the holders of the equipment bonds prior to the consolidation in 1865. It cannot be disputed that before this consolidation, which was authorized by law, and untainted by fraud, the Toledo and Wabash Company might have executed a mortgage upon all its property, which would have been paramount to all its unsecured indebtedness, including the equipment bonds. The statute authorizing the consolidation of railroads and their possession was in force when the equipment bonds were issued and sold, and it became a part of the contract between the Toledo and Wabash Company and the purchasers of these bonds. The purchasers must, therefore, be held to have contemplated at the time they bought their bonds that the Toledo and Wabash Company could, and possible would, consolidate with other railroad companies. The result of a consolidation under the statute is, that the consolidated company assume the liabilities and succeeds to the rights of the constituent companies. That being so it follows that the consolidated company may execute a mortgage upon all the consolidated property, which will be paramount to the insecured indebtedness of the constituent companies.

McMann *vs.* Morrison, 16 Ind., 172.

The Indianapolis, Cincinnati and Lafayette Railroad Company *vs.* Jones, 29 Ind., 465.

Jeffersonville, Madison and Indianapolis Railroad Company *vs.* Hendricks, 41 Ind., 50.

Paine *vs.* The Lake Erie & L. R. R. Co., 30 Ind., 233.

Was there anything in the terms of the consolidation of 1865 that gave the holders of the equipment bonds a security or lien which they did not have before? Did the consolidated company take the property and franchises of the Toledo and Wabash Company with an encumbrance which did not rest upon them before?

791

It was competent for the constituent companies to agree upon any terms of consolidation not in violation of the statute authorizing consolidation.

The property and rights of the Toledo and Wabash Company at the time of the consolidation were estimated to be worth $10,000,000.

Part of the consideration for the transfer of this property was the payment of the $600,000 of equipment bonds. The consolidation agreement contains the following:

"It is further agreed that the bonds and other debts hereinabove specified, and in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereon as the same shall respectively fall due, be protected by the consolidated company according to the true meaning and effect of the instruments or bonds, by which such indebtedness of the several consolidating companies may be evidenced."

The equipment bonds are embraced in the schedule of bonds and debts referred to in this clause. The agreement to pay these bonds as part of the purchase price of the property put into the consolidation by the Toledo and Wabash Company was made for the benefit of the equipment bondholders, who thus acquired an equitable lien on such property. This lien is good against all persons except subsequent purchasers without notice.

When the consideration for a conveyance of property is the payment by the vendee of the debt of a third person, a lien exists on the property conveyed for the benefit of such third person.

Story's Eq., 1244.
Clyde *vs.* Simpson, 4 Ohio St., 445.
Vanetter *vs.* Vanetter, 3 Grat., 148.
Harris *vs.* Fly, 7 Paige, 421.
Hallett *vs.* Hallett, 2 Paige, 15.

It was, no doubt, the intention of the Legislature in passing the statute authorizing the consolidation of railroad companies
792 that the consolidated company should be substituted for the constituent companies, and that the unsecured indebtedness of the latter should remain unsecured indebtedness of the former.

While this is the result of a consolidation under the statute, as already stated, the consolidation may be on such terms as suit the contracting parties, provided those terms do not violate the statute. One of the stipulations of the consolidation agreement of 1865 was payment by the consolidated company of the equipment bonds. The language of this part of the agreement, considered in connection with the terms and recitals of the consolidated mortgage, the consolidation agreement of 1868, the deed of further assurance and the prompt payment of interest on the equipment bonds semi-annually as it became due for eight years after 1865, shows that something more was intended than the mere assumption of an unsecured indebtedness. The proceeds of the equipment bonds had been expended in the betterment of the property of the Toledo and Wabash Company; that company was to pass out of existence, and its entire property was to become part of the possession of the consolidated company. For this reason it may have been thought just to the owners of equipment bonds that they should have a security in the nature of a lien on the property superior to any right that might thereafter be acquired. We may assume that it was well understood by all the parties to the consolidation agreement of 1865 that the

consolidated company, by the mere force of the statute which authorized its creation, was bound to pay all the debts of the constituent companies. No one understood that better than the counsel who drew the consolidation agreement. If nothing more was contemplated by the clause quoted from this agreement than a promise to pay the equipment bonds as unsecured indebtedness, why was the word "protect" used?

If the counsel of defendants are correct in their interpretation of that word, its use was wholly unnecessary. Whenever it fairly appears from an instrument, notwithstanding its form, that it
793 is intended to afford a security, an equitable lien exists in favor of the person in whose behalf the provision is made.

Jones on Mortg., 162.

The Wabash, St. Louis and Pacific Railway Company now owns and operates the property which the Toledo, Wabash and Western Railway Company acquired from the Toledo and Wabash Railway Company, and denies its liability on the equipment bonds. There is nothing to prevent the holders of these bonds from asserting against the present owner of this property the equitable lien which they were entitled to under the consolidation agreement of 1865. All subsequent interests have been acquired with knowledge of this agrement.

These are briefly my reasons for holding that the equipment bonds are a charge upon the property owned by the Wabash, St. Louis and Pacific Railway Company, which originally belonged to the Toledo and Wabash Company.

A decree will be entered declaring such a charge and for accrued interest.

Of course, there is no personal liability of the said Wabash, St. Louis and Pacific Railway Company to pay either the principal or interest of the said equipment bonds; but its line of road situated in Ohio and Indiana is subject to the lien of said equipment bonds and the unpaid coupons thereunto belonging, as hereinbefore found and declared.

Inasmuch, however, as the principal of said equipment bonds will become due and payable on the first day of May, 1883, no decree will be entered or made in pursuance of the foregoing opinion and finding until said principal shall have matured, after which a final decree will be made and entered in the cause in accordance with this opinion and finding.

And afterwards, to wit, at the same term of said Court, on the same day, before the Honorable Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

794 Now here comes the Wabash, St. Louis and Pacific Railroad Company, by its solicitors, and, by leave of the Court, files its petition, praying for a reargument and rehearing of this cause before any decree shall be entered or made under or in pur-

suance of the opinion pronounced, and the finding made by the Court at its present term.

And said petition is in the words following, to wit:

To the Honorable the Judges of the Circuit Court of the United States for the District of Indiana:

Your petitioner, the Wabash, St. Louis and Pacific Railway Company, respectfully represents:

That the above-entitled suit in chancery was, at the — Term, 1882, of this Court, heard upon the complainants' bill and exhibits, and was continued under advisement by the Court until the — day of ——, 1883, when an opinion was pronounced and a finding made by the Court, his Honor Judge Gresham, presiding, whereby it was found and declared that the six hundred equipment bonds mentioned in the complainants' bill of complaint for one thousand dollars each, made by the Toledo and Wabash Railway Company, dated the first day of November, 1862, and payable the first day of May, 1883, and the unpaid coupons or interest warrants belonging thereto are a lien on the railroad and other property of the Toledo, Wabash and Western Railway Company situated in the States of Ohio and Indiana, and which were in the possession and operated and enjoyed by the said last-named Railway Company on the 29th day of May, 1865, and which are now, or may have been, at the commencement of this suit, in the possession of your petitioner. And by said opinion and finding it was further declared and found that the said defendant the Wabash, St. Louis and Pacific Railway Company holds that portion of its railroad, which is situated in the States of Ohio and Indiana, subject to the said lien of said equipment bonds and the unpaid coupons thereunto belonging, and that the same is liable to be sold for the payment of the matured coupons of said equipment bonds, and also for the payment of the principal of said bonds when the same shall have matured.

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And your petitioner further showeth that no decree has been entered in this cause, but that the making and entering of such decree has been deferred by this Court until the principal of said bonds shall have become due and payable, and that said principal will mature on the first day of May, 1883.

And your petitioner further shows that by said opinion and finding it was further declared and found that the said equipment bonds and the coupons thereto attached became a lien on the said railroad and property by virtue of the consolidation mentioned in the complainants' bill of the Toledo and Wabash Railway Company with the three Illinois railroad corporations mentioned in the complainants' bill of complaint, to wit:

The Great Western Railroad Company of 1859, the Quincy and Toledo Railroad Company and the Illinois and Southern Iowa Railroad Company.

Your petitioner respectfully submits that it is advised and believes that the said opinion and finding of this Court, in so far as it asserts

the creation and existence of said lien, is erroneous, and ought to be reconsidered and overruled.

Wherefore your petitioner respectfully prays that a reargument may be granted, and a rehearing be had as to the creation and existence of said lien, before any final decree shall be pronounced or entered in this cause, and that upon such rehearing said opinion and finding may be overruled, and the complainants' bill of complaint dismissed for want of equity.

And your petitioner will ever pray, &c.

BAKER, HORD AND HENDRICKS.

And afterwards, to wit, at the May term of said Court, on the 5th day of November, 1883, before the Honorable William
796 A. Woods, one of the Judges of said Court, the following proceedings in the above-entitled cause were had, to wit:

And now here comes the complainants, by Charles W. Hassler, their solicitor, and the defendants the Wabash, St. Louis and Pacific Railway also come, by Baker, Hord and Hendricks, their solicitors, and the petition of said last-mentioned defendants for a reargument and rehearing in this cause is submitted to the Court for hearing, and the Court having heard the arguments of counsel, and being sufficiently advised in relation thereto, and being of the opinion that the cause having been once heard it should not be reheard in this Court, now here overrules said petition and hereby orders and adjudges that a decree be entered in accordance with the opinion of his Honor Judge Gresham heretofore entered of record in this cause, and an order to the foregoing effect having been made herein on the 12th day of May, 1883, and not entered in the records of the Court, it is ordered that this order be entered *nunc pro tunc* as of that date.

And afterwards, to wit, at the November Term of said Court, on the 5th day of May, 1884, before the Honorable William A. Woods, Judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This cause having, at the November Term, 1882, been heard on the pleadings in the cause, and the Court having at that term, on the 9th day of April, 1883, delivered an opinion and made findings in this cause, which opinion and findings were then entered of record, the complainants now come, by Charles W. Hassler, Esq., their counsel, and the defendant the Wabash, St. Louis and Pacific Railway Company, also comes, by Wager Swayne, Esq., and Baker, Hord and Hendricks, its counsel, and thereupon said complainants, by their counsel, upon the basis of said opinion and findings so entered of record, and upon no other basis or showing whatever, present to the Court the following decree and move the Court to enter the same of record as the final decree of this Court in this cause, to the granting of which motion and the
797 entering of which decree the said defendant objects, upon the grounds that the pleadings in the cause and the aforesaid

opinion and findings of said Court afford no sufficient basis for the proposed decree, but the Court overrules said objection and enters the decree as presented in the words and figures following, to wit:

The Court being sufficiently advised in the premises, it is ordered, adjudged and decreed as follows:

First. That on and prior to the first day of October, 1862, the Toledo and Wabash Railway Company was a corporation duly organized and existing under and by virtue of the laws of the States of Indiana and Ohio, and owning a line of railway extending from the city of Toledo, in the State of Ohio, and passing through the Counties of Lucas, Henry, Fulton, Defiance and Paulding, in the said State, and through the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point in the west line of State Line City, and in the said last-named county, together with the buildings, machine shops, locomotives, cars and other equipments thereto appertaining, and that the property of said company was subject to the liens of four certain mortgage trust deeds, to wit: A certain first mortgage theretofore executed by the Toledo and Illinois River Railroad Company to secure the repayment of the sum of nine hundred thousand dollars ($900,000) upon that part of the road and property of said company lying within the State of Ohio; a certain second mortgage theretofore executed by the Toledo and Wabash Railway Company to secure the repayment of the sum of one million dollars ($1,000,000) upon the same property within the State of Ohio; a certain first mortgage theretofore executed by the Lake Erie, Wabash and St. Louis Railroad Company to secure the repayment of two million five hundred thousand dollars ($2,500,000) upon that part of the road and property of said company lying within the State of Indiana, and a certain second mortgage theretofore executed by the Wabash
798 and Western Railway Company to secure repayment of one million five hundred thousand dollars ($1,500,000) upon that part of the road and property of said company lying within the State of Indiana, which said several mortgage liens amount to the sum of five million and nine hundred thousand dollars ($5,900,000).

Second. That the bonds in the bill of complaint and in the amended and supplemental bill fully set forth and described and which are known as equipment bonds issued by the Toledo & Wabash Railway Company, and dated the first day of November, 1862, and which were payable on the first day of May, 1883, were legally issued, and that the said Toledo and Wabash Railway Company was justly liable for the payment of the principal and interest thereof.

Third. That on the 29th day of May, 1865, the Toledo and Wabash Railway Company consolidated its road, property and capital stock with the road, property and capital stock of the following named corporations of the State of Illinois, viz.:

The Great Western Railroad Company of 1859, the Quincy and

Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company, and the new corporation formed by such consolidation became known as the Toledo, Wabash and Western Railway Company. And it was provided that all rights, franchises, property, real and personal, debts and choses in action of the respective companies to said consolidation should vest in the consolidated company, and that all bonds and other debts therein specified should be protected by said consolidated company, and the said Toledo, Wabash and Western Railway Company thereupon thereafter paid the interest warrants on said equipment bonds as the same matured up to and including that falling due May 1st, 1870.

Fourth. That on the 10th day of August, 1870, the Decatur and East St. Louis Railroad Company was a corporation of the
799 State of Illinois, and that on said date it became consolidated with the said Toledo, Wabash and Western Railway Company, the consolidated company retaining the name of the latter, and being thereafter known thereby, and it was provided that all rights, franchises, privileges, property and appurtenances of every description, choses in action, debts, dues and demands of the companies parties thereto should vest in the consolidated company, and that the terms of the articles of consolidation, whereby the said Toledo, Wabash and Western Railway Company was formed, should be and remain in full force and be binding upon the consolidated company, so far as the same could be applicable, and so far as they were not in conflict with the specific provisions thereof. And the said Toledo, Wabash and Western Railway Company thereupon afterwards paid the interest warrants on the equipment bonds, described in the bill of complaint herein, as the same matured up to and including that falling due November 1, 1874, since which time the coupons or interest warrants maturing on said equipment bonds have remained wholly unpaid, and the said company and the defendants the Wabash Railway Company and the Wabash, St. Louis and Pacific Railway Company have declined and refused to pay them.

Fifth. That on the first day of February, 1873, the said Toledo, Wabash and Western Railway Company made and delivered its deed of trust or mortgage upon the entire line of railroad then belonging to it, and upon its other property, to secure the payment of five million dollars ($5,000,000), payable in gold, which mortgage was made to the New York Guaranty and Indemnity Company, as trustee. That said New York Guaranty and Indemnity Company afterwards resigned said trust created thereby, and one Valentine H. Ketcham was duly appointed trustee in its place and stead, and accepted the trusts created thereby. That bonds were issued under said last-named deed of trust or mortgage. That said Toledo, Wabash and Western Railway Company was in possession of said
800 continuous lines of railroad and other property on the 22d day of February, 1875, and that on that day a petition was filed in the Court of Common Pleas, Lucas County, Ohio, and on

the 24th day of February, 1875, a complaint was filed in the Cass County Circuit Court, State of Indiana, and on the said 24th day of February, 1875, a complaint was filed in the Vermillion County Circuit Court, Illinois, all by the Metropolitan National Bank of the City of New York and others, complainants, against said Toledo, Wabash and Western Railway Company and others, and a cross-petition was filed by the said Valentine H. Ketcham, as trustee, praying that the property covered by the mortgage as aforesaid might be sold to satisfy the amounts due to the holders of the bonds secured thereby; and in the suit so as aforesaid instituted in the State of Ohio, a decree was, on the 14th day of December, 1875, entered in the said Court of Common Pleas, Lucas County, Ohio, by which it *is* was ordered, adjudged and decreed that the road, property, equipments and franchises, and the right and franchise to be a corporation *is* entirety of the said Toledo, Wabash and Western Railway Company should be sold subject to the liens of all deeds of trust or mortgages prior to the said deed of trust or mortgage dated February 1st, 1873, and that the aforesaid prior deeds of trust or mortgages should remain liens upon the property in the order of their priority, and that such sale should be made subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim that might be made by the holders of the bonds, called the equipment bonds, described in the complaint herein and referred to in the petitions in said actions, as to which all questions arising were left open. That subsequently and at the February term, 1876, of the said Circuit Court of Cass County, Indiana, and of the Circuit Court of Vermillion County, Illinois, decrees were made between the same parties in the aforesaid suits, in all particulars adopting the said decree of the said Court of Common Pleas, of Lucas County, Ohio, as the decree of said several Courts respectively.

801 Sixth. That in pursuance of the said decrees, and all of them, a sale was had of the said property, effects, rights and franchises of the said Toledo, Wabash and Western Railway Company, in the City of Toledo, on the 10th day of June, 1876, to John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, as joint tenants, and that subsequently, and on or about the first day of January, 1877, a proper deed of conveyance was made, executed and delivered to the said John W. Ellis and others by Jacob D. Cox, who had been appointed by said decrees special Master Commissioner to execute the same, and who had made said sale whereby was conveyed and assured to the said John W. Ellis and others all and singular the entire property, rights, equipments and franchises then belonging to the said Toledo, Wabash and Western Railway Company, together with the franchises of said railway company, and of the several original companies of which it was composed, and the right and franchise to be a corporation, together with all corporate franchises of said company and of the said companies, severally including the rights and franchises of said companies to be and act as corporations, to have

and to hold the same with appurtenances thereof, unto the said John W. Ellis and others as joint tenants.

That said Ellis, White, Martin, Seney and Post did, by their certain deed, dated the 12th day of January, 1877, convey to the defendant The Wabash Railway Company, the property theretofore conveyed to them by the said Jacob D. Cox, as special Master Commissioner, as in said deed by said Cox especially set forth and referring thereto, and said Wabash Railway Company forthwith entered into possession of the said property, rights, equipment and franchises conveyed to them.

Seventh. That in the year 1879 the said Wabash Railway Company became consolidated with the St. Louis, Kansas City and Northern Railway Company, a corporation of the State of Missouri, and the consolidated corporation became and is known as The Wa-
802 bash, St. Louis and Pacific Railway Company, defendant herein, and is in possession of, operating and enjoying lines of railway within the States of Illinois and Missouri, and the lines of railway within the States of Ohio and Indiana, which, on the 29th day of May, 1865, were in possession of and operated and enjoyed by the Toledo and Wabash Railway Company, together with the buildings, machine-shops, locomotives, cars and other equipments thereunto appertaining and belonging.

Eighth. That the principal of the bonds known as equipment bonds of the Toledo and Wabash Railway Company, which became due on the first day of May, 1883, together with the interest warrants thereon, which have become due since the first day of November, 1874, are a lien on all property, real, personal or mixed, of every kind and nature whatsoever, which on the 29th day of May, 1865, was in possession of and was operated and enjoyed by the Toledo and Wabash Railway Company, situated within the States of Ohio and Indiana, together with the repairs, improvements and accretions thereon and thereunto belonging, which have since been made thereon or have accrued thereto and which are now or may have been at the time of the commencement of this suit in the possession of the Wabash, St. Louis and Pacific Railway Company, subject to the liens of the certain four several mortgages in this decree heretofore specified in the first paragraph hereof, and which amount in the aggregate to the sum of five millions and nine hundred thousand dollars ($5,900,000).

Ninth. That there is now, to wit, on this first day of May, 1844, due to the holders and owners of the bonds known as equipment bonds, issued by the Toledo and Wabash Railway, and to holders of the interest warrants thereunto belonging, the sums following, that is to say:

To the owners and holders of the interest warrants there-
803 unto belonging, and which became due on the first day of May, 1875, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of thirty-two thousand three hundred and forty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1875, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of thirty-one thousand seven hundred and ten dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1876, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date at the rate — six per cent. per annum; to wit, the sum of thirty-one thousand and eighty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1876, the principal sum of twenty-one thousand dollars, together with the interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of thirty thousand four hundred and fifty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1877, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of twenty-nine thousand eight hundred and twenty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1877, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of twenty-nine thousand one hundred and ninety dollars.

To the owners and holders of the interest warrants there-
804 unto belonging, and which became due on the first day of May, 1878, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit; the sum of twenty-eight thousand five hundred and sixty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1878, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-seven thousand nine hundred and thirty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1879, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-seven thousand three hundred dollars.

To the owners and holders of the interest warrants thereunto belonging and which became due on the first day of November, 1879, the principal sum of twenty-one thousand dollars, together with

interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-six thousand six hundred and seventy dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1880, the principal sum of twenty-one thousand dollars, together with the interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-six thousand and forty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1880, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at
the rate of six per cent. per annum, to wit, the sum of twenty-
805 five thousand four hundred and ten dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1881, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-four thousand seven hundred and eighty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1881, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-four thousand one hundred and fifty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1882, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-three thousand five hundred and twenty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1882, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-two thousand eight hundred and ninety dollars.

To the owners and holders of the interest warrant thereunto belonging, and which became due on the 1st day of May, 1883, the principal sum of twenty-one thousand dollars, together with the interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-two thousand two hundred and sixty dollars.

To the owners and holders of said bonds, for the principal sum thereof, the sum of six hundred thousand dollars, together with interest thereon from the first day of May, 1883, to this date, at the
rate of six per cent. per annum, to wit, the sum of thirty-six
806 thousand dollars; the above several items making a total sum
of one million one hundred thousand one hundred and ten

dollars, which said sum is a lien on all the property described in the eighth paragraph of this decree, and as found therein.

Tenth. That the defendants, or any or either of them, pay to the clerk of this Court the said sum of $1,100,110, with interest thereon to the day of payment, together with the costs of this action, within thirty days from the day of the entry of this decree; and if default shall be made in such payment, the property described in the eighth paragraph of this decree, so far as the same may be situated, within the jurisdiction of this Court, subject, nevertheless, to the liens of the mortgages therein specified, shall be sold in satisfaction of the same.

Eleventh. That if default be made in the payment of said sum of $1,100,110, then the Master in Chancery of this Court, William P. Fishback, shall sell, and he is hereby ordered and directed to sell, the said property hereinbefore described and set forth at public sale, in the city of Lafayette, State of Indiana, having first given notice of such intended sale by publication in two newspapers, one published in the City of Indianapolis, Indiana, and the other in the City of New York, by publishing said notice in each of said newspapers once a week for six consecutive weeks, and from the proceeds of said sale the said Master shall first pay the costs of this action, and he shall then bring the residue of such proceeds into this Court.

And thereupon the said defendant The Wabash, St. Louis and Pacific Railway Company prays an appeal to the Supreme Court of the United States from the foregoing decree, which appeal is granted upon the said defendant filing with the Clerk of this Court a proper appeal bond, within sixty days, in the penal sum of $5,000, with surety on such bond to be approved by this Court, and when
807 such bond is filed and approved the same shall operate as a supersedeas herein.

It is hereby stipulated between the parties to this cause, by their respective counsel, and is to be entered of record with the foregoing decree, that this cause shall forthwith be appealed to the Supreme Court of the United States, and shall be submitted upon printed briefs for decision of that Court, under the provisions of Rule 20 of that Court. Appeal bond to be filed within ninety days; bond to be for five thousand dollars.

WAGER SWAYNE,
Attorney for Defendants.
CHARLES W. HASSLER,
Solicitors for Plaintiffs and of Counsel.

And afterwards, to wit, at the May term of said Court, on the 17th day of June, 1884, before the Honorable William A. Woods, Judge, as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

And now, on this 17th day of June, 1884, comes the defendant The Wabash, St. Louis and Pacific Railway Company, by Baker, Hord and Hendricks, its solicitors, and present to the Court the appeal bond of said defendant, executed by said defendant as principal,

and by James Cheney, of Fort Wayne, Indiana, as surety, in the penal sum of five thousand dollars, payable to the plaintiffs, and conditioned according to law; and the Court now here approves said bond and surety, and directs that the same shall be filed, and shall operate as a supersedeas, pursuant to the order heretofore made granting an appeal in this cause.

And said bond is in the words following, to wit:

Know all men by these presents, that the Wabash, St. Louis and Pacific Railway Company, as principal, and James Cheney, as its surety, are held and firmly bound unto Benjamin F. Ham,
808 Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, G. M. Whittemore, Townsend Underhill, and Thomas Mayo in the penal sum of five thousand ($5,000) dollars; for the payment of which, well and truly to be made and done by the said obligors, they, the said obligors, do hereby bind themselves, their successors, heirs, executors and administrators, jointly, severally and firmly, by these presents.

Whereas, a decree of foreclosure was rendered on the 5th day of May, 1884, by the Circuit Court of the United States for the District of Indiana in the hereinbefore entitled cause for more than one million of dollars in favor of the said obligees, plaintiffs in said cause, and against a part of the line of railroad of the said Wabash, St. Louis and Pacific Railway Company, a defendant in said cause, and thereupon, on the same day, the said defendant The Wabash, St. Louis and Pacific Railway Company prayed an appeal to the Supreme Court of the United States from said decree, which appeal was then granted by said Circuit Court, to operate as a supersedeas upon the filing of an appeal bond in the penal sum of $5,000, to be filed within sixty days from the date of the rendition of said decree, and with surety in said bond to the approval of said Court:

Now, therefore, this obligation is made subject to the following condition, that is to say:

If the said appellant, the Wabash, St. Louis and Pacific Railway Company, shall prosecute its said appeal to effect, and if said appellant shall fail to make its plea good in said appeal, then, if said appellant shall also pay and answer all damages and costs for which said appellant shall be or become liable by reason of such failure, then this obligation shall be null and void; otherwise it shall be and remain in full force and virtue.

In witness whereof, the said The Wabash, St. Louis and Pacific Railway Company has caused these presents to be signed by its president, attested by its secretary, and has also caused its
809 corporate seal to be hereunto affixed, and the said surety has also hereunto set his hand and seal this — day of ——, 1884.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,

[SEAL.] By H. M. HOXIE, *3rd Vice-President.*

Attest:
JAMES F. HOW,
Assistant Secretary.
JAMES CHENEY, *Surety.*

UNITED STATES OF AMERICA, *District of Indiana:*

Be it remembered that on this the 28th day of May 1884, James Cheney, the surety named in the annexed appeal bond, personally came before the undersigned, a United States Commissioner, at Fort Wayne, in said district, and, being by me sworn, says: That he is the owner of unencumbered real estate in Indiana of the value of more than ten thousand ($10,000) dollars over and above all his debts and liabilities.

JAMES CHENEY.

Subscribed and sworn to before me the date aforesaid, as witness my hand and official seal.

JAMES B. HARPER,
[SEAL.] *U. S. Commissioner.*

UNITED STATES OF AMERICA, *District of Indiana, ss:*

I, Noble C. Butler, Clerk of the Circuit Court of the United States within and for the District of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript
810 of the record in the cause of David J. Tysen and others against The Wabash Railway Company and others, as fully as the same remains upon the records now in my office.

Witness my hand and the seal of said Court, at Indianapolis, in said district, this 29th day of August, A. D. 1884.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

September 8, 1884. Cost of this transcript $103, paid by appellant, through Baker, Hord & Hendricks.

NOBLE C. BUTLER, *Clerk.*

[Written across the face:] Duplicate.

[Endorsed on cover:] Indiana C. C. U. S. No. 1118. The Wabash, St. Louis and Pacific Railway Company, appellant, *vs.* Benjamin F. Ham, Edward De Rose, Henry A. Mott, John W. Ferdon *et al.* Filed 18th October, 1884.

811 In the Circuit Court of the United States for the District of Indiana.

May Term, 1888, May 7th, A. D. 1888.

Before Honorable William A. Woods, Judge.

No. 6025. Chancery.

BENJAMIN F. HAM, EDWARD DE ROSE, HENRY A. MOTT, JOHN W. FERDON, CHARLES JACKSON, G. M. WHITTEMORE, TOWNSEND UNDERHILL, and THOMAS W. MAYO, Suing in Behalf of Themselves and all Other Holders of Equipment Bonds Issued by the Toledo and Wabash Railway Company, on November 1, 1862,

vs.

WABASH RAILWAY COMPANY, TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, ISAAC H. KNOX, and JAMES R. JESUP, as Trustees.

Come again the parties and it is ordered that the mandate issued to this Court by the Supreme Court of the United States in this cause be spread at large upon the record, which mandate reads as follows:

812 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States
[SEAL.] for the District of Indiana, greeting:

Whereas, lately in the Circuit Court of the United States for the District of Indiana, before you, or some of you, in a cause between Benjamin F. Ham, Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, G. M. Whittemore, Townsend Underhill and Thomas W. Mayo, complainants, and The Wabash Railway Company, The Toledo, Wabash and Western Railway Company, The Wabash, St. Louis and Pacific Railway Company, Isaac H. Knox and James R. Jesup, as trustees, defendants, wherein the decree of the said Circuit Court, entered in said cause on the 5th day of May, A. D. 1884, is in the following words, viz.:

"This cause having, at the November Term, 1882, been heard on the pleadings in the cause and the Court having at that term, on the 9th day of April, 1883, delivered an opinion and made findings in this cause, which opinion and findings were then entered of record, the complainants now come, by Charles W. Hassler, Esq., their counsel, and the defendant, the Wabash, St. Louis and Pacific Railway Company, also comes, by Wager Swayne, Esq., and Baker, Hord & Hendricks, its counsel, and thereupon said complainants, by their counsel, upon the basis of said opinion and findings so entered of record, and upon no other basis or showing whatever, present to the Court the following decree, and move the Court to enter

the same of record as the final decree of this Court in this cause; to the granting of which motion and the entering of which decree the said defendant objects, upon the grounds that the pleadings in the cause and the aforesaid opinion and findings of said Court afford no sufficient basis for the proposed decree; but the Court over-
813 rules said objection and enters the decree as presented in the words and figures following, to wit:

The Court being sufficiently advised in the premises, is is ordered, adjudged and decreed as follows:

First. That on and prior to the first day of October, 1862, the Toledo and Wabash Railway Company was a corporation duly organized and existing under and by virtue of the laws of the States of Indiana and Ohio, and owning a line of railway extending from the City of Toledo, in the State of Ohio, and passing through the Counties of Lucas, Henry, Fulton, Defiance and Paulding, in the said State, and through the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point in the west line of State Line City, in the said last named county, together with the buildings, machine shops, locomotives, cars and other equipments thereto appertaining, and that the property of said company was subject to the liens of four certain mortgage trust deeds, to wit: A certain first mortgage theretofore executed by the Toledo and Illinois River Railroad Company to secure the repayment of the sum of nine hundred thousand dollars ($900,000) upon that part of the road and property of said company lying within the State of Ohio; a certain second mortgage theretofore executed by the Toledo and Wabash Railway Company to secure the repayment of the sum of one million dollars ($1,000,000) upon the same property within the State of Ohio; a certain first mortgage theretofore executed by the Lake Erie, Wabash and St. Louis Railroad Company to secure the repayment of two million five hundred thousand dollars ($2,500,000) upon that part of the road and property of said company lying within the State of Indiana; and a certain second mortgage theretofore executed by the Wabash and Western Railway Company, to secure repayment of one million five hundred thousand dollars ($1,500,000) upon that part of the road and property of said company lying within
814 the State of Indiana, which said several mortgage liens amount to the sum of five million and nine hundred thousand dollars ($5,900,000).

Second. That the bonds in the bill of complaint and in the amended and supplemental bill fully set forth and described, and which are known as equipment bonds, issued by the Toledo and Wabash Railway Company, and dated the first day of November, 1862, and which were payable on the first day of May, 1883, were legally issued, and that the said Toledo and Wabash Railway Company was justly liable for the payment of the principal and interest thereof.

Third. That on the 29th day of May, 1865, the Toledo and Wabash Railway Company consolidated its road, property, and capital

stock with the road, property and capital stock of the following named corporations of the State of Illinois, viz.:

The Great Western Railroad Company of 1859, the Quincy and Toledo Railroad Company, and the Illinois and Southern Iowa Railroad Company, and the new corporation formed by such consolidation became known as the Toledo, Wabash and Western Railway Company. And it was provided that all rights, franchises, property, real and personal, debts and choses in action of the respective companies to said consolidation should vest in the consolidated company, and that all bonds and other debts therein specified should be protected by said consolidated company, and the said Toledo, Wabash and Western Railway Company thereupon thereafter paid the interest warrants on said equipment bonds as the same matured up to and including that falling due May 1st, 1870.

Fourth. That on the 10th day of August, 1870, the Decatur and East St. Louis Railroad Company was a corporation of the State of Illinois, and that on said date it became consolidated with the said Toledo, Wabash and Western Railway Company, the consolidated company retaining the name of the latter, and being thereafter known thereby, and it was provided that all rights, franchises, privileges, property, and appurtenances of every description, choses in action, debts, dues and demands of the companies parties thereto should vest in the consolidated company, and that the terms of the articles of consolidation, whereby the said Toledo, Wabash and Western Railway Company was formed, should be and remain in full force and be binding upon the Consolidated Company, so far as the same could be applicable and so far as they were not in conflict with the specific provisions thereof. And the said Toledo, Wabash and Western Railway Company thereupon afterwards paid the interest warrants on the equipment bonds described in the bill of complaint herein as the same matured, up to and including that falling due November 1, 1874, since which time the coupons or interest warrants maturing on said equipment bonds have remained wholly unpaid, and the said company and the defendants, the Wabash Railway Company and the Wabash, St. Louis and Pacific Railway Company, have declined and refused to pay them.

Fifth. That on the first day of February, 1873, the said Toledo, Wabash and Western Railway Company made and delivered its deed of trust or mortgage upon the entire line of railroad then belonging to it and upon its other property, to secure the payment of five million dollars ($5,000,000), payable in gold, which mortgage was made to the New York Guaranty and Indemnity Company as trustee. That said New York Guaranty and Indemnity Company afterwards resigned said trust created thereby, and one Valentine H. Ketcham was duly appointed trustee in its place and stead and accepted the trusts created thereby. That bonds were issued under said last-named deed of trust or mortgage. That said Toledo, Wabash and Western Railway Company was in possession of said continuous lines of railroad and other property on the 22d day of February, 1875,

and that on that day a petition was filed in the Court of Common Pleas, Lucas County, Ohio, and on the 24th day of February, 1875, a complaint was filed in the Cass County Circuit Court, State
816 of Indiana, and on the said 24th day of February, 1875, a complaint was filed in the Vermillion County Circuit Court, Illinois, all by the Metropolitan National Bank of the City of New York and others, complainants against said Toledo, Wabash and Western Railway Company and others, and a cross-petition was filed by the said Valentine H. Ketcham as trustee, praying that the property covered by the mortgage as aforesaid might be sold to satisfy the amounts due to the holders of the bonds secured thereby; and in the suit so as aforesaid instituted in the State of Ohio, a decree was on the 14th day of December, 1875, entered in the said Court of Common Pleas, Lucas County, Ohio, by which it was ordered, adjudged and decreed that the road, property, equipments and franchises and the right and franchise to be a corporation as entirety of the said Toledo, Wabash and Western Railway Company should be sold subject to the liens of all deeds of trust or mortgages prior to the said deed of trust or mortgage dated February 1st, 1873, and that the aforesaid prior deeds of trust or mortgages should remain liens upon the property in the order of their priority, and that such sale should be made subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim that might be made by the holders of the bonds called the equipment bonds, described in the complaint herein and referred to in the petitions in said actions, as to which all questions arising were left open. That subsequently, and at the February Term, 1876, of the said Circuit Court of Cass County, Indiana, and of the Circuit Court of Vermillion County, Illinois, decrees were made between the same parties in the aforesaid suits, in all particulars adopting the said decree of the said Court of Common Pleas of Lucas County, Ohio, as the decree of said several Courts respectively.

Sixth. That in pursuance of the said decrees and all of them, a sale was had of the said property, effects, rights and franchises of the said Toledo, Wabash and Western Railway Company, in the
817 City of Toledo, on the 10th day of June, 1876, to John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, as joint tenants, and that subsequently, and on or about the first day of January, 1877, a proper deed of conveyance was made, executed and delivered to the said John W. Ellis and others by Jacob D. Cox, who had been appointed by said decrees special Master Commissioner to execute the same, and who had made said sale whereby was conveyed and assured to the said John W. Ellis and others all and singular the entire property, rights, equipments and franchises then belonging to the said Toledo, Wabash and Western Railway Company, together with the franchises of said railway company, and of the several original companies of which it was composed, and the right and franchise to be a corporation, together with all corporate franchises of said company, and of the said companies, severally including the rights and franchises of said several companies to be and act as corporations, to have and to

hold the same with the appurtenances thereof unto the said John W. Ellis and others as joint tenants.

That said Ellis, White, Seney and Post did, by their certain deed, dated the 12th day of January, 1877, convey to the defendant The Wabash Railway Company the property theretofore conveyed to them by the said Jacob D. Cox, as Special Master Commissioner, as in said deed by said Cox, especially set forth and referring thereto, and said Wabash Railway Company forthwith entered into possession of the said property, rights, equipments and franchises conveyed to them.

Seventh. That in the year 1879 the said Wabash Railway Company became consolidated with the St. Louis, Kansas City and Northern Railway Company, a corporation of the State of Missouri, and the consolidated corporation became and is known as The Wabash, St. Louis and Pacific Railway Company, defendant herein, and is in possession of, operating and enjoying lines of railway within the States of Illinois and Missouri, and the lines of railway
818 within the States of Ohio and Indiana, which, on the 29th day of May, 1865, were in possession of and operated and enjoyed by the Toledo and Wabash Railway Company, together with the buildings, machine shops, locomotives, cars and other equipments thereunto appertaining and belonging.

Eighth. That the principal of the bonds known as equipment bonds of the Toledo and Wabash Railway Company, which became due on the first day of May, 1883, together with the interest warrants thereon, which have become due since the first day of November, 1874, are a lien on all the property, real, personal or mixed, of every kind and nature whatsoever, which, on the 29th day of May, 1865, was in possession of and was operated and enjoyed by the Toledo and Wabash Railway Company, situated within the States of Ohio and Indiana, together with the repairs, improvements and accretions thereon and thereunto belonging, which have since been made thereon or have accrued thereto, and which are now or may have been at the time of the commencement of this suit in the possession of the Wabash, St. Louis and Pacific Railway Company, subject only to the liens of the certain four several mortgages in this decree heretofore specified in the first paragraph hereof, and which amount in the aggregate to the sum of five million nine hundred thousand dollars ($5,900,000).

Ninth. That there is now, to wit, on this first day of May, 1884, due to the holders and owners of the bonds known as equipment bonds, issued by the Toledo and Wabash Railway, and to the holders of the interest warrants thereunto belonging, the sums following—that is to say:

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of May, 1875, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at
819 the rate of six per cent. per annum—to wit, the sum of thirty-two thousand three hundred and forty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of November, 1875, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date at the rate of six per cent. per annum—to wit, the sum of thirty-one thousand seven hundred and ten dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of May, 1876, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of thirty-one thousand and eighty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of November, 1876, the principal sum of twenty-one thousand dollars, together with the interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of thirty thousand four hundred and fifty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of May, 1877, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of twenty-nine thousand eight hundred and twenty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of November, 1877, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of twenty-nine thousand one hundred and ninety dollars.

To the owners and holders of the interest warrants there-
820 unto belonging, and which became due on the 1st day of May, 1878, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of twenty-eight thousand five hundred and sixty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of November, 1878, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of twenty-seven thousand nine hundred and thirty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of May, 1879, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of twenty-seven thousand three hundred dollars.

To the owners and holders of the interest warrants thereunto

belonging, and which became due on the 1st day of November, 1879, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it fell so due to this date, at the rate of six per cent. per annum—to wit, the sum of twenty-six thousand six hundred and seventy dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1880, the principal sum of twenty-one thousand dollars, together with the interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum—to wit, the sum of twenty-six thousand and forty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1880, the principal sum of twenty-one thousand dollars,
821 together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum —to wit, the sum of twenty-five thousand four — and ten dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1881, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum, to wit, the sum of twenty-four thousand seven hundred and eighty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1881, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of twenty-four thousand one hundred and fifty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of May, 1882, the principal sum of twenty-one thousand dollars, together with interest thereon from the date of which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of twenty-three thousand five hundred and twenty dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the first day of November, 1882, the principal sum of twenty-one thousand dollars, together with interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of twenty-two thousand two hundred and ninety dollars.

To the owners and holders of the interest warrants thereunto belonging, and which became due on the 1st day of May, 1883, the principal sum of twenty-one thousand dollars, together with the interest thereon from the date at which it so fell due to this date, at the rate of six per cent. per annum; to wit, the sum of twenty-two thousand two hundred and sixty dollars.

To the owners and holders of said bonds, for the principal sum thereof, the sum of six hundred thousand dollars, together with the

interest thereon from the first day of May, 1883, to this date,
822 at the rate of six per cent. per annum; to wit, the sum of thirty-six thousand dollars; the above several items making a total sum of one million one hundred thousand one hundred and ten dollars, which said sum is a lien on all the property described in the eighth paragraph of this decree, and as found herein.

Tenth. That the defendants, or any or either of them, pay to the Clerk of this Court the said sum of $1,100,110, with interest thereon to the day of payment together with the costs of this action, within thirty days from the day of the entry of this decree; and if default shall be made in such payment the property described in the eighth paragraph of this decree, so far as the same may be situated within the jurisdiction of this Court, subject nevertheless to the liens of the mortgages therein specified, shall be sold in satisfaction of the same.

Eleventh. That if default be made in the payment of said sum of $1,100,110, then the Master in Chancery of this Court, William P. Fishback, shall sell, and he is hereby ordered and directed to sell, the said property hereinbefore described and set forth at public sale, in the City of La Fayette, State of Indiana, having first given notice of such intended sale by publication in two newspapers, one published in the City of Indianapolis, Indiana, and the other in the City of New York, by publishing said notice in each of said newspapers once a week for six consecutive weeks, and from the proceeds of said sale the said Master shall first pay the costs of this action, and he shall then bring the residue of such proceeds into this Court."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by The Wabash, St. Louis and Pacific Railway Company, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

823 And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-four, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel. On consideration whereof it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that the said The Wabash, St. Louis and Pacific Railway Company recover against the said complainants three hundred and sixteen dollars and twenty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to disallow the lien claimed by the holders of equipment bonds.

MAY 4TH, 1885.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief-Justice of said Supreme Court, the third day of June, in the year of our Lord one thousand eight hundred and eighty-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

It is therefore ordered and decreed by this Court in obedience to the command of such mandate that the decree of this Court in this cause rendered on May 5, 1884, be and the same is vacated, set aside and held for naught, and that the claim of lien set up in this cause by the holders of equipment bonds be and the same is disallowed, and the bill herein is dismissed for want of equity with costs to be taxed.

824 DISTRICT OF INDIANA:

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the mandate from the Supreme Court of the United States, and of the decree of the Circuit Court of the United States for the District of Indiana, entered thereon in said Court on the 7th day of May, 1888, in the cause of Benjamin F. Ham *et al. vs.* The Wabash Railway Company *et al.*, No. 6025, as fully as the same appears of record in my office.

Witness my hand and the seal of said Court this 26th day of April, 1890.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, William A. Woods, Judge of the District Court of the United States, for said District, do certify that at the date of the foregoing certificate Noble C. Butler was, and now is, the Clerk of the Circuit Court of the United States, for said District, and that his attestations aforesaid is in due form of law.

Witness my hand this 26th day of April, 1890.

WM. A. WOODS.

[Endorsed:] Filed in C. C. Jan. 14/95, L. E. Clark, Clk.

825 EXHIBIT R (AGREED STATEMENT OF FACTS).

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

At a Stated Term of the Circuit Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the first Tuesday in June, being the fourth day of said month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and thirteenth.

Present—The Honorable Augustus J. Ricks, District Judge, and the Honorable E. S. Hammond, District Judge for the Western District of Tennessee, by designation, acting as Circuit Judge.

SATURDAY, *August 17th*, 1889.

JAMES R. JESUP ET AL.
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.

Now, on this day came the complainant, by Foster & Thompson, their solicitors; The Purchasing Committee, Ashley, Hubbard, Welles, and Joy, by Butler, Stillman & Hubbard, their solicitors; Humphreys and Lindley, Trustees, by their solicitors; Henry
826 Crawford, The Farmers' Loan and Trust Company, by Turner, McClure & Rolston, its solicitors, and James Compton, by John G. Milburn and John H. Doyle, his solicitors, and upon their motion, and the Court being now fully satisfied in the premises, it is ordered that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein, upon and concerning said claim and lien and reserved in the former decree herein, saving the rights of said Compton, be, and the same are hereby, referred to Bluford Wilson on account of his experience in such accounting and matters as Special Master to take and report, with all convenient speed, all of the evidence upon all of the matters involved in such issues and pertinent thereto. Said master shall fix the time and place of hearing under this order, giving at least twenty days' written notice to the Solicitors of the parties hereto interested in said issues. Said Master may, if he deems it necessary, or if demanded by counsel, direct the printing of a sufficient number of the copies of the testimony so taken, which is not already printed in the reports of the Masters heretofore filed herein, for the use of the Court and counsel, and the said testimony and the findings of said Master shall be reported by the Master to the Court and filed herein according to the rules and practice of this Court in like cases.

(Signed) A. J. RICKS,
U. S. Dist. Judge, N. D. O.

827 EXHIBIT S (AGREED STATEMENT OF FACTS).

Circuit Court of the United States for the Northern District of Ohio, Western Division. In Equity.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Consolidated and Ancillary Causes upon the Claims of James Compton.

This cause having come on in due course to be heard in the matter of the claim of James Compton, upon the pleadings and proofs of James Compton, and upon the pleadings and proof of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Wells, Purchasing Committee of The Wabash Railroad Company, Solon Humphreys and Daniel A. Lindley, trustees, in respect of said claim, and on all the papers and proceedings herein; and upon the report of Bluford Wilson, special master commissioner heretofore appointed herein, which report bears date and was filed on the 11th day of June, 1891; and on the exceptions filed thereto; and the Court being fully advised in the premises, finds, adjudges and decrees as follows:

(1.) That the defendant, James Compton, was not a party to the suit brought on the 16th day of May, 1878, by David J. Tyson, Jr., against The Wabash Railway Company and others in the Circuit Court of Fountain County, Indiana, and removed into the United States Circuit Court for the District of Indiana, and thereafter, by dismissal of the said suit of David J. Tyson, Jr., and substitution of Benjamin F. Ham and others, as plaintiffs, known in said Court as the suit of Benjamin F. Ham and others against The Wabash, St. Louis & Pacific Railway Company and others that said defendant, James Compton, was not prevented from filing his petition in the Common Pleas Court of Lucas County, on the third day of February, 1880, by the pendency of the said suit in the United States Circuit Court in Indiana, nor from prosecuting said suit in the State Courts of Ohio to final decree in the Supreme Court of Ohio, on the 12th day of May, 1887, by the pendency of the said Ham suit in said United States Circuit Court or in the Supreme Court of the United States, or by reason of any judgment or decree rendered therein; but that said James Compton filed his petition in the Common Pleas Court of Lucas County on the date aforesaid, and rightfully prosecuted the said action to final decree in the Supreme Court of the said State of Ohio; and that the decree of the Supreme Court of Ohio declared the equipment bonds owned by said James Compton, amounting, with interest on the first day of May, 1888, to the sum of $339,920.40, to constitute a valid and substantial lien upon all of the said railroad and real property and

828

the structures thereupon and the fixtures and appurtenances thereunto appertaining, owned by the said The Toledo & Wabash Railway Company at the time of its consolidation, in the year 1865, with the Great Western Railway Company of 1859, The Quincy & Toledo Railroad Company, and The Illinois & Southern Iowa Railroad Company, thereby forming the Toledo, Wabash & Western Railway Company, and which said property, being the line of railway extending from Toledo, Ohio, to the west line of the State of Indiana, by various mesne conveyances, by consolidation and foreclosure, had passed into the hands of and is now held and controlled by The Wabash Railroad Company, party defendant herein.

That the lien thus declared to exist in favor of the said
829 James Compton has priority over the mortgages executed by The Toledo, Wabash & Western Railroad Company, on the first day of February, 1867, to Isaac H. Knox and James R. Jesup, trustees, the mortgage executed by the Wabash railway Company on the 17th day of May, 1879, to Solon Humphreys and Daniel A. Lindley, trustees, and over all mortgages executed by any companies successors in title to said railway property subsequent thereto, and that said decree of the Supreme Court of Ohio is a conclusive adjudication as against the said above-named trustees who were parties thereto and the said The Wabash Railroad Company as their successor in estate and interest, as to the amount, validity and priority of the claim of said James Compton upon said railway and appurtenances thereunto belonging, which was owned by The Toledo & Wabash Railway Company at the time of the making of the consolidation agreement hereinbefore specified.

(2.) That the lien of the said James Compton upon the said line of railway in the States of Ohio and Indiana, was and is inferior and subordinate to four certain mortgages made and executed prior to the year 1862, and described as follows:

(1.) A mortgage executed by the Toledo & Illinois Railway Company on the 8th day of September, 1853, to The Farmers' Loan & Trust Company, as trustee, to secure the payment of bonds issued by The Toledo & Illinois Railway Company to the amount of $900,000.

(2.) A mortgage executed by The Toledo & Wabash Railroad Company on the 15th day of October, 1858, to Edwin D. Morgan, trustee, to secure an issue of bonds by The Toledo & Wabash Railway Company, to the amount of $1,000,000.

(3.) A mortgage executed by The Lake Erie, Wabash & St. Louis Railroad Company, on the first day of August, 1853, to The Farmers' Loan & Trust Company, trustee, to secure an issue of bonds of The Lake Erie, Wabash & St. Louis Railroad Company, to the amount of $2,500,000, and

830 (4.) A mortgage executed by The Wabash & Western Railroad Company, on he 15th day of October, 1858, to Edwin D. Morgan, as trustee, to secure an issue of bonds of The Wabash & Western Railway Company, to the amount of $1,500,000.

The first and second of said mortgages cover the line of railway

in Ohio, and the third and fourth cover the line in the State of Indiana.

(3.) That this Court, on the 23d day of March, 1889, in a proceeding to foreclose all the mortgages hereinbefore described, both prior and subsequent to the said equipment bonds and the lien thereof declared in favor of the defendant James Compton by the Supreme Court of Ohio, entered a decree of sale, directing the sale of all said properties and the foreclosure of all said mortgages; and that to said cause the said James Compton was a party, and this Court, at the time of entering said decree, reserved the claim of the said James Compton, with the intent to preserve his rights in the relation in which he then stood towards the different mortgages, parties to the said suit, and that, subsequent to said decree of sale, and on the 15th day of May, 1889, all the property covered by the said various mortgages and subject to the lien of the defendant James Compton was sold to James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Wells as a purchasing committee; that, subsequent thereto, said sale was confirmed and possession given to the assignee of the said purchasing committee, The Wabash Railroad Company, party defendant herein, who is now the present owner thereof, and has thereby succeeded to all the right, title, interest and estate of each and all the trustees and their respective *cestius que trust,* in, to and under all of the said mortgages thus foreclosed, both those prior in lien to the lien of the said defendant James Compton, and those subsequent and subordinate in lien to the lien of the said James Compton, as hereinbefore set forth.

831 (4.) That the defendant James Compton is entitled to redeem the entire line of railway property subject to his said lien formerly belonging to The Toledo & Wabash Railroad Company, and being the line of railway in the States of Ohio and Indiana, extending from Toledo in the State of Ohio to the west line of the State of Indiana, from the entire amount of the four mortgage liens thereon, hereinbefore described, having priority over the lien of the said James Compton and amounting, on the first day of February, 1889, as shown by the report of Bluford Wilson, the special master commissioner herein, to the sum of $8,540,058.09, together with interest thereon from said first day of February, 1889, at the rate of six per cent. per annum, and the taxes which have been paid upon the said property since the confirmation of the said sale, on the 15th day of May, 1889, together with interest thereon from the date of such payment or payments. The said defendant James Compton will be allowed ninety days from the date of the entry of the decree herein within which to make and perfect the said redemption. The said redemption shall be made by paying to The Wabash Railroad Company, or tendering payment by a deposit of the said sum with the Court, subject to the order of said The Wabash Railroad Company, the present owner of said railway line and property, of the said sum of $8,540,058.09, with interest thereon at six per cent. per annum from February first, 1889, to the date of said payment or tender, together with the taxes which the said

The Wabash Railroad Company or the said purchasing committee have paid upon the said railway property situated within the States of Ohio and Indiana since the 15th day of May, 1889, together with interest thereon from the date of such payments.

(5.) In case of the payment to the said The Wabash Railroad Company, or the tender of the payment, of the said sum of $8,540,058.09, with interest thereon from February first, 1889, together with the taxes and interest thereon, as hereinbefore pro-
832 vided for, then the said The Wabash Railroad Company, or the said James F. Joy, Ossiam D. Ashley, Thomas H. Hubbard and Edgar T. Wells, purchasing committee, purchasers at the foreclosure sale aforesaid, will be allowed sixty days after the said payment or tender and notice thereof within which to pay the entire amount of the lien of the defendant James Compton upon the said railway property, amounting to the sum of $339,920.40, with interest thereon at six per cent. per annum, from May first, 1888, being the amount found due upon the equipment bonds by him owned, by the Supreme Court of Ohio, in said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in said suit; also the sum hereinbefore found to be paid by the said Jame Compton, in order to redeem the said property, together with interest thereon, as hereinbefore found.

In default of such payment by the said purchasing committee or The Wabash Railroad Company to the defendant James Compton, the said railway line and property formerly belonging to The Toledo & Western Railway Company, being the line of railway extending from Toledo, in the State of Ohio, to the west line of the State of Indiana, now owned and possessed by The Wabash Railroad Company, and all property appurtenant thereto, except such property as has been purchased by the said purchasing committee or The Wabash Railroad Company since the 15th day of May, 1889, will be resold at public auction, of which sale ninety days' notice shall be given in a daily newspaper published in each of the cities of Toledo and New York, and — is hereby appointed special master to conduct such sale, and to make report hereon to this Court.

(6.) It is agreed by and between the parties hereto that the following taxes have been paid by the said purchasing committee or The Wabash Railroad Company since the 15th day of May, 1889:

833 In Ohio.

On the 20th day of			June, 1889	$16,374 16
"	"	"	December, 1889	16,374 16
"	"	"	June, 1890	16,997 68
"	"	"	December, 1890	16,997 68
"	"	"	June, 1891	16,778 17
"	"	"	December, 1891	16,778 17
"	"	"	June, 1892	13,968 46

In Indiana.

On the 1st day of November, 1889	$54,800	97
" " " " 1890	58,757	33
" " " " 1891	42,313	73

and that in Indiana, on or before the first day of November, 1892, there will be due and payable the sum of $27,355.46.

(7.) It is further ordered and decreed that, in case the said James Compton shall fail, neglect or decline to redeem the said property within the time and upon the terms hereinbefore set forth and provided, he shall be taxed with all the costs of the proceedings had in and about his claim, including the fees of the special master commissioner, Bluford Wilson, fixed at $2,500.00, and in default of payment of said costs, execution shall issue therefor; should said Compton redeem said property upon the terms and within the time hereinbefore stated and allowed, then the costs of the proceedings incident to his claim, including the allowance to the special commissioner, will be taxed and paid as follows, viz.: One-third thereof by the said James Compton, and two-thirds thereof out of the redemption fund if paid into Court, or by the Wabash Railway Company if a valid tender of redemption is declined by said Company.

Approved July 21, 1892.

HOWELL E. JACKSON,
Circuit Judge.

834 UNITED STATES CIRCUIT COURT,
Northern District of Ohio, Western Division:

This is to certify that the above and foregoing is a true and complete copy of the decree entered on the Order Book, July 21, 1892, in case of James R. Jessup *et al. vs.* The Wabash, St. Louis & Pacific Railway Company.

Witness my hand and the seal of said Court, at Toledo, this 27th day of July, A. D. 1892.

[L. S.]

IRVIN BELFORD, *C'k,*
By FORD BELFORD, *Deputy.*

EXHIBIT T (AGREED STATEMENT OF FACTS).

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[Endorsed:] Filed in C. C. Jan. 14/95. L. E. Clark, Cl'k.

838 United States Circuit Court of Appeals for the Sixth Circuit.

RECORD.

Original Bill.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

Record of the proceedings of the Circuit Court of the United States, within and for the Western Division of the Northern District of Ohio, in the matter of the lien and claim of James Compton, in the cause and matter hereinafter stated, and finally disposed of at

a stated term of said court, begun and held at the city of Toledo, in said district, on the first Tuesday in June, being the sixth day of said month, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States of America the one hundred and sixteenth.

Present: Hon. Augustus J. Ricks, District Judge.

Chancery. No. 552.

JAMES R. JESUP and ISAAC H. KNOX, Trustees,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, JAMES COMPTON, and Others.

Be it remembered, that heretofore, to wit, on February 12, 1887, an ancillary bill was filed in the clerk's office of this court, which said ancillary bill reads and is in words and figures following, to wit:

839 To the Judges of the Circuit Court of the United States for the Northern District of Ohio:

James R. Jesup, of the city, county and state of New York, and a citizen of said state of New York, and Isaac H. Knox, of St. Louis, in the State of Missouri, bring this their ancillary bill against the Wabash, St. Louis & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the states of Missouri, Illinois, Indiana, Ohio and Michigan, and a citizen thereof, Solon Humphreys, of the city, county and state of New York, and a citizen of said state of New York, and Thomas E. Tutt, of the city of St. Louis, in the state of Missouri, and a citizen of said state of Missouri, as receivers of the said Wabash, St. Louis & Pacific Railway Company; the said Solon Humphreys, a resident and citizen as aforesaid; James F. Joy, of Detroit, in the state of Michigan; Ossian D. Ashley and Thomas H. Hubbard, severally, of the city, county and state of New York, and citizens of said state of New York; Edgar T. Welles, of Hartford, in the state of Connecticut, and a citizen of said state of Connecticut; Daniel A. Lindley, of the city, county and state of New York, and a citizen of the said state of New York; the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; the Missouri Pacific Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; the Central Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the state of New York, and a citizen of said state; James Cheney, of Indianapolis, in the state of Indiana, and a citizen of said state; Jay Gould and A. Lawrence Hopkins, severally, of the city, county and state of New York, and citizens of said state of New York, and thereupon your orators complain and allege as follows:

First. Your orators have filed in the Circuit Court of the United

States for the Southern District of Illinois their bill of com-
840 plaint against the defendants above named, for the foreclosure of a mortgage made to your orators upon its line of railway in the states of Illinois, Indiana and Ohio, by the Toledo, Wabash & Western Railway Company, a corporation organized under and by virtue of the laws and the consolidation statutes of the said states of Illinois, Indiana and Ohio, and one of the constituent corporations of the defendant the Wabash, St. Louis & Pacific Railway Company, and for the appointment of a receiver of the said mortgaged property, and for other relief.

A true and correct copy of said bill is hereto annexed, and your orators refer to the same, and repeat each and every one of the allegations therein contained, and pray that the same may be taken in all respects as if said allegations were fully repeated and set forth herein.

Second. A portion of the said mortgaged property is situated in the northern district of Ohio, and within the jurisdiction of this court.

Wherefore, and for as much as your orators are remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are particularly cognizable and relievable, your orators pray that this court may take ancillary jurisdiction of this bill, and of the several matters and things stated and set forth in the said bill, so as aforesaid filed by your orators in the Circuit Court of the United States for the Southern District of Illinois, and your orators repeat the prayer of said bill as if the same were herein set forth fully and at large, and pray as in said bill they have already prayed, and for such other and further relief as may be just and to your honors may seem meet.

May it please your honors to grant to orators a writ or writs of subpœna, to be directed to the said defendants the Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway
841 Company, Solon Humphreys, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, the St. Louis, Iron Mountain & Southern Railway Company, the Missouri Pacific Railway Company, the Central Trust Company of New York, James Cheney, Jay Gould, A. Lawrence Hopkins, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your honors in the honorable court, then and there severally to answer all and singular the matters aforesaid, but not under oath, and to stand to, abide and perform such other and further orders and decrees therein as to your honors shall seem meet.

JAMES R. JESUP,
FOSTER & THOMPSON,
Solicitors for Complainants.

E. C. HENDERSON,
JAMES THOMPSON,
Of Counsel.

To the Judges of the Circuit Court of the United States for the Southern District of Illinois:

James R. Jesup, of the city, county and state of New York, and a citizen of said state of New York, and Isaac H. Knox, of St. Louis, in the State of Missouri, and a citizen of the state of Missouri, bring this their bill against said Wabash, St. Louis & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the states of Missouri, Illinois, Indiana, Ohio and Michigan, and a citizen thereof; Solon Humphreys, of the city, county and state of New York, and a citizen of said state of New York, and Thomas E. Tutt, of St. Louis, in the state of Missouri, and a citizen of said state of Missouri, as receivers of the said Wabash, St. Louis & Pacific Railway Company, and Solon Humphreys, a resident and citizen as aforesaid; James F. Joy, of Detroit, in the state of
842 Michigan, and a citizen of said state of Michigan; Ossian D. Ashley and Thomas H. Hubbard, severally of the city, county and state of New York, and citizens of said state of New York; Edgar T. Welles, of Hartford, in the state of Connecticut, and a citizen of said state of Connecticut; the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; the Missouri Pacific Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; Daniel A. Lindley, of the city, county and state of New York, and a citizen of said state; the Central Trust Company of New York, a corporation organized under and by virtue of the laws of the state of New York, and a citizen of said state; James Cheney, of Indianapolis, in the state of Indiana, and a citizen of said state of Indiana; Jay Gould and A. Lawrence Hopkins, severally of the city, county and state of New York, and citizens of said state of New York.

And thereupon your orators complain and allege as follows:

First. At all times hereinafter in that behalf mentioned the Toledo, Wabash & Western Railway Company was a corporation duly organized and existing under and by virtue of the laws and consolidation statutes of the several states of Ohio, Indiana and Illinois, and owned and operated a line of railroad extending from Toledo, in the state of Ohio, to and through the state of Indiana, and thence in the state of Illinois to Meredosia, with branch of said road to Naples, and from Meredosia to Camp Point, in the state of Illinois, and also with branch of said road from Clayton, in said state, to the east bank of the Mississippi river, at Hamilton, in said state.

Second. In exercise of the powers which were possessed by it under the laws of said states of Ohio, Indiana and Illinois, in
843 order to provide for taking up and discharging certain funded indebtedness of the said Toledo, Wabash & Western Railway Company, represented by the bonds of said company and of constituent corporations, together with the interest thereon, and thus to consolidate said indebtedness into one mortgage debt, and to obtain money for completing portions of its line, and to provide additional equipment, and for other lawful purposes, the said Toledo,

Wabash & Western Railway Company, on or about the first day of February, 1867, in accordance with resolutions passed by its board of directors and by its stockholders at respective meetings thereof duly called, duly made and executed, under its corporate seal and attested by the signatures of its president and secretary, fourteen thousand two hundred of its bonds, bearing date on that day, fourteen thousand of which, numbered consecutively from one to fourteen thousand, both inclusive, were for the sum of one thousand dollars each, and two hundred of which, numbered consecutively from fourteen thousand and one to fourteen thousand two hundred, both inclusive, were for the sum of five thousand dollars each, and by the terms of each of said bonds the said obligor promised to pay to your orators or bearer the said amount thereof on the first day of February, 1907, at the office or agency of said obligor in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable quarter-yearly at its said office or agency in the city of New York on the first days of May, August, November and February in each year, on the presentation and surrender of the coupons or interest warrants thereto annexed, as they should severally become due.

Third. To secure the payment of the said bonds and the interest warrants thereto attached, the said obligor, on or about the first day of February, 1867, in pursuance of the said resolutions of its board of directors and of its stockholders, made, executed, duly acknowledged and delivered to your orators its certain indenture of mortgage, or deed of trust, hereinafter called the consolidated
844 mortgage of said obligor, and thereby conveyed to your orators, upon the trusts therein stated, all the right of way and railroad of said obligor, extending from Toledo, in the state of Ohio, to and through the state of Indiana, and thence in the state of Illinois to Meredosia, with branch of said road to Naples, and from Meredosia to Camp Point, in said state of Illinois, and also with branch of said road from Clayton, in said state, to the east bank of the Mississippi river, at Hamilton, in said state, as then made, or as thereafter might be made, and as then used, or thereafter might be used, together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling-stock, lots, lands, buildings, offices, and all other things, real and personal, then owned or used, or that might be thereafter owned or used by the said mortgagor in connection with the said railroad, and everything appertaining and appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said mortgagor, together with all the property, real and personal, of said mortgagor then acquired, or to be thereafter acquired, at Quincy, in the state of Illinois, as also a certain contract made between the said mortgagor and the Chicago, Burlington & Quincy Railroad Company, dated October 26, 1866, with all the rights and privileges secured by the said contracts to the said mortgagor, and all other contracts.

In and by said bonds and said consolidated mortgage, the said

mortgagor covenanted to and with your orators for the benefit of all persons who should become holders of said bonds thereby secured, that the said mortgagor would pay all of the said bonds, principal and interest, in the manner stated in the said bonds and herein alleged, and that it would pay to the persons by said mortgage appointed commissioners, the sum of fifty thousand dollars per year, for the purpose of being used and applied by said commissioners as a sinking fund for the payment and extinguishment of the principal of all said bonds secured by said mortgage, and that said sum
845 should be paid to said commissioners in installments of twenty-five thousand dollars every six months, on the first days of February and August in every year, until and including the maturity of said bonds.

It was also agreed in and by said consolidated mortgage that the commissioners having the custody of said sinking fund should be the president of said mortgagor and two members of its board of directors, one of whom should be changed every year, and it was declared that it should be the duty of said commissioners and their successors in the trust, in respect to all the moneys that should be paid them on account of said sinking fund, as well as to all the accumulations thereof, to invest the same by purchasing the bonds secured by said consolidated mortgage, on the best terms that the same could be bought, but not at a rate exceeding the par value of said bonds and five per cent. additional; and the bonds so purchased should be held by said commissioners or deposited by them with some trust company or other safe depository, and be immediately stamped or endorsed as belonging to the said sinking fund, but should remain in force, and the interest thereon should continue to be paid by said mortgagor, and the amount of such interest should be added and applied as a part of the capital of the said sinking fund, and be used in the same manner as the semi-annual payments of twenty-five thousand dollars. And if said bonds could not be purchased as therein provided, the said commissioners should invest said moneys in any of the bonds of the various companies creating the funded debt of the mortgagor; and, in case of inability to procure bonds of that kind, the said commissioners should invest said moneys in the bonds of the United States.

It was further covenanted in and by said bonds and said consolidated mortgage securing the same, that in case default should be made in any of the quarter-yearly installments of interest on any of said bonds at the times and in the manner in the coupons or interest warrants therewith provided, and should have been demanded,
846 and such default should continue for the period of six months after the maturity and demand for payment of the said installments, or in case default should be made in the payment of the said commissioners of the whole or any part of the semi-annual installment of the said sinking fund, as therein provided, and such default should continue for the period of six months, then, and in either of such cases, the principal of all said bonds thereby secured should become immediately due at the option of the holder or

holders of a majority in the interest of said bonds then outstanding, to be expressed by them in writing to the trustees of said mortgage.

Said consolidated mortgage was forthwith duly recorded in the officers of the recorders and clerks of the various counties through which the said mortgaged railroad ran.

A copy thereof is hereto annexed, marked A, and to it, for its contents, your orators refer.

Fourth. Thereafter, and on and subsequent to the first day of February, 1867, the said Toledo, Wabash & Western Railway Company duly issued and delivered, or caused to be issued and delivered, to various persons and corporations, said mortgage bonds to the amount of two million six hundred and ten thousand dollars, with the coupons thereto attached, duly certified by your orators, the trustees under the said mortgage securing the same.

Except as hereinafter alleged, said bonds are now outstanding in the hands of divers persons and corporations, who are now the owners and holders thereof for value.

Fifth. At the time of the execution and delivery to your orators of the said consolidated mortgage the said mortgaged property was subject to the following mortgages, the liens of which, upon the property therein respectively described, were prior to the lien thereon of said consolidated mortgage, to-wit:

847 A mortgage made by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company of New York, on the line of road running from Toledo to the westerly boundary of the state of Ohio, to secure the payment, with semi-annual interest at seven per cent., of bonds of the mortgagor to the amount of nine hundred thousand dollars, a mortgage on the same property made by the Toledo & Wabash Railroad Company to Edward D. Morgan, to secure the payment, with semi-annual interest at the rate of seven per cent. of bonds of the mortgagor to the amount of one million dollars.

A mortgage by the Lake Erie, Wabash & St. Louis Railroad Company to the said Farmers' Loan & Trust Company, on the line of railroad running through the state of Indiana, to secure the payment, with semi-annual interest at seven per cent., of bonds of the mortgagor to the amount of two millions five hundred thousand dollars.

A mortgage on the same property, made by the Wabash & Western Railway Company to the said Edward D. Morgan, to secure the payment, with semi-annual interest at seven per cent., of bonds of the mortgagor to the amount of one million five hundred thousand dollars.

A mortgage made by the Great Western Railroad Company, on the line of roads from the Illinois river to Decatur, to secure its bonds, to the amount of one million dollars, and a mortgage made by said Great Western Railroad Company, on the residue of its lines of railroad, running from the Illinois river to the state line of Indiana, to secure its bonds to the amount of one million, three hundred and fifty thousand dollars; of the bonds secured by said mortgages all but four were retired by the issue of bonds of the Great Western Railroad

Company of 1859, secured by the mortgage next hereinafter described.

A mortgage made by the Great Western Railroad Company of 1859, to George Griswold, Alexander M. White and Henry H. Worden, on the line of railroads from Naples and Meredosia to the boundary line between the states of Illinois and Indiana, to secure the payment, with semi-annual interest at seven per cent., of
848 bonds of the mortgagor to the amount of two million, five hundred thousand dollars, issued to retire the said bonds of the Great Western Railroad Company; of said bonds two thousand four hundred and ninety-six, for one thousand dollars each, were issued.

A mortgage made by said Great Western Railroad Company of 1859, to Solon Humphreys and James R. Jesup, on the same property, to secure the payment, with semi-annual interest at seven per cent., of bonds of the mortgagor to the amount of two million five hundred thousand dollars.

A mortgage made by the Illinois & Southern Iowa Railroad Company, to John N. A. Griswold, James R. Jesup and Lucien Tilton, on the line of railroad from Clayton to Carthage, to secure the payment, with semi-annual interest at seven per cent., of bonds of the mortgagor to the amount of three hundred thousand dollars.

Sixth. Thereafter, and on or about October 1, 1868, the said Toledo, Wabash & Western Railway Company, under and in pursuance of the laws governing the same, consolidated, under the name of the Toledo, Wabash & Western Railway Company, with the Decatur and East St. Louis Railway Company, a corporation organized and existing under the laws of the state of Illinois, and owning and operating a line of railroad from Decatur to East St. Louis, in said state.

Seventh. Thereafter, and in or about the year 1876, under and by virtue of decrees of foreclosure and sale, made respectively in an action pending in the Court of Common Pleas of Lucas county, in the state of Ohio, and in an action pending in the Circuit Court of Cass county, in the state of Indiana, and in an action pending in the Circuit Court of Vermillion county, in the state of Illinois, for the foreclosure of liens thereon, junior and subsequent to the said consolidated mortgage to your orators, all and singular, the railway of said Toledo, Wabash & Western Railway Company, lying in
849 said states of Ohio, Indiana and Illinois, and its said property and equipment were sold to holders of bonds secured by liens in said actions foreclosed.

The said purchasers reorganized under the laws of the said states of Ohio, Indiana and Illinois, respectively, corporations which were subsequently consolidated under the name of the Wabash Railway Company; and said consolidated company became vested with all the said lines of railway, and the said property and equipment of the said Toledo, Wabash & Western Railway Company, but subject in all things to the lien thereon of said consolidated mortgage to your orators.

Shortly thereafter the said Wabash Railway Company, anticipating

serious difficulty in making payments of interest which had theretofore accrued and then remained unpaid, and which would presently thereafter accrue upon the said bonds secured by said consolidated mortgage to your orators, as well as upon other bonds, proposed to the holders of the coupons representing said interest to fund the same under an agreement by which the said holders might take, in lieu thereof, scrip certificates which might be exchanged for bonds of said Wabash Railway Company, known as funded debt bonds; the coupons so funded to be held or deposited as collateral security for the payment of said scrip certificates and bonds.

Coupons for such unpaid interest on the said bonds of the Toledo, Wabash & Western Railway Company, secured by said consolidated mortgage to your orators to the amount, as your orators are informed, of six hundred and thirty-nine thousand and four hundred and fifty dollars or more, were never satisfied and cancelled, and remain outstanding as collateral security for the payment of scrip certificates or funded debt bonds of said Wabash Railway Company.

Eighth. Thereafter, and on or about the seventeenth day of May, 1879, the said Wabash Railway Company made and executed its two bonds of one thousand dollars each, bearing date on said day and payable at its office or agency in the city of New York, on the first day of April, 1909, in lawful gold coin of the United States,
850 with interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first days of April and October in each year, in like gold coin, at its said office or agency, upon the surrender of the coupons thereto annexed as they severally became due.

To secure the payment of said bonds and of said coupons as they severally became due, the said obligor, on the same day, executed and delivered to the defendants Solon Humphreys and Daniel A. Lindley a mortgage or deed of trust, and thereby conveyed to said *said* Humphreys and Lindley, upon the trusts therein stated, and subject in all things as to the property embraced therein, to the said consolidated mortgage, all and singular the railroad, roadbed and right of way of said obligor, together with all and singular the equipments, appurtenances and franchises thereunto belonging or in any wise appertaining, and then acquired, or to be thereafter acquired.

Thereafter, and on and subsequent to said May 17, 1879, the said Wabash Railway Company issued and delivered, or caused to be issued and delivered to various persons and corporations, to an amount of which your orators are not yet informed, said bonds secured by said mortgage, certified by the said trustees thereof; and said bonds, so issued, are now outstanding in the hands of divers persons who are the owners and holders thereof for value.

Ninth. After the delivery of said mortgage the said Wabash Railway consolidated, under the name of the Wabash, St. Louis & Pacific Railway Company, with the St. Louis, Kansas City & Northern Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Missouri, and owning and operating a line of railway extending from St. Louis to Kansas City, in said state, and various branch lines connected therewith, which were, at

the time of said consolidation, subject to the liens of various mortgages to secure issues of bonds theretofore made.

The said Wabash, St. Louis & Pacific Railway Company
851 thereupon became liable to pay all the debts and obligations of said constituent corporations, including all and singular the said bonds of the said Toledo, Wabash & Western Railway Company, secured by said consolidated mortgage to your orators, and said Wabash, St. Louis & Pacific Railway Company thereafter, and until about June 1, 1884, paid the interest accruing upon said bonds as the same became due and payable.

Tenth. Thereafter, and on or about the first day of June, 1880, the said Wabash, St. Louis & Pacific Railway Company, to secure an issue of its bonds aggregating fifty millions of dollars, and payable on the first day of June, 1920, with semi-annual interest at six per cent., made and executed to the defendants, the Central Trust Company, of New York, and James Cheney, a mortgage, or deed of trust, bearing date on said day and thereby conveying to said trustees upon the trusts therein stated, and subject to the said prior liens thereon, all and singular the lines of railway of said mortgagor wherever situate, together with the equipment, appurtenances and franchises thereunto belonging.

Thereafter said mortgagor issued and delivered, or caused to be issued and delivered to various persons and corporations, said bonds to the amount of about seventeen millions of dollars.

Eleventh. On or about the twenty-eighth day of May, 1884, the said Wabash, St. Louis & Pacific Railway Company filed in the Circuit Court of the United States, for the Northern District of Illinois, its bill in equity against the Central Trust Company of New York, James Cheney and others, and alleging its insolvency, prayed for the appointment of receivers of its property; thereupon and on said day, by an order of said court, the defendants Solon Humphreys and Thomas E. Tutt were appointed receivers, with power to take possession of all the lands, railroads and property, rights and
852 choses in action of the said Wabash, St. Louis & Pacific Railway Company lying or being within the jurisdiction of said court.

Thereafter, in an action of similar character, instituted in this court by the Wabash, St. Louis & Pacific Railway Company against said defendants, a similar order was made by this court, and an order for the Circuit Court of the United States for the Eastern District of Missouri, in an action brought in that district of a similar character, was made the order of this court.

Twelfth. The said Solon Humphreys and Thomas E. Tutt, appointed receivers as aforesaid, entered upon and took possession of the property of the said Wabash, St. Louis & Pacific Railway Company and used and operated the same, including the said property mortgaged, as hereinabove alleged, to your orators.

Thirteenth. Thereafter the Central Trust Company of New York and James Cheney instituted actions in the courts of the various states in which any part of the railroad property of the said Wabash, St. Louis & Pacific Railway Company was situated, against said

company and others, for a foreclosure of the said general mortgage made to said complainants.

Each of the said actions was removed from the state court in which the same was pending, to the Circuit Court of the United States for the corresponding district.

With the action so removed to the Circuit Court of the United States for the Eastern District of Missouri, was consolidated the said action instituted therein, as hereinabove alleged, by the Wabash, St. Louis & Pacific Railway Company against the Central Trust Company, James Cheney and others.

On or about January 6, 1886, in said consolidated action, a decree was entered foreclosing said general mortgage of the Wabash, St. Louis & Pacific Railway Company, and ordering the sale of the railways and property in said decree particularly described, subject to the liens of the mortgages executed prior to said general mort-
853 gage by the said Wabash, St. Louis & Pacific Railway Company, or any of its predecessor corporations, on any part of said railway and property so ordered sold.

Fourteenth. Thereafter, and in or about the month of May, 1886, under and in pursuance of said decree of foreclosure, the said property therein directed to be sold was sold to the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, who were a purchasing committee under the plan of reorganization of said Wabash, St. Louis & Pacific Railway Company.

Your orators are informed that said purchase has been confirmed by said court, and that the master by whom said property was sold has executed to said purchasers a deed of said railway and property, subject in all things, as hereinabove alleged, to the rights and equities of the holders of bonds secured by mortgages prior in date to said general mortgage of June 1, 1880, on any part of said property.

Fifteenth. Prior to the consolidation, on November, 1879, with the St. Louis, Kansas City & Northern Railway Company of the Wabash Railway Company, said last-named company owned and used upon its railroad a large and valuable equipment, subject to the lien of said consolidated mortgage to your orators, consisting of over 200 engines, 39 baggage, express and mail cars, 68 passenger, 500 freight, 101 caboose cars, and of the value of several million dollars.

After said consolidation said Wabash, St. Louis & Pacific Railway Company also purchased for service on its lines of railway a large additional amount of equipment, and said Humphreys and Tutt, as receivers of said Wabash, St. Louis & Pacific Railway Company, have also purchased for such use a large additional amount of such equipment.

All said equipment has been used indiscriminately upon the
854 entire system of the consolidated corporation without any apportionment thereof to any particular division of road.

An equitable and fair proportion of such additional equipment belongs, and ought in justice to be allotted to, the line of railway constituting the former line of the Toledo, Wabash & Western Rail-

way Company, and as after acquired property of the mortgagor, is subject to the lien of said consolidated mortgage.

Sixteenth. The said Wabash, St. Louis & Pacific Railway Company failed to pay the interest due on said twenty-seven hundred bonds, secured by said consolidated mortgage, to your orators, which accrued and became due and payable on the first day of August, 1884, and on the first day of November, 1884, and on the first day of February, 1885, and on the first day of May, 1885, and on the first day of August, 1885, and on the first day of November, 1885, and on the first day of February, 1886, and on the first day of May, 1886, and on the first day of August, 1886, and on the first day of November, 1886, and failed to pay the coupons on said bonds maturing on said days respectively, although the payment of said interest and of said coupons was duly demanded, as said interest became due, and said coupons respectively matured.

Seventeenth. Your orators are informed that the said Toledo, Wabash & Western Railway Company, on the first day of February, 1868, paid the installment of twenty-five thousand dollars due on that day to the sinking fund created by its said consolidated mortgage, and thereafter until on or about the first day of February, 1870, continued to pay installments as they became due, but since said last-named day the said Toledo, Wabash & Western Railway Company, and its successor corporations, have failed to keep and perform said covenant of said consolidated mortgage, and no sum whatever has since been deposited to constitute such sinking fund. As the said amounts were received by the said commissioners of said sinking fund, the same were from time to time invested by
855 said commissioners in the bonds of said company, secured by said consolidated mortgage to your orators, to the amount of ninety thousand dollars. Since said investments the said commissioners have held said bonds constituting said sinking fund and have received the interest thereon from time to time, as the same accrued and became payable, until the said default in payment on or about July 1, 1884.

After the termination of the Toledo, Wabash & Western Railway Company, the said sinking fund was held by the president and two of the directors, for the time being, of its successor corporations, and at the time of the formation by consolidation of the Wabash, St. Louis & Pacific Railway Company, your orator is informed that the said bonds constituting said sinking fund and the accumulation of interest thereon, were transferred to the president of said last named company, and to two of the directors thereof, as commissioners, and the sinking fund was thereafter held by the president of said company for the time being, and two of the directors thereof. At the time of the appointment of receivers of said company, the defendant Jay Gould, with the defendants Solon Humphreys and A. Lawrence Hopkins, constituted, as your orators believe, said commissioners, of said sinking fund. As such commissioners, said defendants were vested with and in possession of said sinking fund, which has ever since remained in their possession and under their control.

Eighteenth. The said mortgaged property is an inadequate se-

curity for the payment of the bonds and coupons secured by the said consolidated mortgage to your orators. Said property is now in the possession of this court, through its receivers, appointed by its order.

Nineteenth. No proceedings at law have been had, nor any suit or action commenced by your orators to recover the principal
856 of said bonds secured by said consolidated mortgage to them, or the coupons attached thereto, or any interest unpaid or accrued thereon.

Twentieth. Upon application by your orators leave has been granted to your orators to include as defendants herein the said Solon Humphreys and Thomas E. Tutt, receivers of the said Wabash, St. Louis & Pacific Railway Company.

Twenty-first. The following named persons and corporations have or claim to have some interest in said mortgaged property as owner, lessee, mortgagee or otherwise, which interest, if any, has accrued, or is subsequent to the lien of said consolidated mortgage to your orators, to wit, the Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, Solon Humphreys, Daniel A. Lindley, the St. Louis, Iron Mountain & Southern Railway Company, the Missouri Pacific Railway Company, the Central Trust Company of New York, James Cheney, Jay Gould, A. Lawrence Hopkins.

Wherefore, and for as much as your orators are remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are particularly cognizable and relievable, to the end, therefore, that the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were herein expressed, and they thereunto particularly interrogated, but not under oath answers under oath, being hereby expressly waived; that an account may be had and taken of the bonds and coupons secured by said consolidated mortgage, executed by the Toledo, Wabash & Western Railway Company to your orators as trustees, and of the amount due for
857 interest on said bonds; that the names of the lawful holders thereof may be ascertained; that said consolidated mortgage may be decreed to be a lien upon all the railroad premises and property therein described, subject only to the lien of the mortgages described in the fifth article of this bill, as to the property embraced therein respectively, and to be a prior lien thereon to any lien, right or interest of any of the defendants herein; that an inquiry may be had of the rolling stock and equipment purchased by the said Toledo, Wabash & Western Railway Company, after the delivery to your orators of said consolidated mortgage, and of the rolling stock and equipment purchased by any of the successor corporations of said Toledo, Wabash & Western Railway Company, and by the defendants, Solon Humphreys and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company, and that said

after acquired rolling stock and equipment of the Toledo, Wabash & Western Railway Company, and an equitable proportion of that acquired by its successor corporations, and by said receivers, be decreed to be subject to the lien of the said consolidated mortgage to your orators; that an inquiry may be had of the amount due to the sinking fund, established by said consolidated mortgage to your orators; that an account may be had and taken of said sinking fund; that the defendant the Wabash, St. Louis & Pacific Railway Company may discover the names of the commissioners thereof since its creation; that the defendants, Gould, Humphreys and Hopkins be required to account for the property received by them as commissioners thereof; that the bonds secured by said consolidated mortgage, constituting the same, be decreed to be cancelled, and that the amount thereof otherwise invested be paid into court to be applied upon the said outstanding bonds secured by said consolidated mortgage; that, subject only as aforesaid, said property may be sold at a judicial sale thereof, free from the claims of all parties hereto, and free from all claims of all parties whose interests are in any
858 manner represented by any party hereto, under the judgment or decree of this court upon such terms and conditions as to this court shall seem meet and proper; that each and all of the defendants, and all persons in like situation with them, or any of them, and all persons claiming, or to claim by, from or under them, or any of them, may from and by said sale be absolutely barred and foreclosed of and from all right and equity of redemption of, in and to all of the said mortgaged premises and property; that the proceeds arising from said sale may be brought into court; that your orators may be paid their commissions and costs, counsel fees, charges and expenses of this action, and the amount due on said bonds with interest to the date of such payment, so far as the amount of money applicable thereto will pay the same; that the defendant, the Wabash, St. Louis & Pacific Railway Company, may be adjudged to pay any deficiency which may remain after so applying all of said moneys applicable thereto; that pending this suit a receiver or receivers be appointed with the usual power of receivers in like cases, of all and singular the mortgage property and premises, rights, privileges and immunities connected therewith, and of the rolling stock, machinery, equipment and other property incident to the same; that said receiver or receivers may be authorized and directed to maintain and operate the said railroad, and to keep the same in proper repair, and to receive, collect and preserve all the property, assets and income thereof; and that such direction may be made with respect to such receivership as may be equitable and proper; and that your orators may have such other and further relief in the premises, or both, as may be just and equitable, and as to your honors shall seem meet.

May it please your honors to grant to your orators a writ or writs of supœna to be directed to the said defendants the Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard,
859 Edgar T. Welles, Solon Humphreys, Daniel A. Lindley, the St. Louis, Iron Mountain & Southern Railway Company, the

Missouri Pacific Railway Company, the Central Trust Company of New York, James Cheney, Jay Gould, A. Lawrence Hopkins.

Therein and thereby commanding them, and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, then and there, severally, to answer all and singular the matters aforesaid, but not under oath, and to stand to, abide and perform such other and further orders or decrees as to your honors shall seem meet.

JAMES R. JESUP,
FOSTER & THOMPSON,
Solicitors for Complainants.

E. C. HENDERSON,
JAMES THOMPSON,
Of Counsel.

860 *Answer to the Wabash, St. Louis & Pacific Railway Company.*

Afterwards, on April 29, 1887, an answer was filed herein by the Wabash, St. Louis & Pacific Railway Company, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Bill to Foreclose Mortgage of 1867.

The separate answer of the Wabash, St. Louis & Pacific Railway Company to the bill of complaint filed against said defendant and others in the above-entitled cause.

This respondent saving and reserving to itself any and all manner of benefit and advantage that may or can be taken of the many and manifest errors, uncertainties and misstatements of said bill of complaint, for answer to so much thereof as it is advised is material and necessary to be answered unto, answering, says:

That the said James R. Jesup, complainant in said cause, was at the time of the commencement of said suit, and still, is a citizen and resident of the State of New York; and that defendants
861 Ossian D. Ashley, Thomas H. Hubbarn, Daniel A. Lindley, the Central Trust Company of New York, Jay Gould and A. L. Hopkins, were at the commencement of said suit, and still are, citizens and residents of said state of New York. And this respondent, by protestation, alleges that because of the common citizenship and residence of said complainant and defendants this court is with-

out jurisdiction of said cause, and submits the question of jurisdiction to the court.

This respondent admits that on the first day of June, 1880, this respondent did execute and deliver to the Central Trust Company of New York and James Cheney, as trustee, the mortgage or deed of trust mentioned in the bill of complaint as having been then executed, and also that said mortgage became a lien as stated in said bill, and that bonds secured thereby were afterwards issued and negotiated for value as in said bill alleged, and that the same are now outstanding and unpaid.

Respondent admits that said mortgage was afterwards foreclosed by judicial proceedings, but not as in said bill alleged. This respondent hereby refers to the answer of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, filed to said bill of complaint, as setting forth the true history of the proceedings, under and by virtue of which said mortgage of June 1, 1880, and the mortgage known as the collateral trust was foreclosed and the property embraced thereunder sold by decree of court and purchased as in said answer stated. And this respondent hereby adopts the answer of said Joy, Ashley, Hubbard and Welles as to the history of said proceedings, and avers that all the statements of said answer with respect to said proceedings in the several courts where said foreclosure proceedings were pending are correct and true.

Respondent alleges that since the filing of said bill of complaint by said Jesup and Knox, the main lines of the Wabash system, west of the Mississippi river, and also all other lines not covered by the mortgages of 1867 and 1879, in said bill described, have been surrendered to the purchasers thereof at the judicial sale in said
862 answer of Joy, Ashley, Hubbard and Welles set forth.

This respondent distinctly denies each and every allegation of the bill of complaint of said Jesup and Knox, except such as herein expressly admitted, and as to each and all the allegations and averments so denied this respondent calls for full proof.

And having fully answered, this respondent prays to be hence dismissed according to the practice of this honorable court.

WILLIAMS & THOMPSON,
GREENE & HUMPHREYS,
Solicitors for the Wabash, St. Louis & Pacific Railway Company.

WAGER SWAYNE,
JOHN L. THOMPSON,
HENRY S. GREENE,
FRANK B. SWAYNE,
Of Counsel.

Endorsed on said answer was the following, to wit: Filed April 29, 1887. A. J. Ricks, Clerk.

863 *Answer of James F. Joy and Others.*

On April 29, 1887, an answer to the ancillary bill was filed herein by James F. Joy and others, purchasing committee, which said answer reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

The joint and separate answer of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles to the bill of complaint filed against them and others in the court of [as] aforesaid.

These respondents, saving and reserving to themselves all manner of benefit and advantage that may or can be taken of the many and manifest errors, misstatements and insufficiencies of said bill of complaint, for answer to so much thereof as they are advised is material and necessary to be answered unto, answering, say:

I. It is true that at the time stated in said bill of complaint the Toledo, Wabash & Western Railway Company was a corporation existing under the laws of the states of Ohio, Indiana and
864 Illinois, owning and operating a line of railroad extending from Toledo, in the state of Ohio, through the state of Indiana and thence in the state of Illinois to Meredosia, with a branch to Naples, and from Meredosia to Camp Point, and also a branch from Clayton to the east bank of the Mississippi river, at Hamilton, in said state.

II. These respondents admit that about the first day of February, 1867, said company executed certain instruments in the form of bonds, each for the sum of one thousand dollars, payable on the first day of February, A. D. 1907, in the city of New York, with interest at the rate of seven per cent. per annum, payable quarterly, in New York, on the first day of May, August, November and February of each year.

That the entire amount of said bonds executed by said company was $2,700,000, as these respondents are informed and believe, but how many thereof were negotiated or sold for value these respondents do not know, nor do they know the number or amount of said bonds now outstanding and unpaid. And as to the number and amount of said bonds sold or negotiated for value, and the amount thereof now outstanding, these respondents ask for full proof: these respondents do not know whether said bonds were issued under the authority of, or in conformity with the law, or by order of any resolutions passed by the stockholders or directors of said company, and as to such averments of the bill of complaint they call for full proof.

III. It is true that in order to secure the payment of the sums

of money specified in said bonds said company did, on the said first day of February, A. D. 1867, execute to complainants, as trustees, a certain instrument in the form of a mortgage or deed of trust (which said instrument will be hereinafter referred to as a mortgage for the sake of brevity).

It is true that said instrument purported to cover and embrace certain lines of railroad property and interests, but as to all
865 the terms, provisions, conditions and descriptions contained in said instrument, these respondents refer to the copy thereof filed with the bill of complaint and marked "Exhibit C," and do not admit the statements of such provisions, terms and conditions as set forth in the body of said bill.

IV. These respondents do not admit that said mortgage was executed in pursuance of any resolution of the board of directors and stockholders of said company, or that the same was so executed in conformity with or by the authority of law, or that said instrument was recorded as the law required. And as to all such allegations of the bill of complaint these respondents ask for full proof.

V. These respondents do not admit that, at the time of the execution of the said mortgage, the property embraced therein was subject to the several mortgages or liens set forth and referred to in the fifth paragraph of the bill of complaint, and as to all such allegations of the bill of complaint respondents require full proof.

VI. It is true as alleged in the bill that about October 1, 1868, the Toledo, Wabash & Western Railway Company was lawfully consolidated with the Decatur & East St. Louis Railroad Company, a corporation owning a line of railroad extending from Decatur, Illinois, to East St. Louis, Illinois, the consolidated company retaining the name of the Toledo, Wabash & Western Railway Company.

It is also true that about the year 1876 all the railroads and property of the said consolidated company, with its lines of railroad and franchise, were sold under decrees rendered by the several courts referred to in paragraph seven of the bill, and were purchased by the holders of bonds that were junior in point of time to the said mortgage executed as aforesaid to complainants as trustees. But these respondents do not admit that the title acquired by said purchase was subject to the lien of said mortgage of February 1, 1867.

866 It is also true that said purchasers reorganized under the laws of the states of Ohio, Indiana and Illinois under the name of the Wabash Railway Company, and that the said company became vested with all the said lines of railway equipment, franchises, rights and interests of the said Toledo, Wabash & Western Railway Company.

VII. These respondents admit that afterwards some arrangement was made by which some part of the interest secured by the said mortgage of February 1, 1867, was represented by scrip certificates, which might be exchanged for bonds aforesaid, such bonds to be known as funded debt bonds, the coupons so funded to be held as collateral security for the payment of said scrip certificates and bonds. These respondents do not know and do not admit the terms

of such agreement, or how far the same was carried out, or what amounts of funded debt, bonds or scrip are now outstanding, and as to all such allegations of the bill of complaint these respondents now ask for full proof.

VIII. These respondents admit that on or about the seventeenth day of May, 1879, the Wabash Railway Company executed certain other bonds for one thousand dollars each, amounting in number to about two thousand, payable in the city of New York, on the first day of April, 1909, with seven per cent. interest per annum, payable on the first days of April and October of each year.

It is also true that, to secure last mentioned bonds, said Wabash Railway Company, about the first day of April, 1879, executed and delivered to Solon Humphreys and Daniel A. Lindley a certain instrument in the form of a mortgage or deed of trust upon all and singular its lines of railroad, right of way, road bed, equipments and franchises. As to the terms, conditions and provisions of said instrument this respondent does not admit any of the statements of said bill of complaint, but refers to the said instrument itself,
867 to be produced and shown as the law requires. And respondents do not admit that said mortgage was lawfully executed, authorized or recorded, or that the same became a valid lien on any of the property described therein, but as to all averments of the bill with respect thereto respondents call for full proof. These respondents do not know the amounts of bonds secured by said instrument or now outstanding, or by whom the same are held, and call for full proof with respect thereto.

IX. Respondents admit that, after the execution of the said last named alleged mortgage, the said Wabash Railway Company consolidated its property, capital stock and franchises with those of the St. Louis, Kansas City & Northern Railway Company, a corporation of the State of Missouri, owning a line of railroad extending from St. Louis, Missouri, to Kansas City, Missouri, and various branch lines, and that said consolidated corporation became the Wabash, St. Louis & Pacific Railway Company; that said last named company became liable to pay all the valid mortgage debts of its constituent corporations, and did pay the interest on the same until June 1, 1884.

X. These respondents admit all the allegations contained in the tenth paragraph of the bill of complaint.

XI. It is true that the said Wabash, St. Louis & Pacific Railway Company filed its bill of complaint in the Circuit Court of the United States, as alleged in the eleventh paragraph of the bill of complaint. But these respondents believe it necessary to set forth more fully the proceedings referred to in paragraphs eleven, twelve, thirteen and fourteen of the bill of complaint, and therefore show:

First. That before the filing of said bill in the Northern District of Illinois, the said Wabash, St. Louis & Pacific Railway Company filed its bill of complaint in the Circuit Court of the United States for the Eastern District of Missouri, making the Central Trust
868 Company of New York and James Cheney and others defendants. And in and by said bill said complainant com-

pany alleged its own insolvency, and that all its vast property was in great danger of being torn to pieces, wasted and lost, to the great injury of its creditors, and praying the appointment of a receiver therefor. That about the twenty-seventh day of May, A. D. 1884, said court, by order entered of record, appointed Solon Humphreys and Thomas E. Tutt, receivers of the lines and property of said railway company. And after such appointment said railway company filed auxiliary bills of complaint of a like character thereto, in all other Circuit Courts of the United States, into the jurisdiction of which said lines of railroad extended, being thirteen in number, including that of the northern district of Illinois. And thereupon said Humphreys and Tutt were also appointed receivers, as aforesaid, by order of each of said other courts.

Second. That afterwards said Central Trust Company and James Cheney, as trustees under a certain mortgage, called the general mortgage executed by said railway company June 1, 1880, filed their cross-bill praying the foreclosure of said mortgage in the said Circuit Court of the United States for the Eastern District of Missouri, and that later said Trust Company and James Cheney filed auxiliary cross-bills in all the other thirteen courts in which the said railway company had filed its bill as aforesaid.

Third. That said Central Trust Company and James Cheney, in order to remove all doubt as to the jurisdiction of said United States Courts, afterwards filed original bills praying the foreclosure of said general mortgage in one state court in each of the states of Missouri, Iowa, Illinois, Indiana, Ohio and Michigan, and said causes were removed into the proper courts of the United States; namely, the Circuit Court of the United States for the Eastern District of Missouri; the Southern District of Iowa, Eastern Division;
the Southern District of Illinois; the District of Indiana; the
869 Northern District of Ohio, Western Division, and the Eastern
District of Michigan. And by order of each of said courts the several causes so pending therein, namely, the original bill of the Wabash, St. Louis & Pacific Railway Company, the cross-bill of the Central Trust Company and James Cheney, and the bill removed into said court from the state court, as aforesaid, were consolidated or amalgamated, and proceeded as one cause.

Fourth. And afterwards the Mercantile Trust Company of New York, trustee, under a certain instrument or mortgage, called the collateral trust, filed its cross-bill in the six circuit courts aforesaid, praying the foreclosure of said collateral trust.

Fifth. And afterwards such proceedings were had that said Circuit Court of the United States for the Eastern District of Missouri entered final decree foreclosing the general mortgage and the collateral trust, and ordering the sale of all the property embraced in said instruments; that after the entry of said decree, like decrees were entered in all the other five courts aforesaid, and a commissioner was appointed by said six courts to sell said property under said decrees; that all said property was sold under said decrees, and purchased by these respondents as representatives of the holders of general mortgage and collateral trust bonds, but no part of said

property has as yet been delivered to these respondents, although all said six courts have approved said sale, and these respondents beg leave to refer to the records of said courts for all said proceedings and for the terms and conditions of said decrees, so far as may be necessary for the purposes to this cause.

XII. These respondents admit that said Wabash, St. Louis & Pacific Railway Company has not paid any installment of interest, maturing on the so-called mortgage of February, 1867, on or since the first day of June, 1884; but these respondents deny that payment of such interest was demanded, as stated in the sixteenth paragraph of the bill of complainant.

870 XIII. Respondents admit that installments on the sinking fund were paid as stated in the seventeenth paragraph of the bill of complaint, but how long they were so paid and to what amount and how such payments were invested, these respondents do not know, but call for proof. Respondents do not know whether the funds constituting said sinking fund were ever transferred to defendants J. Gould and Amos L. Hopkins, but respondents allege that the disposition of said bonds should be inquired into by this court.

XIV. Respondents deny that the property embraced in said alleged mortgage is insufficient security for the bonds therein referred to, so far as they may be valid and outstanding, and they therefore deny the averments of the eighteenth paragraph of the bill.

These respondents expressly deny each and every allegation of the bill of complaint not hereinbefore expressly denied or admitted. And now having fully answered, they pray to be hence dismissed in conformity with the practice of this honorable court.

WILLIAMS & THOMPSON, AND
GREENE & HUMPHREYS,
Solicitors for Defendants Joy, Ashley, Hubbard, and Welles

WAGER SWAYNE,
JOHN L. THOMPSON,
H. S. GREENE,
FRANK B. SWAYNE,
Of Counsel.

Endorsed on said answer was the following, to wit: Filed April 29, 1887. A. J. Ricks, Clerk.

871 *Answer of Humphreys and Lindley, Trustees.*

Afterwards, to wit, on May 14, 1887, an answer was filed herein by Solon Humphreys and Daniel A. Lindley, trustees, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, SOLON HUMPHREYS, DANIEL A. LINDLEY and Others, Defendants.

The joint and separate answer of Solon Humphreys and Daniel A. Lindley, as trustees to the bill of complaint filed against them and others in the above-entitled cause.

These respondents saving and reserving to themselves all benefit and advantage that may or can be taken of the many and manifest errors, misstatements and insufficiencies of the bill of complaint, for answer to so much thereof as they are advised is material and necessary to be answered unto, answering say:

They admit the citizenship and residence of the complainants and the defendants to be as in said bill of complaint set forth.

These respondents admit the several consolidations of
872 railroad companies alleged in said bill, and that the same were made at the times therein stated, but respondents do not admit the legal effect of such consolidations to be as in said bill alleged.

These respondents also admit that about the year 1876, by virtue of decrees rendered in certain state courts of Ohio, Indiana and Illinois, all the railway and property of the Toledo, Wabash & Western Railway Company, with all its franchises, were sold and purchased, and that the purchaser thereof reorganized under the name of the Wabash Railway Company, and such company became the owner of all said railway, equipment, property and franchises; but respondent does not admit that the title of said Wabash Railway Company to said railway, property and franchises was subject to any prior lien.

Respondents admit that on the seventeenth day of May, 1879, said Wabash Railway Company executed and issued for value 2,000 bonds of $1,000 each, as stated in the eighth paragraph of the bill of complaint, and that on said day said Wabash Railway Company executed and delivered to these respondents, as trustees, its mortgage or deed of trust on all its railways, equipment, franchises and property to secure the payment of said bonds. Respondents aver that all said bonds were issued and sold or negotiated for value, and are now outstanding and unpaid, and are all entitled to the benefit of the lien created by said last-mentioned mortgage.

Respondents admit that on the first day of June, 1880, the Wabash, St. Louis & Pacific Railway Company executed the mortgage or deed of trust referred to in paragraph ten of the bill of complaint, and also that bonds were issued, secured by said mortgage, to the amount stated in said paragraph.

It is also true that certain legal proceedings were commenced and prosecuted in various courts of the United States, under which receivers were appointed to take charge of and operate all the lines

of railroad and property of said Wabash, St. Louis & Pacific Railway Company, Respondent Solon Humphreys being one of
873 the receivers, and Thomas E. Tutt the other. It is true that such proceedings were had; that decrees were rendered in each of said courts foreclosing said mortgage on June 1, 1880, and that all said railroads, equipment, franchise and property were sold and were purchased by a purchasing committee composed of defendants James J. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles.

That these respondents deny that said proceedings are correctly set forth in said bill of complaint, and, so far as such proceedings are relevant or material to this cause, respondents refer to the true history and description thereof, set forth in the answer of said Joy, Ashley, Hubbard and Welles to the said bill of complaint, and pray that so much of said answer as describes and sets forth said proceedings be taken as a part of this answer.

Respondents deny the execution of each and every mortgage or deed of trust described or referred to in said bill of complaint, except the mortgage of May 17, 1879, and that of June 1, 1880. And as to any other mortgage or deed of trust, and as to all bonds alleged to have been executed by any person or corporation whatever, so far as the same may be claimed to constitute or be entitled to a lien superior to said mortgage of May 17, 1879, these respondents call for full proof.

These respondents hereby expressly deny each and every allegation of said bill of complaint not hereinbefore expressly admitted, and as to all such allegations call for full proof.

And now, having fully answered, these respondents pray to be hence dismissed according to the practice of this honorable court.

HUGH CREA,
Solicitor for Humphreys and Lindley, Trustees.

Endorsed on said answer was the following, to wit: Filed May 14, 1887. A. J. Ricks, Clerk.

874 *Replications of James R. Jesup and Isaac H. Knox.*

On September 3, 1888, a replication was filed herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Ancillary Bill.

The replication of James R. Jesup and Isaac H. Knox, complainants, to the joint and several answers of Solon Humphreys and Daniel A. Lindley, defendants.

These repliants, saving and reserving to themselves all manner of benefit and advantage of exception to the many insufficiencies of said answer of said defendants for replication thereunto, say that they will aver and prove their said bill to be true, certain and sufficient in law to be answered unto, and that said answer of said defendants is uncertain, untrue and insufficient to be replied unto by these repliants.

Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied is true.

875 All which matters and things these repliants are and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray as in their said bill they have already prayed.

FOSTER & THOMSON,
Solicitors for Complainants.

Endorsed thereon was the following to wit: Filed September 3, 1888. A. J. Ricks, Clerk.

On September 3, 1888, a replication was filed herein and reads and is in words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

The replication of James R. Jesup and Isaac H. Knox, complainants, to the joint and several answers of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, defendants.

These repliants saving and reserving to themselves all manner of advantage of exception to the many insufficiencies of said answer of said defendants for replication thereunto say, that they will aver and prove their said bill to be true, certain and sufficient in law to
876 be answered and that said answer of said defendant is uncertain, untrue and insufficient in the law to be replied unto by these repliants. Without this that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied is true.

All which matters and things these repliants will aver, maintain and prove as this honorable court shall direct and humbly pray as in their said bill they have already prayed.

FOSTER & THOMSON,
Solicitors for Complainants.

Endorsed thereon was the following, to wit: Filed September 3, 1888. A. J. Ricks, Clerk.

On September 3, 1888, a replication was filed herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Ancillary Bill.

The replication of James R. Jesup and Isaac H. Knox, complainants, to the answer of the Wabash, St. Louis & Pacific Railway Company, defendant.

877 These repliants saving and reserving to themselves all and all manner of advantage of exception to the many errors and insufficiencies of said answer of said defendant for replication thereunto, say that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered, and that said answer

of said defendants is uncertain, untrue and insufficient to be replied unto by these repliants. Without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be re-lied unto, confessed or avoided, traversed or denied is true.

All which matters and things these repliants will aver, maintain and prove as this honorable court shall direct and humbly pray as in their said bill they have already prayed.

FOSTER & THOMSON,
Solicitors for Complainants.

Endorsed thereon was the following, to wit: Filed September 2, 1888. A. J. Ricks, Clerk.

878 *Stipulation as to Answers Standing as Cross-bills.*

On October 15, 1888, a consent order or stipulation was filed herein, and reads and is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio. In Equity.

JAMES R. JESUP and ISAAC H. KNOX, Trustees,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others.

Come now the complainants, and also the defendants Solon Humphreys and Daniel A. Lindley, trustees, by their respective solicitors, and with leave of the court first had and obtained, the complainants file an amendment and supplement to their bill of complaint, making additional parties defendants as follows: The Farmers' Loan & Trust Company, Alexander M. White and Henry H. Warden, trustees, John T. Terry, James F. Joy, trustees, and Alfred T. White, trustee, and thereupon the defendants Solon Humphreys and Daniel A. Lindley, trustees, having answered the bill, file their cross-bill herein, making the original complainants and the said new parties last above-mentioned defendants to their said cross-bill.

Thereupon came the said new parties, viz., the Farmers' Loan & Trust Company, Alexander M. White and Henry H. Warden, trustees, John T. Terry, James F. Joy, trustees, and duly appear to said amended and supplemental bill of complaint, and also to the cross-bill of said Humphreys and Lindley, trustees, and file
879 their several answers to the said bill and cross-bill, and by consent of all the parties hereto, it is ordered by the court that the said answers herein shall also be taken and held as cross-bills, entitling the respective parties to all the affirmative relief on final decree or otherwise, which they would be decreed to receive as upon a separate cross-bill filed against all the parties to this action.

It is further ordered, by the consent of the parties, that this cause shall stand for reference upon the said bill and amendment and sup-

plement thereto and such cross-bill and answers without any formal replication being filed by any of the parties.

Consented to:

TURNER, McCLURE & ROLSTON,
Solicitors for Farmers' Loan & Trust Co.
BUTLER, STILLMAN & HUBBARD,
Solicitors for the Central Trust Company of New York et al.
DILLON & SWAYNE,
Solicitors for White & Worden, Alfred T. White, John T. Terry, James F. Joy, Humphreys & Lindley.
FOSTER & THOMPSON,
Complainants' Solicitors.
HENRY CRAWFORD,
Solicitor for Humphreys & Lindley.

Upon which said stipulation was the following endorsement: Filed October 15, 1888. A. J. Ricks, Clerk.

880 *Answer of Joy et al., Purchasing Committee.*

Afterwards, on October 15, 1888, James F. Joy and others, purchasing committee, filed answer to amended and supplemental bill herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
against
JAMES F. JOY and Others, Defendants.

Now come the defendants Ossian D. Ashley, Edgar T. Welles, Thomas H. Hubbard and James F. Joy, purchasing committee, defendants herein, and by way of answer to the amended and supplemental bill of the complainants and to the cross-bills of Solon Humphreys and Daniel A. Lindley and the Farmers' Loan & Trust Company, say that in the suit brought by the Farmers' Loan & Trust Company in the United States Circuit Court for the District of Indiana and in the cases brought in the United States Circuit Court for Southern District of Illinois, by Alexander M. White and Henry H. Worden, trustees, and John T. Terry, trustee, and Isaac H. Knox, trustee, and Alfred T. White, trustee, for the foreclosure of various mortgages upon the several divisions of the Wabash Railway have filed their answers in each of said cases to which they attach to, make a part of, this their answer in this cause, and refer to the same as their answer herein.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendants.

881 Circuit Court of the United States, Northern District of Ohio, Western Division.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK ET AL., Defendants.

Answer of James F. Joy and Others, Purchasing Committee, to the Supplemental and Amended Bill.

Toledo and Illinois Railroad.

Butler, Stillman & Hubbard, Solicitors for Purchasing Committee, 54 Wall Street, New York City.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK ET AL.

The answer of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, constituting the purchasing committee mentioned in the supplemental and amended bill of complaint.

882 These respondents, acting as a committee, and as trustees aforesaid, saving and reserving to themselves all benefit and advantage of the errors and insufficiencies of the said amended bill of complaint, for answer thereto, or to so much thereof as they are advised is material to be answered unto, say as follows:

The respondents are informed and believe that the statements and allegations made in the articles or paragraphs of said amended bill of complaint, numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, thirteen, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth and thirty-first are true, and the respondents, therefore, admit the facts therein stated and alleged.

The said respondents are not informed, save by said amended bill, whether the eleventh article or paragraph thereof correctly states the amount of interest due on the bonds therein mentioned; but they are advised and believe that all other allegations made in said article are true, and they, therefore, admit the facts therein alleged.

The said respondents are not informed, save by said amended bill, whether the eleventh article or paragraph thereof correctly states the amount of interest due on the bonds therein mentioned; but they are advised and believe that all other allegations made in said article are true, and they, therefore, admit the facts therein alleged.

The said respondents aver that all the bonds mentioned in the

fifteenth article or paragraph of said amended bill, not excepting $400,000 thereof therein mentioned, are now outstanding and unpaid together with interest thereon; and they allege that they, as a purchasing committee and as trustees as aforesaid, are the owners and holders of said bonds amounting to $400,000. The respondents admit and aver that under the agreement of November 21, 1887, hereinafter in this answer mentioned, the respondents, as between
883 themselves and bondholders who have become parties to said agreement, will be under obligation to surrender said $400,000 of bonds, and not to enforce the same in the event said agreement shall be fully carried out. But the respondents aver and will maintain that unless and until said agreement shall be fully carried out and accomplished after a decree shall have been entered in this cause, the said $400,000 of bonds should be recognized as part of the said issue of $2,000,000, and the rights of their holders and owners protected and enforced. Save as hereinbefore specified, the respondents admit, on information and belief, that the statements and averments of the fifteenth article are true.

The said respondents admit that suits were instituted and removed from the state court to the United States Court; and admit that actions were consolidated, and that decrees were made and entered, as is stated and alleged in the twentieth article or paragraph of said amended bill. The respondents pray reference to said decrees and supplemental decrees, for a statement of the mortgages or liens subject, to which the sale directed by said decree was to be made, and they deny that it was to be, or was subject to mortgages or liens save and except as particularly specified in said decrees.

The said respondents admit that they purchased the greater part, but not all, of the property sold under foreclosure on the twenty-sixth of April, 1886, as is stated in the twenty-first article or paragraph of said amended bill. They admit and aver that they made such purchase, in their capacity as purchasing committee, representing bondholders, parties to the agreement of July 15, 1885, in said articles mentioned. They admit that said sale was confirmed, and that deeds of the property so purchased were made, subject to the liens specified in the said decree and in the order or decree confirming said sale; and they admit and aver that possession of the property so purchased was not delivered to the said purchasers at the time when said deeds were made and delivered.

The said respondents admit that, on the thirty-first day of December, 1886, the Circuit Court of the United States for the
884 Eastern District of Missouri ordered that the property purchased by the respondents, as a committee as aforesaid, should be delivered to them upon their compliance with certain conditions as to payment set forth in said order. They aver that part of the property so purchased, and embraced in said order of December 31, 1886, and thereby ordered to be delivered to the respondents, subject to certain liens as hereinbefore mentioned, was the railroad and property which the complainant, by said amended bill, seeks to have sold under a decree in this cause.

They admit and aver that they have in all respects complied with

all the orders of said court, as is stated and alleged in the twenty-second article or paragraph of said amended bill, and that therefore they claim to be entitled to the possession, custody and control of said property covered by the mortgage in said article mentioned, subject, however, to the mortgages and liens hereinbefore mentioned in this answer. They aver that in complying with the orders of said court before mentioned, they have paid two million of dollars and upwards in excess of and in addition to the amount for which they bid in said property at the sale thereof on the twenty-sixth of April, 1886.

They aver that the amounts of money so paid in excess or the greater part of said amounts were applied to pay receiver's certificates of indebtedness and other debts which constitute liens prior to all mortgages on the railroads so purchased, and a part of which indebtedness should have been apportioned to and borne by the railroad and property covered by the mortgage which the complainants asks to have foreclosed by this action.

The said respondents admit and aver that under the agreement of November 21, 1887, hereinafter in this answer mentioned, and in the event that said agreement shall be fully carried out, the respondents, as between themselves and bondholders who have become parties to said agreement, will be bound to forego all claims upon the railroad and property last above mentioned for repayment of their
885 moneys, which were used and applied as aforesaid to relieve said property from receiver's debts and liens superior in equity to the mortgage, which the complainants ask to have foreclosed.

But the respondents aver and will maintain that unless and until said agreement shall be fully carried out and accomplished after a decree shall have been entered in this cause, the moneys paid by them in excess of their bid as aforesaid should be apportioned among the railroad and properties for whose benefit it was used, and a proper part thereof should be charged on the railroad and property covered by the complainant's said mortgage, and should be declared a lien superior to said mortgage, and should be enforced for the protection of the respondents, and that the decree in this cause should make proper provision for the enforcement of said charge and lien.

The respondents further aver that, after they had complied with the orders of the said Circuit Court of the United States for the Eastern District of Missouri, and had paid the moneys required by said court, they were put in possession of certain parts of the property purchased by them and being within the territorial jurisdiction of said court; but that they were and have ever since been unable to obtain possession of other parts of the property so purchased by them, including the railroad and property covered by the mortgage which this suit is brought to foreclose.

The respondents aver that, for the purpose of accommodating all differences in respect to the said property whereof they were not put in possession, they made and entered into an agreement November 21, 1887, with bondholders interested in said property and with others, whereof a copy marked "Exhibit A" is hereto annexed as a part of this answer.

The respondents aver that the holders and owners of a large majority of every class and series of bonds mentioned in said agreement have accepted the same and have become parties
886 thereto; that the respondents have, up to this time, complied with the terms of said agreement, and have paid out large sums of money in pursuance thereof. And the respondents aver that they are advised and believe that it is necessary for the protection of the bondholders who are parties of said agreement, and in order that the property which the complainant asks to have sold should bring the best obtainable price, that the decree in this cause should provide for the sale of said property at the same time with other properties mentioned in said agreement, so that the purchaser may purchase all the properties covered by said agreement, and may hold control and operate them together as parts of one system.

The respondents, therefore, say that an account may be taken of the bonds and coupons secured by the mortgage of September 8, 1853, as prayed by said amended bill, and of all bonds and coupons secured by any mortgage of later date upon the same premises; that the rights of the respondents in respect to the $400,000 of bonds hereinbefore mentioned, and in respect to the moneys paid by them as hereinbefore stated and applied to the discharge of receivers' indebtedness and liens prior or superior to the said mortgage to the complainant, may be ascertained, and may by decree of this court be stated and declared; that the rights and interests of the respondents as trustees and committee, under the agreement of July 15, 1885, mentioned in said amended bill, and under the agreement of November 21, 1887, mentioned in this answer, may be ascertained, declared and reserved or otherwise protected by decree of this court, and that the respondents may have such other relief as to the court may seem meet.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Purchasing Committee, Respondents.

887 STATE OF NEW YORK,
County and City of New York, ss:

Ossian D. Ashley, being duly sworn, says that he is one of the respondents above named, that the foregoing answer is true of his own knowledge, except as to matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this — day of August, 1888.

Amended and Supplemental Ancillary Bill.

On October 16, 1888, an amended and supplemental ancillary bill was filed herein, and reads, and is in words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio.

Consolidated Cause.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Amended and Supplemental Ancillary Bill.

To the Judges of the Circuit Court of the Northern District of Ohio:

James R. Jesup, of the city, county and state of New York,
888 and a citizen of said state of New York, and Isaac H. Knox, of St. Louis, in the state of Missouri, and a citizen of said state of Missouri, bring this, their amended and supplemental ancillary bill against the Wabash, St. Louis & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the states of Missouri, Illinois, Indiana, Ohio and Michigan, and a citizen thereof; Solon Humphreys, of the city, county and state of New York, and a citizen of said state of New York, and Thomas E. Tutt, of the city of St. Louis, in the state of Missouri, and a citizen of said state of Missouri, as receivers of the said Wabash, St. Louis & Pacific Railway Company; the said Solon Humphreys, a resident and citizen as aforesaid; the Farmers' Loan & Trust Company, a corporation duly organized and existing under and by virtue of the laws of the state of New York, and a citizen of said state; Alexander M. White, of the city, county and state of New York, a citizen of said state; Henry H. Worden, of the state of Massachusetts, and a citizen of said state; John T. Terry, of the city, county and state of New York, and a citizen of said state; James F. Joy, of Detroit, in the state of Michigan, and a citizen of said state of Michigan; Ossian D. Ashley and Thomas H. Hubbard, severally of the city, county and state of New York, and citizens of said state of New York; Edgar T. Welles, of Hartford, in the state of Connecticut, a citizen of said state of Connecticut; Daniel A. Lindley, of the city, county and state of New York, and a citizen of said state of New York; Isaac H. Knox, of St. Louis, in the state of Missouri, and a citizen of said state of Missouri; the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; the Missouri, Pacific Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; the Central Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the state of New York, and a citizen of said state: James Cheney, of Indian-
apolis, in the state of Indiana, and a citizen of said state; Jay
889 Gould and A. Lawrence Hopkins, severally of the city, county and state of New York, and citizens of said state of New York; S. Fisher Johnson, Edward Popper and J. Harsen Purdy, all

of the city, county and state of New York, and citizens of said state of New York; Edwin Parsons, of the city, county and state of New York, and a citizen of said state of New York; Maximilian Herschel, of the city, county and state of New York, and a citizen of said state of New York; the Mercantile Trust Company, a corporation duly organized and existing under and by virtue of the laws of the state of New York, and a citizen of said state of New York; John McNulta, as receiver of the property formerly of the Wabash, St. Louis & Pacific Railway Company east of the Mississippi.

First. On or about the thirty-first day of January, 1887, your orators filed in the Circuit Court of the United States for the Southern District of Illinois their bill of complaint against the Wabash, St. Louis & Pacific Railway Company and others, defendants, for the foreclosure of a mortgage made to your orators upon its line of railway in the states of Illinois, Indiana and Ohio by the Toledo, Wabash & Western Railway Company, a corporation organizeed under and by virtue of the laws and consolidation statutes of the said states of Illinois, Indiana and Ohio, and formerly one of the constituent corporations of the defendant the Wabash, St. Louis & Pacific Railway Company, and for the appointment of a receiver of the said mortgaged property, and for other relief.

On or about the twelfth day of February, 1887, your orators filed in this court their ancillary bill of complaint against the same defendants, praying for similar relief as in the said bill prayed, and said cause is still pending undetermined in this court.

Your orators have also filed in the said Circuit Court of the United States for the Southern District of Illinois their amended and supplemental bill against the defendants hereinabove named for the
890 foreclosure of said mortgage and for other relief.

A true and correct copy of said amended and supplemental bill is hereto annexed, and your orators refer to the same, and repeat each and every of the allegations therein contained, and pray that the same may be taken in all respects as if said allegations were fully repeated and set forth herein.

Second. A portion of the said mortgaged property is situate in the Northern District of Ohio, and within the jurisdiction of this court.

Wherefore, and forasmuch as your orators are remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are particularly cognizable and relievable, your orators pray that this court may take ancillary jurisdiction of this bill and of the several matters and things stated and set forth in the said amended and supplemental bill, so as aforesaid, filed by your orators in the Circuit Court of the United States for the Southern District of Illinois, and your orators repeat the prayer of said amended and supplemental bill, as if the same were herein set forth fully and at large, and pray as in said amended and supplemental bill they have already prayed, and for such other and further relief as may be just and to your honors shall seem meet.

May it please your honors to grant to your orators a writ or writs

of subpœna, to be directed to the said defendants the Wabash, St. Louis & Pacific Railway Company; Solon Humphreys and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company; Solon Humphreys, the Farmers' Loan & Trust Company, Alexander M. White, Henry H. Worden, John T. Terry, Alfred T. White, Isaac H. Knox, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, the St. Louis, Iron Mountain & Southern Railway Company, Daniel A. Lindley, the Missouri Pacific Railway Company, the Central Trust Company of New York, James
891 Cheney, Jay Gould, A. Lawrence Hopkins, S. Fisher Johnson, Edward Popper, J. Harsen Purdy, Edwin Parsons, Maximilian Herschel, the Mercantile Trust Company; John McNulta, as receiver of the property formerly of the Wabash, St. Louis & Pacific Railway Company, east of the Mississippi river, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, then and there severally to answer all and singular the matters aforesaid, but not under oath, and to stand to, abide and perform such other and further orders and decrees therein as to your honors shall seem meet.

JAMES R. JESUP,
FOSTER & THOMSON,
Solicitors for Complainants.

JAMES THOMSON,
Of Counsel.

To the Judges of the Circuit Court of the United States for the Southern District of Illinois:

James R. Jesup, of the city, county and state of New York, and a citizen of said state of New York, and Isaac H. Knox, of St. Louis, in the state of Missouri, and a citizen of said state of Missouri, bring this their amended and supplemental bill against the Wabash, St. Louis & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the states of Missouri, Illinois, Indiana, Ohio and Michigan, and a citizen thereof; Solon Humphreys, of the city, county and state of New York, and a citizen of said state of New York, and Thomas E. Tutt, of St. Louis, in the state of Missouri, and a citizen of said state of Missouri, as receivers of the said Wabash, St. Louis & Pacific Railway Company; the said Solon Humphreys, a resident and citizen as aforesaid; the Farmers' Loan and Trust Company, a corporation duly organized and
892 existing under and by virtue of the laws of the state of New York, and a citizen of the said State of New York; Alexander M. White, of the city, county and state of New York, and a citizen of said state of New York; Henry H. Worden, of state of Massachusetts, and a citizen of said state of Massachusetts; John T. Terry, of the city, county and state of New York, and a citizen of said state of New York; Alfred T. White, of the city, county and state of New York, and a citizen of said state; James F. Joy, of Detroit, in the state of Michigan, and a citizen of said state of Michigan; Ossian D. Ashley and Thomas H. Hubbard, severally, of

the city, county and state of New York, and citizens of said state of New York; Edgar T. Welles, of Hartford, in the state of Connecticut, and a citizen of said state of Connecticut; Isaac H. Knox, of St. Louis, in the state of Missouri, and a citizen of said state of Missouri; the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; the Missouri Pacific Railway Company, a corporation organized and existing under the laws of the state of Missouri, and a citizen of said state; Daniel A. Lindley, of the city, county and state of New York, and a citizen of said state; the Central Trust Company of New York, a corporation organized under and by virtue of the laws of the state of New York, and a citizen of said state; James Cheney, of Indianapolis, in the state of Indiana, and a citizen of said state of Indiana; Jay Gould and A. Lawrence Hopkins, severally, of the city, county and state of New York, and citizens of said state of New York; S. Fisher Johnson, Edward Popper and J. Harsen Purdy, all of the city, county and state of New York, and citizens of said state of New York; Edwin Parsons, of the city, county and state of New York, and a citizen of said state of New York; Maximilian Herschel, of the city, county and state of New York, and a citizen of said state of New York; the Mercantile Trust Company, a corporation duly organized and existing under and by virtue of the laws of the state of New York, and a citizen of
893 said state of New York; John McNulta, as receiver of the property formerly of the Wabash, St. Louis & Pacific Railway Company lying east of the Mississippi river;

And thereupon your orators complain and allege as follows:

First. At all the times hereinafter in that behalf mentioned, the Toledo, Wabash & Western Railway Company was a corporation duly organized and existing under and by virtue of the laws and consolidation statutes of the several states of Ohio, Indiana and Illinois, and owned and operated a line of railroad extending from Toledo, in the state of Ohio, to and through the state of Indiana, and thence in the state of Illinois to Meredosia, with branch of said road to Naples, and from Meredosia to Camp Point, in said state of Illinois, and also with a branch of said road from Clayton, in said state, to the east bank of the Mississippi river at Hamilton, in said state.

Second. In the exercise of the powers which were possessed by it under the laws of said states of Ohio, Indiana and Illinois, in order to provide for taking up and discharging certain funded indebtedness of the said Toledo, Wabash & Western Railway Company, represented by the bonds of said company and of constituent corporations, together with the interest thereon, and thus to consolidate said indebtedness into one mortgage debt, and to obtain money for completing portions of its line and to provide additional equipment, and for other lawful purposes, the said Toledo, Wabash & Western Railway Company on or about the first day of February, 1867, in accordance with resolutions passed by its board of directors and by its stockholders, at respective meetings thereof, duly called, duly made and executed under its corporate seal and attested by the sig-

natures of its president and secretary, fourteen thousand two hundred of its bonds, bearing date on that day, fourteen thousand of which, numbered consecutively from one to fourteen thou-
894 sand, both inclusive, were for the sum of one thousand dollars each, and two hundred of which, numbered consecutively from fourteen thousand and one to fourteen thousand two hundred, both inclusive, were for the sum of five thousand dollars each, and by the terms of each of said bonds the said obligor promised to pay to your orators or bearer the said amount thereof, on the first day of February, 1907, at the office or agency of said obligor, in the city of New York, with interest thereon at the rate of seven per centum per annum, payable quarter-yearly at its said office or agency in the city of New York, on the first days of May, August, November and February in each year, on the presentation and surrender of the coupons or interest warrants thereto annexed, as they should severally become due.

Third. To secure the payment of the said bonds and of the interest warrants thereto attached, the said obligor, on or about said first day of February, 1867, in pursuance of the said resolutions of its board of directors and of its stockholders, made, executed, duly acknowledged and delivered to your orators it is certain indenture of mortgage, or deed of trust, hereinafter called the Consolidated Mortgage of said obligor, and thereby conveyed to your orators upon the trusts therein stated, all the right of way and railroad of the said obligor extending from Toledo, in the state of Ohio, to and through the state of Indiana, and thence in the state of Illinois to Meredosia, with branch of said road to Naples, and from said Meredosia to Camp Point, in said state of Illinois, and also with branch of said road from Clayton, in said state, to the east bank of the Mississippi river at Hamilton in said state, as then made, or as thereafter might be made, and as then used, or thereafter might be used, together with all embankments, bridges, turnouts, sidetracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all other things, real and personal, then owned
895 or used, or that might thereafter be owned or used by the said mortgagor, in connection with the said railroad, and everything appertaining, and appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said mortgagor, together with all the property, real and personal of said mortgagor then acquired or to be thereafter acquired at Quincy in said state of Illinois, as also a certain contract made between the said mortgagor and the Chicago, Burlington & Quincy Railroad Company, dated October 26, 1866, with all the rights and privileges secured by the said contracts to said mortgagor, and all other contracts.

In and by said bonds and said consolidated mortgage, the said mortgagor covenanted to and with your orators for the benefit of all persons who should become holders of said bonds thereby secured, that the said mortgagor would pay all of said bonds, principal and interest, in the manner stated in said bonds, and herein

alleged, and that it would pay to the persons by said mortgage appointed commissioners, the sum of fifty thousand dollars per year, for the purpose of being used and applied by said commissioners as a sinking fund for the payment and extinguishment of the principal of all said bonds secured by said mortgage, and that said sum should be paid to said commissioners in installments of twenty-five thousand dollars every six months, on the first days of February and August, in every year, until and including the maturity of said bonds.

It was also agreed in and by said consolidated mortgage, that the commissioners having the custody of said sinking fund should be the president of said mortgagor and two members of its board of directors, one of whom should be changed every year, and it was declared that it should be the duty of said commissioners and their successors in the trust, in respect to all the moneys that should be paid to them on account of said sinking fund, as well as to all the accumulations thereof, to invest the same by purchasing the bonds secured by said consolidated mortgage on the best
896 terms that the same could be bought, but at a rate not exceeding the par value of said bonds and five per cent. additional, and the bonds so purchased should be held by said commissioners or deposited by them with some trust company or other safe depository, and be immediately stamped or indorsed as belonging to the said sinking fund, but should remain in force, and the interest thereon should continue to be paid by said mortgagor and the amount of such interest should be added and applied as a part of the capital of the said sinking fund, and be used in the same manner as the semi-annual payments of twenty-five thousand dollars and if the said bonds could not be purchased as therein provided, the said commissioners should invest said moneys in any of the bonds of the various companies creating the funded debt of the mortgagor; and in case of inability to procure bonds of that kind, the said commissioners should invest said moneys in the bonds of the United States.

It was further covenanted in and by said bonds and said consolidated mortgage securing the same, that in case default should be made in any of the quarter-yearly installments of interest on any of said bonds at the times and in the manner in the coupons or interest warrants therewith provided, and should have been demanded, and such default should continue for the period of six months after the maturity and demand for payment of the said installments, or in case default should be made in the payment to the said commissioners of the whole or any part of any semi-annual installment of the said sinking fund, as therein provided, and such default shall continue for a period of six months, then and in either of such cases, the principal of all said bonds thereby secured should become immediately due at the option of the holder or holders of a majority in interest of said bonds then outstanding, to be expressed by them in writing to the trustees of said mortgage.

Said consolidated mortgage was forthwith duly recorded
897 in the offices of the recorders and clerks of the various counties through which the said mortgaged railroad ran. A copy thereof is hereto annexed, marked A, and to it for its contents your orators refer.

Fourth. Thereafter, and on and subsequent to the said first day of February, 1867, the said Toledo, Wabash & Western Railway Company duly issued and delivered, or caused to be issued and delivered, to various persons and corporations, said mortgaged bonds to the amount of two million seven hundred thousand dollars, with the coupons thereto attached, duly certified by your orators, the trustees under the said mortgage securing the same.

Except as hereinafter alleged, said bonds are now outstanding in the hands of divers persons and corporations, who are now the owners and holders thereof for value.

Fifth. Your orators further show that on or about the eighth day of September, 1853, the Toledo & Illinois Railroad Company, a corporation then existing under the laws of the state of Ohio, made and executed to the defendant the Farmers' Loan & Trust Company, as trustee, a mortgage covering the line of road then owned by it, extending from Toledo to the westerly boundary line of the state of Ohio, being part of the line of road described in the said consolidated mortgage to your orators, to secure the payment of an issue of its bonds to the amount of nine hundred thousand dollars, bearing date the first day of August, 1853, payable on the first day of August, 1865, with interest thereon at the rate of seven per centum per annum, payable semi-annually on the first days of February and August, in each year. The time of payment of the principal of said bonds was thereafter extended at maturity to and including the first of August, 1890. Some or all of the said bonds, as your orators are informed, are still outstanding in the hands of divers persons and corporations, owners and holders thereof for value.

On or about the first day of August, 1853, the Lake
898 Erie, Wabash & St. Louis Railway Company, a corporation then existing under the laws of the state of Indiana, made and executed to the said defendant the Farmers' Loan & Trust Company, as trustee, a mortgage covering the line of road then owned by it extending across the state of Indiana, being another part of the line of road described in said consolidated mortgage to your orators, to secure the payment of an issue of its bonds to the extent of two millions five hundred thousand dollars, bearing date on said first day of August, 1853, payable on the first day of August, 1865, with interest thereon at the rate of seven per centum per annum, payable semi-annually on the first days of February and August in each year. The time of payment of the principal of said bonds was thereafter extended at maturity to the first day of August, 1890. Some or all of said bonds are still outstanding in the hands of various persons and corporations, owners and holders thereof for value.

On or about the twenty-fifth day of June, 1856, the said Toledo & Illinois Railroad Company consolidated under the laws of the states of Ohio and Indiana with the said Lake Erie, Wabash & St. Louis Railroad Company under the name of the Toledo, Wabash & Western Railroad Company. Subsequently, and on or about the eighth day of October, 1858, the property of said consolidated company was sold under decrees of courts of the states of Ohio and Indiana, that portion of said property situate in the state of Ohio to the Toledo & Wabash Railroad Company, a corporation under the laws of said state, and that portion of said road situate in the state of Indiana to the Wabash & Western Railway Company, a corporation under the laws of said state of Indiana.

On or about the fifteenth day of October, 1858, the said Toledo & Wabash Railroad Company made and executed to Edwin D. Morgan, as trustee, a mortgage upon the said line of railroad from Toledo to the westerly boundary line of said state of Ohio, part of the line of road described in the consolidated mortgage to your orators as aforesaid, to secure payment of its bonds to
899 the amount of one million dollars, bearing date on said fifteenth day of October, 1858, payable on the first day of November, 1878, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November in each year. The time of payment of the principal of said bonds was at maturity extended to the first day of May, 1893.

The said Edwin D. Morgan departed this life on or about the fourteenth day of February, 1883, and your orators are informed that the defendant James F. Joy has been appointed his successor in the trust. Some or all of said bonds, as your orators are informed, are still outstanding in the hands of various persons and corporations, owners and holders thereof for value.

On or about said fifteenth day of October, 1858, said Wabash & Western Railroad Company made and executed to said Edwin D. Morgan, as trustee, a mortgage covering said line of railroad within the state of Indiana, part of the line of railroad described in the consolidated mortgage to your orators as aforesaid, to secure an issue of its bonds to the extent of one million five hundred thousand dollars, bearing date on said fifteenth day of October, 1858, payable on the first day of November, 1878, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of May and November of each year. The time for the payment of the principal of said bonds was thereafter extended to the first day of May, 1893. Your orators are informed that since the death of the said Edwin D. Morgan the defendant James F. Joy has been appointed his successor in the trust. Some or all of said bonds, as your orators are informed, are still outstanding in the hands of various persons and corporations, owners and holders thereof for value.

In the month of October, 1858, said Toledo & Wabash Railroad Company and said Wabash & Western Railroad Company con-

solidated under the laws of the states of Ohio and Indiana, under the name of the Toledo & Wabash Railroad Company.

On or about the first day of March, 1862, the Illinois
900 Southern Iowa Railroad Company, a corporation then existing under the laws of the state of Illinois, made and executed to Lucien Tilton, your orator, James R. Jessup and one John N. A. Griswold, a mortgage covering the line of road from Warsaw and the east shore of the Mississippi river, opposite Keokuk, Iowa, at Hamilton, Hancock county, Illinois, to the junction with the Quincy & Toledo Railroad at Clayton, in Adams county, Illinois, being another part of the line of railroad described in said consolidated mortgage to your orators to secure the payment of an issue of its bonds to the amount of three hundred thousand dollars, bearing date on said first day of March, 1862, payable on the first day of August, 1882, with interest at seven per centum per annum, payable semi-annually on the first days of February and August in each year. All of said bonds were issued and are now outstanding in the hands of divers persons and corporations, owners and holders thereof for value. The said Lucien Tilton has since died.

On or about the twenty-fifth day of May, 1863, the Great Western Railroad Company of 1859, a corporation then existing under the laws of the state of Illinois, made and executed to George Griswold and to the defendants Alexander M. White and Henry H. Worden, a mortgage covering the line of railroad then belonging to it, extending from Naples and Meredosia through Springfield and Decatur to the boundary line between the states of Illinois and Indiana, being another part of the line of railroad described in said consolidated mortgage to your orators, to secure payment of an issue of its bonds to the amount of two million five hundred thousand dollars, bearing date on said twenty-fifth day of May, 1863, payable on the first day of August, 1888, with interest at seven per centum per annum, payable semi-annually on the first days of February and August in each year. On or about the 26th day of April, 1884, the said George Griswold died, and said White and Worden are now the sole trustees under said mortgage. The

said bonds were issued to retire [and] take up two certain
901 issues of bonds of the Great Western Railroad Company, amounting to one million dollars and one million three hundred and fifty thousand dollars, respectively, of which bonds all but four were so retired and taken up.

Some or all of said bonds secured by said mortgage to said Griswold, White and Worden, as your orators are informed, are still outstanding in the hands of divers persons and corporations, owners and holders thereof for value.

On or about the eleventh day of May, 1865, said Great Western Railroad Company of 1859 made and executed to your orator James R. Jesup and the defendant Solon Humphreys a mortgage covering the same property last above mentioned, and being part of said line of railroad described in the consolidated mortgage to your

orators as aforesaid, to secure payment of an issue of its bonds to the amount of two million five hundred thousand dollars, bearing date on said day, payable on the first day of May, 1893, with interest at seven per centum per annum, payable semi-annually on the first days of May and November in each year. The said Solon Humphreys has duly resigned and discharged himself of the trusts created by said mortgage, and your orator James R. Jesup is now the sole trustee thereof. All of said bonds were issued, and are now outstanding in the hands of divers persons and corporations, owners and holders thereof for value.

On or about the twenty-ninth day of May, 1865, the Quincy & Toledo Railroad Company, a corporation then existing under the laws of the state of Illinois, made and executed to the defendant John T. Terry a mortgage covering the line of road then belonging to it, extending from Clayton in the state of Illinois to the west side of the Illinois river, opposite Meredosia, and being another part of the said line of railroad described in said consolidated mortgage to your orators, to secure payment of an issue of its bonds amounting to five hundred thousand dollars, bearing date on said day, payable on the first day of November, 1890, with interest at seven per
902 centum per annum, payable semi-annually on the first days of May and November in each year. Some or all of said bonds, as your orators are informed, are still outstanding in the hands of verious persons and corporations, owners and holders thereof for value.

Your orators further show that thereafter, and early in the year 1865, the said Toledo & Wabash Railroad Company, the said Illinois & Southern Iowa Railroad Company, the said Great Western Railroad Company of 1859 and the said Quincy & Toledo Railroad Company consolidated under the laws and consolidation statutes of the states of Illinois, Indiana and Ohio under the name of the Toledo, Wabash & Western Railway Company.

Your orators further show that, at the time of the execution to them by the said Toledo, Wabash & Western Railway Company of its consolidated mortgage, as hereinabove set forth, upon the lines the railroad hereinabove described, constituting the property of said consolidated company, the said mortgaged property, excepting the line of road from Clayton to Camp Point, and also the line of road from Carthage to Elvaston, was subject to the lien of said mortgages hereinabove particularly set forth.

Sixth. Thereafter and on or about the — day of August, 1870, the said Toledo, Wabash & Western Railway Company under and in pursuance of the laws governing the same, consolidated under the name of the Toledo, Wabash & Western Railway Company with the Decatur & East St. Louis Railway Company, a corporation organized and existing under the laws of said state of Illinois, and owning and operating a line of railroad from Decatur to East St. Louis in said state.

At the time of such consolidation the line of road of the said Decatur & East St. Louis Railway Company was subject to a mortgage, bearing date the third day of June, 1869, made by the said com-

pany to your orator Isaac H. Knox, to secure an issue of its
903 bonds to the amount of two million seven hundred thousand dollars, bearing date on said day, payable on the first day of August, 1889, with interest at the rate of seven per centum per annum, payable semi-annually, the lien of which said mortgage, as to the property therein described, was prior to the lien of the said consolidated mortgage to your orators. All of said bonds are still outstanding in the hands of various persons and corporations, owners and holders thereof for value.

Seventh. Thereafter, and in or about the year 1876, under and by virtue of decrees of foreclosure and sale, made respectively in an action pending in the Court of Common Pleas of Lucas county, in the state of Ohio, and in an action pending in the Circuit Court of Cass county, in the state of Indiana, and in an action pending in the circuit Court of Vermillion county, in the state of Illinois, for the foreclosure of liens thereon junior and subsequent to the said consolidated mortgage to your orators, all and singular the railway of said Toledo, Wabash & Western Railway Company lying in the said states of Ohio, Indiana and Illinois, and its said property and equipment, were sold to holders of bonds secured by liens in said actions foreclosed.

The said purchasers reorganized under the laws of the said states of Ohio, Indiana and Illinois respectively, corporations which were subsequently consolidated under the name of the Wabash Railway Company; and that said consolidated company became vested with all the said lines of railway, and the said property and equipment of the said Toledo, Wabash & Western Railway Company, but subject in all things to the lien thereon of said consolidated mortgage to your orators.

Shortly thereafter, the said Wabash Railway Company, anticipating serious difficulty in making payments of interest which had theretofore accrued and then remained unpaid, and which would presently thereafter accrue, upon the said bonds secured by said consolidated mortgage to your orators, as well as upon other
904 bonds, proposed to the holders of the coupons representing said interest to fund the same under an agreement by which the said holders might take, in lieu thereof, scrip certificates which might be exchanged for bonds of said Wabash Railway Company, known as funded debt bonds; the coupons so funded to be held or deposited as collateral security for the payment of said scrip certificates and bonds.

Coupons for such unpaid interest on the said bonds of the Toledo, Wabash & Western Railway Company, secured by said consolidated mortgage to your orators to the amount, as your orators are informed, of six hundred and thirty-nine thousand four hundred and fifty dollars, or more, and coupons upon such other bonds to an amount of which your orators are not informed, were never satisfied and cancelled, and remain outstanding as collateral security for the payment of scrip certificates or funded debt bonds of said Wabash Railway Company.

Eighth. Your orators further show that thereafter the said Wabash

Railway Company became the purchaser of a certain line of railroad, theretofore known as the Hannibal and Naples Railroad, and extending from Naples, in Scott county, in the state of Illinois, to the Mississippi river at East Hannibal, in said state.

Thereafter, and on or about the sixteenth day of May, 1879, the said Wabash Railway Company made and executed to Alfred T. White, as trustee, a mortgage covering the said line of railroad above mentioned, to secure an issue of its bonds to the amount of five hundred thousand dollars, bearing date on said day, payable on the first day of June, 1909, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of December and June of each year. Some or all of said bonds, as your orators are informed and believe, are now outstanding in the hands of various persons and corporations, holders thereof for value.

Thereafter, and on or about the seventeenth day of May,
905 1879, the said Wabash Railway Company made and executed its two thousand bonds of one thousand dollars each, bearing date on said day and payable at its office or agency in the city of New York, on the first of April, 1909, in lawful gold coin of the United States, with interest thereon at the rate of seven per cent. per annum, payable semiannually, on the first days of April and October in each year, in like gold coin, at its said office or agency, upon the surrender of the coupons thereto annexed as they severally became due.

To secure the payment of said bonds and said coupons, as they severally became due, the said obligor, on the same day, executed and delivered to the defendants Solon Humphreys and Daniel A. Lindley a mortgage or deed of trust, and thereby conveyed to said Humphreys and Lindley upon the trusts therein stated, and subject in all things as to the property embraced therein, to the said consolidated mortgage, all and singular the railroad, road-bed and right of way of the said obligor, together with all and singular the equipments, appurtenances and franchises thereto belonging or in any wise appertaining, and then acquired or to be thereafter acquired.

Thereafter, and on and subsequent to said May 17, 1879, the said Wabash Railway Company issued and delivered, or caused to be issued and delivered, to various persons and corporations, to an amount of which your orators are not yet informed, said bonds secured by the said mortgage, certified by the said trustees thereof; and said bonds so issued are now outstanding in the hands of divers persons who are the owners and holders thereof for value.

Ninth. After the delivery of said mortgage, the said Wabash Railway Company consolidated under the name of the Wabash, St. Louis & Pacific Railway Company, with the St. Louis, Kansas City & Northern Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Missouri, and owning and operating a line of railway extending from St. Louis to Kansas City in said State, and various branch lines connected there-
906 with, which were at the time of said consolidation subject to the liens of various mortgages to secure issues of bonds theretofore made.

The said Wabash, St. Louis & Pacific Railway Company there-

upon became liable to pay all the debts and obligations of its said constituent corporations including all and singular of the said bonds of the said Toledo, Wabash & Western Railway Company, secured by said consolidated mortgage to your orators, and said Wabash, St. Louis & Pacific Railway Company thereafter, and until about June 1, 1884, paid the interest accruing upon said bonds as the same became due and payable.

Tenth. Thereafter, and on or about the first day of June, 1880, the said Wabash, St. Louis & Pacific Railway Company, to secure an issue of its bonds aggregating fifty millions of dollars and payable on the first day of June, 1920, with semi-annual interest at six per cent., made and executed to the defendants the Central Trust Company of New York and James Cheney, a mortgage or deed of trust bearing date on said day and thereby conveyed to said trustees upon the trusts therein stated, and subject to the said prior liens thereon, all and singular the lines of railway of said mortgagor wherever situate, together with the equipment, appurtenances and franchises thereunto belonging.

Thereafter said mortgagor issued and delivered, or caused to be issued and delivered to various persons and corporations, said bonds, to the amount of about seventeen millions of dollars.

Eleventh. On or about the twenty-eighth day of May, 1884, the said Wabash, St. Louis & Pacific Railway Company filed in the Circuit Court of the United States for the Northern District of Illinois its bill in equity against the said Central Trust Company of New York, James Cheney and others, and alleging its insolvency prayed for the appointment of receivers of its property; thereupon and on said day, by an order of said court, the defendants Solon Humphreys and Thomas E. Tutt were appointed receivers with
907 power to take possession of all the lands, railroad and property, rights and choses in action of the said Wabash, St. Louis & Pacific Railway Company lying or being within the jurisdiction of said court.

Thereafter, in an action of similar character instituted in this court by the said Wabash, St. Louis & Pacific Railway Company against said defendants, a similar order was made by this court, and an order of the Circuit Court of the United States for the Eastern District of Missouri, in an action brought in that district of a similar character, was made the order of this court.

Twelfth. The said Solon Humphreys and Thomas E. Tutt, appointed receivers as aforesaid, entered upon and took possession of the property of the said Wabash, St. Louis & Pacific Railway Company and used and operated the same, including the said property mortgaged as hereinabove alleged to your orators.

Thirteenth. Thereafter, the said Central Trust Company of New York and James Cheney instituted actions in the courts of the various states in which any part of the railroad property of the said Wabash, St. Louis & Pacific Railway Company was situated, against said company and others for a foreclosure of the said general mortgage made to said complainants.

Each of said actions was removed from the state court in which

the same was pending to the Circuit Court of the United States for the corresponding district.

With the action so removed to the Circuit Court of the United States for the Eastern District of Missouri, was consolidated the said action instituted therein, as hereinabove alleged, by the Wabash, St. Louis & Pacific Railway Company against the said Central Trust Company, James Cheney and others.

On or about January 6, 1886, in said consolidated action, a decree was entered foreclosing said general mortgage of the Wabash, St. Louis & Pacific Railway Company, and ordering the sale of
908 the railways and property in said decree particularly described subject to the liens of the mortgages executed prior to said general mortgage by the said Wabash, St. Louis & Pacific Railway Company, or any of its predecessor corporations on any part of said railway and property so ordered sold.

Fourteenth. Thereafter, and in and about the month of May, 1886, under and in pursuance of said decree of foreclosure, the said property therein directed to be sold was sold to the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, who were a purchasing committee under a plan of reorganization of said Wabash, St. Louis & Pacific Railway Company.

Your orators are informed that said purchase has been confirmed by said court, and that the master by whom said property was sold has executed to said purchasers a deed of said railway and property subject in all things, as hereinabove alleged, to the rights and equities of the holders of bonds secured by mortgages prior in date of said general mortgage of June 1, 1880, on any part of said property.

Fifteenth. Prior to the consolidation in November, 1879, with the St. Louis, Kansas City & Northern Railway Company, of the Wabash Railway Company, said last-named company owned and used upon its railroad a large and valuable equipment, subject to lien of said consolidated mortgage to your orators, consisting of over 200 engines, 39 baggage, express and mail cars, 68 passenger, 500 freight, and 101 caboose cars, and of the value of several millions of dollars.

After said consolidation said Wabash, St. Louis & Pacific Railway Company also purchased, for a service on its line of railway, a large additional amount of equipment, and said Humphreys and Tutt, as receivers of said Wabash, St. Louis & Pacific Railway Company, have also purchased for such use, a large additional amount of such equipment.

909 All said equipment has been used indiscriminately upon the entire system of the consolidated corporation without any apportionment thereof to any particular division of road.

Your orators allege that the said consolidated mortgage executed to them by the said Toledo, Wabash & Western Railway Company is a first and prior lien upon a very considerable portion of the said rolling stock and equipment, and is entitled to priority of payment out of the proceeds of the sale thereof, and that an equitable and fair proportion of such additional equipment belongs and ought in justice to be allotted to the line of railway constituting, the former

line of the Toledo, Wabash & Western Railway Company, and as after acquired property of the mortgagor is subject to the lien of said consolidated mortgage.

Sixteenth. The said Wabash, St. Louis & Pacific Railway Company failed to pay the interest due on the said twenty-seven hundred bonds secured by said consolidated mortgage to your orators, which occurred and became due and payable on the first day of August, 1884, and on the first day of November, 1884, and on the first day of February, 1885, and on the first day of May, 1885, and on the first day of August, 1885, and on the first day of November, 1885, and on the first day of February, 1886, and on the first day of May, 1886, and on the first day of August, 1886, and on the first day of November, 1886, and on the first day of February, 1887, and on the first day of May, 1887, and on the first day of August, 1887, and on the first day of November, 1887, and on the first day of February, 1888, and on the first day of May, 1888, and on the first day of August, 1888, and failed to pay the coupons on said bonds maturing on said days respectively, although payment of said interest and of said coupons was duly demanded, as said interest became due and said coupons respectively matured.

On or about the second day of May, 1888, by notice in writing, bearing date on that day, the defendant the Central Trust
910 Company of New York, and the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as holders of more than a majority of the bonds outstanding secured by the said consolidated mortgage executed to your orators, as trustees, notified your orators that as such holders they elected to consider the principal of said bonds payable for default in payment of the interest, and of the installment to the sinking fund, for more than six months prior thereto, and required your orators to proceed in accordance with the terms of the said mortgage with the foreclosure thereof.

Seventeenth. Your orators are informed that the said Toledo, Wabash & Western Railway Company, on the first day of February, 1868, paid the installment of twenty-five thousand dollars due on that day to the sinking fund created by its said consolidated mortgage, and thereafter, until on or about the first day of February, 1870, continued to pay installments as they became due, but since said last named day the said Toledo, Wabash & Western Railway Company, and its successor corporations have failed to keep and perform said covenant of said consolidated mortgage, and no sum whatever has since been deposited to constitute such sinking fund. As the said amounts were received by the said commissioners of said sinking fund, the same were from time to time invested by said commissioners in the bonds of said company, secured by said consolidated mortgage to your orators, to the amount of ninety thousand dollars. Since said investments, the said commissioners have held said bonds constituting said sinking fund, and have received the interest thereon from time to time, as the same accrued and became payable, until the said default in payment on or about July 1, 1884.

After the termination of the Toledo, Wabash & Western Railway

Company, the said sinking fund was held by the president and two of the directors, for the time being, of its successor corporations, and at the time of the formation by consolidation of the Wabash,
911 St. Louis & Pacific Railway Company, your orator is informed that the said bonds constituting said sinking fund and the accumulations of interest thereon, were transferred to the president of said last-named company, and to two of the directors thereof, as commissioners, and said sinking fund was thereafter held by the president of said company for the time being, and two of the directors thereof. At the time of the appointment of receivers of said company, the defendant Jay Gould, with the defendants Solon Humphreys and A. Lawrence Hopkins, constituted, as your orators believe, said commissioners of said sinking fund. As such commissioners, said defendants were vested with and in possession of said sinking fund, which has ever since remained in their possession and under their control.

Eighteenth. The said mortgaged property is an inadequate security for the payment of the bonds and coupons secured by said consolidated mortgage to your orators. Said property is now in the possession of this Court through its receivers appointed by its order.

Nineteenth. No proceedings at law have been had nor any suit or action commenced by your orators to recover the principal of said bonds secured by said consolidated mortgage to them, or the coupons attached thereto, or any interest unpaid or accrued thereon.

Twentieth. Upon application by your orators, leave has been granted to your orators to include as defendants herein the said Solon Humphreys and Thomas E. Tutt, receivers of the said Wabash, St. Louis & Pacific Railway Company, and John McNulta as receiver of the property formerly of the Wabash, St. Louis & Pacific Railway Company east of the Mississippi river.

Twenty-first. The following named persons and corporations have or claim to have some interest in said mortgaged property, as owner, lessee, mortgagee or otherwise, which interest, if any, has
912 accrued, or is subsequent to the lien of said consolidated mortgage to your orators, to wit: the Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, Solon Humphreys, Daniel A. Lindley, the St. Louis, Iron Mountain & Southern Railway Company, the Missouri Pacific Railway Company, the Central Trust Company of New York, James Cheney, Jay Gould, A. Lawrence Hopkins.

Twenty-second. Your orators further show that the interest upon the said underlying mortgages executed as hereinabove alleged by the said Toledo & Illinois Railroad Company, the Lake Erie, Wabash & St. Louis Railroad Company, the Toledo & Wabash Railroad Company, the Wabash & Western Railroad Company, the Illinois & Southern Iowa Railroad Company, the Great Western Railroad Company of 1859, the Quincy & Toledo Railroad Company, and the Decatur & East St. Louis Railroad Company is unpaid and in arrears, and that the holders of the bonds secured by said mortgages re-

spectively are entitled to require the trustees thereof to proceed with the foreclosure of said mortgages.

Your orators further show that for the best interests of the bondholders secured by said mortgage to your orators, and to avoid a multiplicity of actions, and to secure a sale of the said property covered by the said consolidated mortgage, it will be necessary for your orators to be permitted to make the trustees of said several underlying mortgages parties defendant to this action, in order that a decree may be made herein setting the rights and equities of the said several classes of bondholders and ordering a sale of said property and equipment free and clear of all lien of said underlying mortgages.

Your orators further show that on or about the thirty-first day of January, 1887, your orator, James R. Jesup, filed in this
913 court his original bill of complaint against the Wabash, St. Louis & Pacific Railway Company and others, defendants, for the foreclosure of the said mortgage executed to him and said defendant Griswold and Tilton, as trustees, by the said Illinois & Southern Iowa Railroad Company, and that said action is still pending undetermined in this court.

Your orators further show that on or about the said thirty-first day of January, 1887, your orator, James R. Jesup, filed in this court his bill of complaint, praying the foreclosure of the said mortgage executed to him and said defendant Humphreys, as trustees by the said Great Western Railroad Company of 1859, and that said action is also still pending and undetermined in this court.

Twenty-third. Your orators further show that on or about the thirty-first day of January, 1887, they filed in this court their original bill in this action against the said Wabash, St. Louis & Pacific Railway Company and others for the foreclosure of the said consolidated mortgage executed by the said Toledo, Wabash & Western Railway Company to them as trustees, and that said action is still pending undetermined in this court.

Twenty-fourth. Your orators further show that the defendants S. Fisher Johnson, Edward Popper and J. Harsen Purdy are made parties hereto as a committee representing certain holders of first mortgage bonds of the Toledo & Illinois Railroad Company, the Lake Erie, Wabash & St. Louis Railroad Company, the Great Western Railroad Company of 1859, and the Decatur & East St. Louis Railroad Company; that the defendant Edward Parsons is made a party hereto as a holder and on behalf of other holders of "Funded Debt" bonds of the Wabash Railway Company apportioned to the Toledo & Illinois Railroad Company, the Lake Erie, Wabash & St. Louis Railroad Company and the Great Western Railroad Company of 1859; that the defendant Maximilian Herschel is made a party hereto as a holder and on behalf of other holders
914 of scrip certificates of the Wabash Railway Company issued in exchange for past due coupons of the first mortgage bonds of the Toledo & Illinois Railroad Company, the Lake Erie, Wabash & St. Louis Railroad Company, the Great Western Railroad Company of 1859 and the Decatur and East St. Louis Railroad Company, and

as a holder and on behalf of other holders of the "Funded Debt" bonds of the Wabash Railway Company apportioned to the Decatur & East St. Louis Company; that the defendant the Mercantile Trust Company is made a party hereto as trustees of coupons deposited for the "Funded Debt" bonds and scrip certificates of the Wabash Railway Company; that the defendant Isaac H. Knox is made party defendant hereto as trustee of the mortgage executed by the Decatur & East St. Louis Railroad Company.

Wherefore, and forasmuch as your orators are remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are practically cognizable and relievable.

Your orators pray that they may be permitted to file this, their amended and supplemental bill, in this court, in this action, and to make the said the Farmers' Loan & Trust Company, the said James F. Joy, as trustee of the said mortgages executed by the Toledo & Wabash Railroad Company and the Wabash & Western Railroad Company, the said Alexander M. White and Henry H. Worden, and the said John T. Terry, parties defendant to this bill in addition to the defendants named in your orator's original bill; that the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were herein expressed, and they thereunto particularly interrogated, but not under oath, answers under oath being hereby expressly waived; that an account may be had and taken of the bonds and coupons secured by said consolidated mortgage executed by the Toledo, Wabash & Western Railway
915 Company to your orators as trustees, and of the amount due for interest on said bonds; that the names of the lawful holders thereof may be ascertained; that the said consolidated mortgage may be decreed to be a lien upon all the railroad premises and property therein described, subject only to the lien of the mortgages described in the fifth article of this bill, as to the property embraced therein respectively, and to be a prior lien thereon to any lien, right or interest of any of the said defendants named in the twenty-first paragraph of this bill; that an inquiry may be had of the rolling stock and equipment purchased by the said Toledo, Wabash & Western Railway Company, after the delivery to your orators of said consolidated mortgage, and of the rolling stock and equipment purchased by any of the successor corporations of said Toledo, Wabash & Western Railway Company, and by the defendants Solon Humphreys and Thomas E. Tutt, as receivers of the Wabash, St. Louis & Pacific Railway Company, and that said after-acquired rolling stock and equipment of the Toledo, Wabash & Western Railway Company and an equitable proportion of that acquired by its successor corporations, and by said receivers, be decreed to be subject to the first and prior lien of the said consolidated mortgage to your orators; that the rights and equities of the bonds secured by said underlying mortgages may be ascertained and determined; that an account may be had and taken of the bonds and coupons secured by the said underlying mortgages and of the amount due for interest on said bonds,

and that the names of the lawful holders thereof may be ascertained; that an inquiry be had of the amount due to the sinking fund, established by said consolidated mortgage to your orators; that an account may be had and taken of said sinking fund; that the defendant the Wabash, St. Louis & Pacific Railway Company may discover the names of the commissioners thereof since its creation; that the defendants Gould, Humphreys and Hopkins be required to account for the property received by them as commissioners thereof; that the bonds secured by said consolidated mortgage, constituting the
916 same, be decreed to be cancelled, and that the amount thereof otherwise invested be paid into court to be applied upon the said outstanding bonds, secured by said consolidated mortgage; that said property may be sold at a judicial sale thereof, free from the claims of all parties hereto, and free from all claims of all parties whose interests are in any manner represented by any party hereto, under the judgment or decree of this court, upon such terms and conditions as to the court shall seem meet and proper; that each and all of the defendants, and all persons in like situation with them, or any of them, and all persons claiming, or to claim by, from or under them, or any of them, may from and by said sale be absolutely barred and foreclosed of and from all right and equity of redemption, of, in and to all of the said mortgaged premises and property; that the proceeds arising from said sale may be brought into court; that your orators may be paid their commissions, and the costs, counsel fees, charges and expenses of this action; that the remainder of such proceeds may be applied to the payment according to the respective equities as found by this court of the amount found to be due, with interest thereon to the date of such payment, on the bonds secured by said consolidated mortgage to your orators, and on the bonds secured by the respective mortgages described in the fifth article of this amended and supplemental bill, so far as the amount of money applicable thereto will pay the same; that the defendant the Wabash, St. Louis & Pacific Railway Company may be adjudged to pay your orators any deficiency which may remain after so applying all of said moneys applicable thereto; that pending this suit a receiver or receivers be appointed with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises, rights, privileges and immunities connected therewith, and of the rolling stock, machinery, equipment and other property incident to the same; that said receiver or receivers may be authorized and directed to maintain and operate the said railroad, and to keep the same in
917 proper repair, and to receive, collect and preserve all the property, assets and income thereof, and that such direction may be made with respect to such receivership as may be equitable and proper; and that your orators may have such other and further relief in the premises, or both, as may be just and equitable, and as to your honors shall seem meet.

May it please your honors to grant to your orators a writ or writs of subpœna to be directed to the said defendants the Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, as Receivers of the Wabash, St. Louis & Pacific Railway

Company, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, Solon Humphreys, Daniel A. Lindley, the St. Louis, Iron Mountain & Southern Railway Company, the Missouri Pacific Railway Company, the Farmers' Loan & Trust Company, Alexander M. White, Henry H. Worden, John T. Terry, Alfred T. White, Isaac H. Knox, the Central Trust Company of New York, James Cheney, Jay Gould, A. Lawrence Hopkins, S. Fisher Johnson, Edward Popper, J. Harsen Purdy, Edwin Parsons, Maximilian Herschel, the Mercantile Trust Company, John McNulta, as receiver of the property formerly of the Wabash, St. Louis & Pacific Railway Company east of the Mississippi river, therein and thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, then and there, severally, to answer all and singular the matters aforesaid, but not under oath, and to stand to, abide and perform such other and further orders or decrees as to your honors shall seem meet.

JAMES R. JESUP.

FOSTER & THOMPSON,
Solicitors for Complainants.
JAMES THOMPSON,
Of Counsel.

918 *Answer of James F. Joy to Amended and Supplemental Bill.*

On October 15, 1888, James F. Joy, by his attorneys, filed his answer to the amended and supplemental bill of complainants, and reads and is in words and figures following, to-wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
against
JAMES F. JOY AND OTHERS, Defendants.

Now comes the defendant James F. Joy, by Dillon & Swayne, his solicitors, and enters his appearance herein, and by way of answer to the amended and supplemental bill of the complainants, and to the cross-bills of Humphreys and Lindley, and of the Farmers' Loan & Trust Company filed herein, says, that in a certain suit brought by the Farmers' Trust & Loan Company, complainant, in the United States Circuit Court, for the District of Indiana, to foreclose a mortgage upon the lines of railway known as the Lake Erie, Wabash & St. Louis R. R. Division, this defendant filed his answer, which answer he attaches hereto and makes a part of his answer, marked exhibit "A," and adopts the allegations thereof in this cause as his answer, and prays that the same may be taken as a cross-bill, and he be entitled to affirmative relief thereon as upon a cross-bill.

DILLON & SWAYNE,
Attorneys for Defendant James F. Joy.

919 United States Circuit Court, District of Indiana.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK and Others, Defendants.

Answer of James F. Joy, Trustee (to the Supplemental and Amended Bill).

Circuit Court of the United States for the District of Indiana.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY and Others, Defendants.

Separate Answer of James F. Joy.

The separate answer of James F. Joy, trustee, in the second mortgage of the Wabash & Western Railway Company to the supplemental and amended bill of the Farmers' Loan & Trust Company.

920 This defendant, as trustee in the mortgage executed by the Wabash & Western Railway Company, on the 15th day of October, 1858, to Edwin D. Morgan, trustee, deceased, saving and reserving unto himself any and all manner of advantage or exception that can or may be taken to the imperfections in the supplemental and amended bill of the Farmers' Loan & Trust Company, for his answer thereto, or so much thereof as he is advised it is material or necessary for him to answer, says:

That he admits that he was at the commencement of this suit and still is a citizen and resident of the city — Detroit, state of Michigan; he says further that the Wabash & Western Railway Company, was, on the fifteenth day of October, 1858, and prior thereto had been a corporation duly constituted under the laws of the state of Indiana, and was then the owner of the line of railway described in the bill of complaint of the complainant, extending across the state of Indiana; that on the said fifteenth day of October, 1858, the said Wabash & Western Railway Company duly executed and delivered to Edwin D. Morgan, then a resident and a citizen of the city of New York, state of New York, its mortgage or deed of trust conveying to said Edwin D. Morgan the said line of railway and all the franchises, powers, privileges and other rights of said corporation, and all the rolling stock, materials, machinery, furniture and equipments of the said road and depots and depot grounds and buildings erected or to be erected thereon, together with all the increased accessions and incidents thereto, being the same property described in the deed of John L. Robinson, marshal and commissioner, to A. Boody, dated October 5, 1858; that the said conveyance was made to the said Edwin D. Morgan in trust to secure the pay-

ment of the following described bonds, to be issued for the purpose of said railway company, to wit, bonds of the denominations of $100, $500 and $1,000, each, to the amount of $1,500,000, bearing interest at the rate of seven per cent. per annum, payable semi-an-
921 nually on the first days of May and November in each year thereafter, at the office of Edwin D. Morgan or other such place in the city of New York as may be designated, each of said bonds being authenticated by a certificate signed by said Edwin D. Morgan, a true copy of which mortgage or deed of trust is hereto attached and made a part of this defendant's answer in this cause and marked "A."

This defendant, further answering, says that in said mortgage or deed of trust it was provided that in case of death or disability of the said Edwin D. Morgan the estate hereby granted should not vest in his heirs or legal representatives, but should as to said party cease and determine, and said Wabash & Western Railway Company should proceed at once to appoint a successor to said trust, and in the event of a failure to appoint such successor for the term of sixty days, then, upon application of the holders of said bonds to the amount of $500,000, it should be lawful for the person being at the time Judge of the Circuit Court of Tippecanoe county, Indiana, to appoint a successor to said trust, who should have the same privileges, rights and duties in regard to said trust named herein at the execution of this indenture.

Defendant further says that Edwin D. Morgan departed this life on or about the fourteenth day of February, 1883, and that on or about the — day of May, 1888, this defendant was duly appointed as his successor in said trust.

This defendant, further answering, says that he is advised that all of said bonds to the amount of $1,500,000 are outstanding and unpaid and are owned and held by parties to him unknown.

This defendant, further answering, says that since on or about the first day of November, 1884, the interest coupons of said bonds have not been paid by the Wabash, St. Louis & Pacific Railway Company.

This defendant, further answering, says that he is informed and believes that, under the plan set forth in the amended bill herein filed, there are outstanding coupons of the bonds secured by the mortgage or deed of trust of which this defendant is trustee,
922 to the amount of $263,353, and the holders of which, this defendant is informed, claim to be entitled to the lien of said mortgage.

This defendant, further answering, says that the said mortgage or deed of trust is the second mortgage or lien upon the property described in the bill of complaint of the complainant herein and subject only to the lien of the complainant's mortgage or deed of trust.

This defendant asks that this court will in all respects protect and enforce the rights of the holders of bonds secured by said mortgage or deed of trust as aforesaid executed to said Edwin D. Morgan, and this defendant having answered fully herein, prays to be dis-

missed with his reasonable costs and charges in his behalf sustained.

DILLON & SWAYNE,
Solicitors for Defendant Joy.

STATE OF ——, *County of* ——, *ss:*

James F. Joy, being duly sworn, says that he is one of the defendants herein; that the foregoing answer is true to his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

—— ——.

Sworn to before me this — day of ——, 1888.

—— ——.

923 EXHIBIT A (COMPTON APPEAL RECORD).

Second Mortgage Wabash and Western Railway Company.

This indenture, made this fifteenth day of October, A. D. eighteen hundred and fifty-eight, between the Wabash & Western Railway Company, a corporation duly constituted under the laws of the state of Indiana, of the first part, and Edward D. Morgan, of the city and state of New York, of the second part, witnesseth:

Whereas, the said party of the first part hath ordered to be issued for the purposes of said railway, its bonds of the denomination of one hundred, five hundred and one thousand dollars each, to the amount of fifteen hundred thousand dollars, bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year hereafter, at the office of Edwin D. Morgan, or such other place in the city of New York as may be designated; each of said bonds bearing even date herewith, and made payable to the said Morgan or bearer on the first day of November, A. D. eighteen hundred and seventy-eight, at the same place, and each bond being authenticated by a certificate signed by said Morgan. Now, therefore, the said party of the first part, in order to secure the payment of said bonds and interest, and in consideration of one dollar in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for other sufficient consideration, hath granted, sold and conveyed, and doth by these presents sell and convey to the said Morgan, his successor or successors in the said trust hereby created, all the following property of the party of the first part, viz.: Its railroad made and to be made, the right of way, and all the land occupied thereby, together with all the superstructure, depots, depot grounds and buildings erected or to be erected thereon, and the rail, tracks, side tracks,

924 bridges, fences, viaducts, culverts, rights, privileges and franchises of the said party of the first part in the state of Indiana, and all the rolling stock, materials, machinery, furniture and equipments of the said road, being the same property described in

the deed of John L. Robinson, marshal and commissioner, to A. Boody, dated October fifth, eighteen hundred and fifty-eight, and conveyed by A. Boody to the party of the first part. But nothing herein contained is intended to prevent said company from disposing of any property whatsoever, which may not be immediately necessary with the operation of its said railroad. To have and to hold the said premises, and every part thereof, and all the increase, accessions and incidents, unto the said Morgan, and his successors severally in the said trust, upon the following trust, viz.:

On failure to pay the interest or principal, or any part of either, according to the tenor of said bond, then, after sixty days from said default, upon request of the holder of such bonds, the said trustee, or his successors in the trust may enter and take possession of all or any part of the said mortgaged property, and as the attorney in fact or agent of the party of the first part, by himself or his agents or otherwise, have, use and operate the railroad, and make all the needful repairs, alterations and additions thereto, and after paying the expenses of such use, repairs, etc., apply the overplus to the payment of the interest due and unpaid, and after that the principal; or, on such default aforesaid, the trustee or his successors in the trust may, at his discretion or on the written request of the holders of at least one-half of the outstanding bonds, shall proceed by judicial decree to foreclose and sell the road and property hereby mortgaged and apply the proceeds to the payment of the costs and to the interest and principal remaining unpaid; on such sale all benefit of valuation and appraisement laws is waived. The sale to be made subject to the first mortgage made by the Lake Erie, Wabash & St. Louis Railroad Company, bearing date the first day of August, eighteen hundred and fifty-three, for two million
925 five hundred thousand dollars, and subject to the following conditions in relation to the said bonds, that is to say:

Whereas, the payment of said bonds and the interest thereon was and is a part of the condition of the purchasing, holding and controlling said road by said party of the first part; and

Whereas, the said party of the first part has executed its bond for two million five hundred thousand dollars to the said Edwin D. Morgan as trustee in behalf of the holders of said bonds of the Lake Erie, Wabash & St. Louis Railroad Company, and has executed a prior mortgage upon the property hereinbefore described to secure said bonds, it is therefore declared to be the true intent and meaning of this instrument as follows, viz.:

First. That the mortgage attaches to the property above described as subject and subordinate to said issue of two million five hundred thousand dollars, whether evidenced by said bonds of the Lake Erie, Wabash & St. Louis Railroad Company, or said bonds of the party of the first part made to Edwin D. Morgan as trustee.

Second. That the party of the first part, or any railroad company of which it may become a component part by consolidation, shall be chargeable with said sum, two million five hundred thousand dollars, as a prior lien and incumbrance to any other debt thereon.

Third. That it shall be lawful for this company, or such consolidated company of which it may be a part hereafter, to substitute for

the aforesaid bond of two million five hundred thousand dollars made to Edwin D. Morgan, trustee, etc., other bonds of such denomination as may be deemed for the interest of said company to make out, not exceeding in amount and time of payment the terms and conditions of said bonds, the object and intent of such bond being to pay the aforesaid bonds of the Lake Erie, Wabash & St. Louis Railroad Company, and the same, when so made and substituted, shall have the same priority of lien to the said bonds which are described in this mortgage as in fact made and particularly set forth in the
926 mortgage made and executed prior to this indenture, and the holders of all such bonds shall be subrogated to the rights and security of the holders of said bonds issued by the Lake Erie, Wabash & St. Louis Railroad Company; and it is hereby agreed, and these presents are upon the express condition, that on payment of the principal and interest of said bonds the estate hereby granted to the party of the second part shall cease, determine and become void, and the right of the premises and property hereby conveyed shall revert to and revest in the party of the first part, without any acknowledgment of satisfaction, reconveyance, reentry or other act; and it is also further mutually agreed that the said party of the second part, and successors in said trust, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the wrongful acts of any agents employed by him, when such agent is selected with reasonable discretion, and that said party of the second part, and his successors in said trust, shall be entitled to receive proper compensation for any labor or service performed by them in discharge of said trust in case they shall be compelled to take possession of said premises, or any part thereof, or manage the same. In case of the death or disability of said party of the second part, the estate hereby granted shall not rest in his heirs or legal representatives, but shall as to said party cease and determine, and the party of the first part shall proceed at once to appoint a successor to said trust, and in the event of a failure to appoint him for the term of sixty days, then, upon application of holders of said bonds to the amount of five hundred thousand dollars ($500,000), it shall be lawful for the person being at the time Judge of the Circuit Court of Tippecanoe county, Indiana, to appoint a successor to said trust, who shall have same rights, privileges and duties in regard to said trust named herein at the excution of this indenture.

In witness whereof the party of the first part hath caused these presents to be signed by its president, countersigned by its
927 secretary, and the corporate seal of the company to be affixed hereto, in LaFayette, in the state of Indiana, this fifteenth day of October, eighteen hundred and fifty-eight.

A. BOODY,
President.

[SEAL.] JOHN N. DRUMMOND,
Secretary.

In presence of
L. TILTON.
JOSEPH S. GRAMINS.

STATE OF OHIO, *Cuyahoga County, ss:*

Be it remembered that on this fourteenth day of October, A. D. eighteen hundred and fifty-eight, before me the subscriber, a notary public within and for the county aforesaid, personally came the above named A. Boody, president of the Wabash & Western Railway Company, and acknowledged the foregoing instrument to be the act and deed of said company, and that the same was executed by him in that behalf.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

JOSEPH S. GRAMINS,
[SEAL.] *Notary Public.*

STATE OF OHIO, *Lucas County, ss:*

On the eighteenth day of October, A. D. eighteen hundred and fifty-eight, before me, the subscriber, a notary public in and for said county, personally appeared John N. Drummond, secretary of the Wabash & Western Railway Company, who acknowledged
928 that he countersigned the foregoing instrument as such secretary, by order of the board of directors of said company, and that he affixed the corporate seal thereto by like order of said board for the uses and purposes therein expressed, and that the same is the act and deed of said company.

EDWARD BISSELL, JR.,
[SEAL.] *Notary Public.*

Endorsed on said answer was the following, to wit: "Filed October 18, 1888, A. J. Ricks, Clerk."

929 *Cross Bill of Humphreys and Lindley, Trustees.*

On October 15, 1888, a cross-bill was filed in this cause by Humphreys and Lindley, trustees, and reads and is as follows, to wit:

In the United States Circuit Court for the — District of —.

Bill.

JAMES R. JESUP and ISAAC H. KNOX, Trustees, Complainants,
against
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

SOLON HUMPHREYS and DANIEL A. LINDLEY, Trustees, Complainants,
against
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

Cross Bill.

The Cross-bill of Solon Humphreys and Daniel A. Lindley, Trustees.

Your orators, Solon Humphreys and Daniel A. Lindley, as trustees, respectfully show that heretofore, to wit, on the — day of ——,

1887, the above-named original complainants James R. Jesup and Isaac H. Knox, as trustees, exhibited their bill of complaint
930 in this court against the Wabash, St. Louis & Pacific Railway Company, and these cross-complainants and other- as defendants, wherein they prayed for a foreclosure of the certain mortgage in said original bill described, and for the sale of the property therein mentioned, and your orators have appeared and filed their answer to such bill.

And thereupon your orators further show that the Wabash Railway Company was, on the seventeenth day of May, 1879, a corporation created by and existing under the laws of the states of Ohio, Indiana and Illinois, and was then the owner of a continuous line of railway in said states, extending from the city of Toledo, in the state of Ohio, through the state of Indiana, and thence into the state of Illinois, to Meredosia, with a branch of said railway to Naples and East Hannibal, and from Meredosia to Camp Point, in the state of Illinois, and with a branch of said road from Clayton to the east bank of the Mississippi River at Hamilton, in said state, and with a branch of said road leading from Decatur to East St. Louis, in the same state including therein the same line of railway described in the original bill of complaint, and also a very large quantity of engines, cars, tools, machinery and supplies and material, and that on said seventeenth day of May, 1878, the said corporation duly executed and delivered to your orators its mortgage or deed of trust, conveying to them the said line of railway above described, together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water tanks and fixtures, shop, engine and other houses, depots, turn-tables, engines, machinery, cars, tools, rolling stock, lots, lands, buildings and offices and other things, real and personal, then owned or used or that might thereafter be owned or used by the said Wabash Railway Company, in connection with the said railroad and every appurtenant thereto, and all the powers and privileges, franchises and charter or other rights of the said Wabash Railway Company, together with all and singular the tenements and hereditaments and appurtenances thereto belonging or in anywise
931 appertaining, together with all reversions, remainders, tolls, income, rents, issues and profits thereof, and all contracts, leases and rights now existing or that might be acquired by said railway company from other corporations, companies or other individuals, and of the estate, right, title and interest or demand, as well at law as in equity, of the said railway company in and to the same and every part thereof, together with an express covenant for the execution of all proper conveyances and transfers by such corporations as would vest in your orators all such equipment or other property as might from time to time be acquired and owned by such mortgagor; that the said conveyance was made to your orators in trust to secure the payment of the following described bonds and the interest thereon, to wit, two thousand bonds of $1,000 each, bearing date seventeenth day of May, 1879, issued by the Wabash Railway Company, for value received, payable to Solon Humphreys and Daniel A.

Lindley, or bearer, at the company's office or agency in the city of New York, on the first day of April, A. D. 1909, in lawful gold coin of the United States, with interest thereon at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October of each year, in like gold coin, at said office or agency, upon the surrender of the coupons annexed to such bonds as they severally become due, provided that said company may, at its option and upon six months' notice, given at the time of maturity of any of said coupons falling due at or after the first day of April, 1879, pay the holder of such bond the principal thereof, with interest to date of such payment. A true copy of which mortgage or deed of trust is hereto attached and made a part of this cross-bill as Exhibit "A."

Shortly after the date of such mortgage the same was duly recorded in each of the counties in Ohio, Indiana and Illinois, wherein said railroad was situated and thereby became a lien on all such property.

All of said bonds, to the amount of $2,000,000, were shortly afterwards negotiated for value, and are now outstanding and un-
932 paid, and owned and held by divers parties.

Your orators show that since, on or about the first day of October, 1884, the interest coupons of said bonds have not been paid by the Wabash, St. Louis & Pacific Railway Company, although the same have been duly presented, and the payment thereof demanded, and the interest for over four years remains unpaid, together with the interest on all such defaulted coupons.

In consequence of a default for more than six months in the payment of interest on such bonds, after the same had become due and been demanded, a majority in value of the holders of all the bonds outstanding and secured by said mortgage of May 17, 1879, have notified your orators that they have elected and determined that the entire principal of all such issue of bonds shall at once become due and payable, and have in writing demanded and required your orators to enforce said security and foreclose the said mortgage, and collect the entire principal and interest of said bonds.

After the execution and delivery of said mortgage to your orators, and about November 1, 1879, the said mortgagor corporation became consolidated with another railroad corporation, and thereafter the consolidated company was known and designated as the Wabash, St. Louis & Pacific Railway Company, and by virtue of such consolidation, and the laws regulating such merger, it became personally liable upon all the said bonds and coupons secured by the mortgage to your orators.

Your orators show that the line of railway described in said mortgage of May 17, 1879, and extending from the city of Toledo to the Mississippi river at Hamilton, Quincy, Hannibal and East St. Louis, has been for about twenty-three years owned, maintained and operated as one property, and during all of such period no equipment, whether constructed or purchased, has ever been set apart or allotted to any particular division of such road, and the
933 earnings of all such property have been received in a common treasury.

Your orators further show that, besides the lien of the mortgage of February 1, 1867, which is claimed by the original complainants, the following persons and corporations claim an interest in and lien upon some part of the property covered by the mortgage of 1879, so executed to your orators, viz.:

1. The Farmers' Loan & Trust Company of New York claims a lien on the portion of the railroad in Ohio, by reason of the execution to it of a mortgage in 1853 by the Toledo & Illinois Railroad Company to secure $900,000 of bonds and their annexed coupons.

2. The Farmers' Loan & Trust Company of New York claims a lien on the portion of the road in Indiana, by reason of the execution to it of a mortgage in 1853 by the Lake Erie, Wabash & St. Louis Railroad Company, to secure $2,500,000 of bonds and their annexed coupons.

3. Alexander M. White and Henry H. Worden claim a lien on a part of the road in Illinois, by reason of the execution to them (and one George Griswold, since deceased) of a mortgage in 1863 by the Great Western Railroad Company in 1859 to secure $2,500,000 of bonds and their annexed coupons.

4. Isaac H. Knox claims a lien on a part of the road in Illinois, by reason of the execution to him in 1867 of a mortgage by the Decatur & East St. Louis Railroad Company to secure $2,700,000 of bonds and their annexed coupons.

5. John T. Terry claims a lien on a part of the road in Illinois, by reason of the execution in 1865 of a mortgage to him by the Quincy & Toledo Railroad Company to secure $500,000 of bonds and their annexed coupons.

934 6. John N. A. Griswold and James R. Jesup claims a lien on a part of the road in Illinois, by reason of the execution in 1862 of a mortgage to them by the Illinois & Southern Iowa Railroad Company to secure $300,000 of bonds and their annexed coupons.

7. Alfred I. White claims a lien on a part of the road in Illinois, by reason of the execution in 1879 of a mortgage to him by the Wabash Railway Company to secure $500,000 of bonds and their annexed coupons.

8. James F. Joy claims a lien upon a part of the road in Ohio, by reason of being a substituted trustee in a mortgage executed to E. D. Morgan, trustee, in a mortgage in 1858 by the Toledo & Wabash Railroad Company to secure $1,000,000 of bonds and their annexed coupons.

9. James F. Joy claims a lien upon a part of the road in Indiana, by reason of being substituted trustee in a mortgage executed to E. D. Morgan, trustee, in 1858, by the Wabash & Western Railroad Company, to secure $1,500,000 of bonds and their annexed coupons.

10. James R. Jesup claims a lien upon a part of the road in Illinois, by reason of a mortgage executed to him as trustee, in 1865, by the Great Western Railroad Company of 1859 to secure $2,500,000 of bonds and their annexed coupons.

Each and every of such ten mortgages, as well as the original complainants herein, in addition to their respective claims of lien upon some portion of the roadway described in their several trust deeds, do also insist that their liens cover some portion of the large amount and value of the present equipment now in use on the property and owned by the Wabash Railway Company, or its successor by consolidation, the Wabash, St. Louis & Pacific Railway Company, and it will be necessary for the court to ascertain and decree in this cause the respective priorities and extent and amount of each such lien, not only upon the fixed property of
935 the mortgagor, but also upon the equipment now in existence.

Your orators further show that the mortgage executed to them as aforesaid is the only one of any of the liens on the property, which covers all of the property, real as well as personal, owned by said mortgagor corporation, and that by the express covenants thereof your orators, as trustees, for the benefit of the bondholders secured thereby, have the right to the income and revenue of the property, treated and operated as a unit and without being served, and have a contract right to a foreclosure and sale thereof treated as one property, including all the accretion and equipment added thereto since the date of said mortgage.

Your orators further show that by the record of their said mortgage as aforesaid, it became and has since continued to be a lien on all the real property therein described, subject only to the indebtedness described in and secured by the respective mortgages, which had been previously executed on such property or some part thereof, and recorded according to law, and that such property can not, as against the recorded lien of your orators, be subjected to any claim or priority or charged with the payment of any bonds, notes, coupons or obligations of any corporation other than such respective mortgagors, and which are not specifically recited in such recorded mortgage as a part of the mortgaged debt.

So far as the claim of lien upon the roadway in Ohio is made by the Farmers' Loan & Trust Company, by virtue of the mortgage of the Toledo & Illinois Railroad Company executed in 1853, your orators show that all of the coupons described in said recorded mortgage were fully paid at and before the year 1865, and that the said corporate existence of said mortgagor wholly ceased in 1858 by virtue of a foreclosure and sale of all its property and the entire principal of such bonds matured by the terms of such mortgage in 1867, and more than twenty years has elapsed since the full right accrued to foreclose such mortgage for the principal thereof.

936 Your orator further shows that precisely the same facts are true with regard to the claim of lien on the roadway in Indiana for $2,500,000, made under the mortgage executed by the Lake Erie, Wabash & St. Louis Railway Company.

Your orator further shows that neither of the said alleged first mortgages in Ohio and Indiana contain any clause covering after

acquired property or any covenant for further assurance, nor do the same create any contract lien upon the income or revenue of such property and none of the personal property or equipment now in use on the line ever belonged to either of such mortgagor corporations, both of which ceased to exist about thirty years ago.

By reason of such matters divers of the bondholders secured by the mortgage of 1879 insist, and, therefore, as instructed by them, your orator claims that there are no valid outstanding coupons of any kind constituting any part of the debt secured either by the mortgage executed by the Toledo & Illinois Railroad Company or the Lake Erie, Wabash & St. Louis Railroad Company and that more than twenty years having elapsed since the full maturity of the principal of both such mortgages according to the terms thereof as executed and recorded, there is no power to foreclose the same and that neither of said mortgages constitute any present lien upon any part of the railroad property which is entitled to a priority over the mortgage to your orators or entitled to any claim upon or payment out of the current income of such property.

Your orators further show that not only were the properties of the original corporations then owning the Ohio and Indiana portions of the property sold out in 1857 under judicial decree, but long after the execution and record of each of said sectional mortgages (except the Hannibal and Naples branch), the respective mortgagors ceased to exist in 1876, and the whole property was then sold out under judicial decree and became vested in purchasers for value, who thereupon organized the Wabash Railway Company, and all of the locomotives, machinery, cars, tools and material now on the road, were either bought or manufactured by the
937 said Wabash Railway Company or its successor by consolidation as aforesaid, and no part of such equipment and material was in existence or constituted any part of the property covered by such earlier mortgagors or purchased at such judicial sale, and by reason thereof your orators will insist that, excepting a very small portion in value or quantity covered by the mortgage in 1867, the entire equipment and material now owned or used in connection with such railroad property is subject to the lien of your orators' mortgage as the first and paramount lien.

Your orators show that the entire line of such railroad and all its equipments as described in their said mortgage has been in the possession of a receiver of this court for the benefit of all creditors as they may show themselves entitled ever since January 1, 1887, and that while the holders of bonds other than those secured by the mortgage to your orators have received large sums of money out of the income of the property, your orators' *cestui que trusts* have not received any payments whatever, although the equipment of the road, which is fairly worth the sum of about $5,000,000, was an important and necessary factor in producing such net income, and the bondholders having a first lien on such equipment are in equity entitled to pay out of the moneys earned by the receiver until the payments to them shall be made equal to the pay-

ments heretofore made to the creditors who hold liens only upon some portion of the roadway.

Your orators are advised that James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles claim some interest or estate in such mortgaged property, but the same is subject in all respects to the prior lien of your orators' mortgage.

The premises consider-, your orators pray:

That said Wabash, St. Louis & Pacific Railway Company, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, the Farmers Loan & Trust Company, Alexander M. White, Henry H. Worden, Isaac H. Knox, James R. Jesup, James F. Joy, trustee,
John T. Terry and John N. A. Griswold be made parties
938 defendant to this cross-bill and ordered to appear and answer the premises, but without oath; that an account may be taken of the sums due for principal and interest upon all the bonds issued and outstanding under and secured by the mortgage so executed to your orators by the said Wabash Railway Company on May 17, 1879; that the said mortgage be decreed to constitute a valid lien upon all the property therein described, and specially that it be decreed to constitute a first and paramount lien upon all the engines, cars, tools, machinery and materials purchased or constructed by the said mortgagor or its successor by consolidation and now in existence and used on the road; that all the several liens and claims of liens upon the said property and every part thereof shall be marshaled and a decree be entered ascertaining and defining and enforcing the several liens according to the nature, amount and priority thereof, and specifically adjudging what specific property is embraced in such liens and every of them; that thereupon the court will decree a sale of the entire property covered by your orators' mortgage as a unit upon such terms as the court shall seem meet, and that such sale be made free from all the said liens so ascertained and decreed, and shall divide and apportion the proceeds of such sale among your orators and all the other mortgage creditors in accordance with the several priorities and equities as they may be so adjudged; and further decree that upon such sale the rights, liens and titles of each and every of the parties hereto and all claiming by, under or through them to the said mortgaged property shall be forever barred and foreclosed.

Your orators pray for such other and further relief as may be necessary or proper to fully enforce their liens and equities, and the court may be competent to award in the premises.

SOLON HUMPHREYS,
DANIEL A. LINDLEY,
Cross-Complainants.
HENRY CRAWFORD, *Solicitor.*

939 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY, THOS. H. HUBBARD, EDGAR T. WELLES, JAMES F. JOY, OSSIAN D. ASHLEY, ISAAC H. KNOX, JAMES R. JESUP, SOLON HUMPHREYS, DANIEL A. LINDLEY, JAMES COMPTON, ISAAC M. SIMON, JOHN B. MANNING, WILLIAM F. REDMOND, EDWARD H. LITCHFIELD and the ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, Defendants.

Amended Bill (Toledo & Illinois Railroad).

To the Honorable the Judges of the United States Circuit Court for the Northern District of Ohio, Western Division:

The Farmers' Loan & Trust Company, a corporation duly organized and existing under the laws of the state of New York, and a citizen of said state, having its principal office and place of abode in the city of New York, brings by leave of this court, this its supplemental and amended bill of complaint in this cause against the Central Trust Company of New York, a corporation or-
940 ganized and existing under the laws of the state of New York, and a citizen of said state, and having its principal office and place of abode in the city of New York; James Cheney, a citizen of the state of Indiana, residing at Ft. Wayne, in said state; Ossian D. Ashley, Thomas H. Hubbard, James R. Jesup and Daniel A. Lindley, citizens of the State of New York, residing at the city of New York, in said state; Solon Humphreys, a citizen of the State of New Jersey, residing at Bergen Point, in said state; James F. Joy, a citizen of Michigan, residing at Detroit, in said state; Edgar T. Welles, a citizen of Connecticut, residing at Hartford, in said state; James Compton, a resident of the District of Columbia, residing at Washington, in said district; Isaac M. Simon, John B. Morning, William F. Redmond, Edward Popper, Edward H. Litchfield and the Adelbert College of Western Reserve University.

And thereupon your orator complains and says (making all the allegations hereof, except those personal to itself, on information and belief):

First. Your orator is a corporation bearing the corporate name of the Farmers' Loan & Trust Company, duly created under and by virtue of the laws of the state of New York, and, as such corporation, is fully authorized and empowered to hold in trust the property conveyed to it in trust as hereinafter stated and to execute the trusts reposed in it, and under and by virtue of the mortgage or deed of trust as hereinafter described.

Second. At and prior to the eighth day of September, 1853, the Toledo & Illinois Railroad Company was a corporation duly created and existing under the laws of the state of Ohio, and as such was

the owner of a line of railway known as the Toledo & Illinois Railway, extending from Toledo, Ohio, to the west line of Paulding county in said state.

Third. The Toledo & Illinois Railroad Company, on or
941 about the eighth day of September, 1853, in accordance with the laws of said state, and in the due exercise of the powers conferred upon it by its charter, and in order to provide money for the purpose of equipping and finishing said railroad, in accordance with resolutions of its board of directors, duly passed at a meeting thereof duly called, duly made and executed, under its corporate seal, and attested by the signatures of its president and secretary, nine hundred of its bonds bearing date the first day of August, 1853, numbered from one to nine hundred inclusive. By the terms of each of said bonds, said railroad company agreed to pay to your orator, as trustee, one thousand dollars, at its office in the city of New York, state of New York, on the first day of August, 1865, with interest thereon at the rate of seven per centum per annum, payable semi-annually, on the first days of August and February in each year, until the principal sum should be paid, on presentation and surrender of the coupons or interest warrants thereto annexed, as they should severally become due. When the principal of said bonds became due on the first day of August, 1865, it was not paid in the case of any of said bonds; but additional coupons were issued and annexed to said bonds for an additional period of twenty-five years, and the following words were stamped upon each of said bonds, namely; "For value received it is hereby agreed between the Toledo & Illinois Railway Company, and the holder of this bond, that the time for payment of the principal thereof shall be extended until August 1, 1890, provided the annexed coupons for interest, issued by said company, shall be paid when due." As to whether any agreement was made between the holders of said bonds and the corporations at that time operating said railroad by virtue of which the payment of the principal of said bonds was extended for such twenty-five years, your orator is not informed, except as above stated; but it insists that, if such stamping constituted such an agreement, then the conditions thereof have not been observed by said railway
942 company, and said interest coupons have not been paid when due, as hereinafter more specifically set forth.

Fourth. To secure the payment of the said bonds and of the coupons or interest warrants thereto attached, the said Toledo & Illinois Railroad Company, on or about the eighth day of September, 1853, in further pursuance of the said resolution of its board of directors, made, executed, duly acknowledged and delivered to your orator its certain indenture of mortgage or deed of trust, bearing date on that day, and thereby conveyed to your orator upon the trusts therein stated all the right of way and the railroad of the said obligor, consisting of the road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipment of the road, and those to be purchased or paid for with the

above-described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected thereon, and all franchise rights or privileges of the said obligor in, to or concerning the same.

In and by said deed of trust it was provided that in case the Toledo & Illinois Railroad Company should fail to pay the principal or interest on any of the said bonds or any part thereof, when due and payable and when demanded, then, after sixty days from such default, the said trustee should be fully empowered to enter into and take possession of all or any part of said property, and to use, have and enjoy the same, and all the rent, income and profits thereof, and to have the income thereof after the payment of expenses and repairs applied to the payment of said bonds, principal and interest.

Your orator further says that in accordance with the terms of said trust deed the holders of more than one-half of the said bonds have united in a request in writing to your orator to proceed to
943 enforce the provisions of said deed and to foreclose the said mortgage and to take possession of said premises.

Said mortgage or deed of trust was forthwith duly recorded in the offices of the clerks and recorders of the various counties through which the said railroad ran or was situated or to be situated.

A copy of said mortgage or deed of trust is hereto annexed, marked "Exhibit A," and made a part hereof, and to it your orator refers for more definite statement of its contents.

Fifth. That thereafter and on and subsequent to said eighth day of September, 1853, the Toledo & Illinois Railway Company, mortgagor as aforesaid, duly issued and delivered to various persons and corporations all of said mortgage bonds, to wit, nine hundred thereof, with the coupons thereto attached, the said bonds duly certified by your orator as trustee of the mortgage securing the same.

Said bonds are now outstanding in the hands of divers persons and corporations, who are now the owners thereof, for value.

Sixth. The Lake Erie, Wabash & St. Louis Railroad Company was a corporation duly incorporated and organized on or about the thirty-first of August, 1852, under the laws of the state of Indiana, and subsequently became the owner of a line of railroad extending from the western boundary of the state of Ohio, at the western terminus of the Toledo & Illinois Railroad Company, across the state of Indiana to the eastern boundary of the state of Illinois. On or about the twenty-fifth day of June, 1856, the Toledo & Illinois Railroad Company and the Lake Erie, Wabash & St. Louis Railroad Company, with all their railroads aforesaid, franchises and property duly consolidated under the name of the Toledo, Wabash & Western Railroad Company. The said consolidated company thus formed subsequently became indebted, and in accordance with decrees of foreclosure and sale, entered by competent courts, in Ohio and Indiana, all its prop-
944 erty, rights and franchises were, on the eighth day of October, 1858, duly sold.

That portion of said line of railroad lying and being within the state of Ohio was at said sale purchased by the Toledo & Wabash Railroad Company, a corporation duly incorporated July 21, 1858, under the laws of the state of Ohio; and that portion of said line of

railway lying within the state of Indiana was at said sale purchased by the Wabash & Western Railroad Company, a corporation duly incorporated September 27, 1858, under the laws of the last-named state, but said sale to the Toledo and Wabash Railroad Company was made subject to your orator's mortgage hereinbefore set forth and hereto attached as Exhibit "A."

Seventh. On or about the fifteenth day of October, 18[5]8, the Toledo & Wabash Railroad Company duly issued its bonds amounting to $1,000,000, bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November of each year. Said bonds were made payable to Edwin D. Morgan or bearer, and by the terms thereof were to mature on the first day of November, 1878, but the time for the payment of said bonds was on or before the maturity thereof, by consent of the holders, extended to May 1, 1893, and additional coupons for the interest to accrue during said extended period were delivered to the holders thereof.

To secure the payment of said bonds and interest, said Toledo & Wabash Railroad Company duly executed a deed of trust to Edwin D. Morgan, as trustee, upon all its railroad built or to be built in the state of Ohio, and upon all its property of every description pertaining to said railroad, and that such mortgage constitutes a second lien upon said line of railway within the said state of Ohio, as hereinbefore described.

The said Edwin D. Morgan departed this life on or about the fourteenth day of February, 1883, and under and in accordance
945 with the provisions of said deed of trust said defendant James F. Joy has been duly appointed and qualified as his successor in said trust.

Eighth. In the month of October, 1858, the Toledo & Wabash Railroad Company and the Wabash & Western Railway Company, hereinbefore named, were duly consolidated under and by virtue of the laws of the states of Ohio and Indiana, the consolidated company thus formed taking the name of the Toledo & Wabash Railway Company.

Ninth. On or about the twenty-ninth day of January, 1859, there was duly incorporated under the laws of the state of Illinois, a corporation known as the Great Western Railroad Company of 1859, which company became the owner of a line of railway extending from the state line of Indiana, at the western terminus of the lines of railway of said companies, hereinbefore named as existing in the state of Indiana, to Meredosia and Naples, Illinois, a distance of 180.7 miles.

Tenth. During the summer of 1865, said consolidated company, the Toledo & Wabash Railway Company, the Great Western Railroad Company of 1859, the Quincy & Toledo Railroad Company and the Illinois & Southern Iowa Railroad Company (the two last named companies being duly organized corporations of the state of Illinois, and each the owner of a line of railway) were all duly consolidated, and together formed one consolidated corporation known as the Toledo, Wabash & Western Railway Company—such consolidation

having been effected under the laws of the states of Ohio, Indiana and Illinois.

Eleventh. On or about the first day of February, 1867, the Toledo, Wabash & Western Railway Company resolved to issue its bonds to the extent of $15,000,000, for the purposes of said corporation in the operation and management of said railways, which said bonds bear date February 1, 1867, and were made payable in forty years
946 from the date thereof, with interest at seven per cent. per annum, payable quarterly, on the first days of May, August, November and February in each year; the interest on the same being evidenced by coupons or interest warrants thereto attached. The said company to secure the payment of principal and interest on said bonds, did on said same date duly execute and deliver a deed of trust to the defendants, Isaac H. Knox and James R. Jesup, as trustees, conveying to said parties, upon the trusts therein stated; all the lines, property and franchises of said railway company, from Toledo, Ohio, to Meredosia and Naples, Illinois, and from Meredosia to Camp Point, Illinois, and with branch from Clayton, Illinois, to the east bank of the Mississippi river at Hamilton, Illinois. Said mortgage, or deed of trust, also embraced property afterwards acquired, which might be used in connection with said railroad.

But a small portion of said fifteen millions of bonds were ever issued; so that the said bonds now outstanding amount to the sum of $2,610,000, and the interest thereon amounted, on the first day of August, 1884, to $2,450. All subsequent installments of interest on the same are due and unpaid.

Twelfth. On the first day of February, 1873, said consolidated corporation, known as the Toledo, Wabash & Western Railway Company, issued its bonds, amounting to the sum of $5,000,000 interest and principal, payable in gold, which said bonds from said last-mentioned fact are known as the gold bonds of said company.

To secure the payment of said bonds and the interest thereon, said company executed its certain indentuae of mortgage or deed of trust, bearing date on that day, and therein and thereby conveyed to Valentine H. Ketcham, as trustee, all its railroad and property of every kind and description soever; and said trustee created a lien upon all said railroad and property, subject, however, as to said property within the state of Ohio, to the mortgages hereinbefore set forth.

947 Thirteenth. The Toledo, Wabash & Western Railway Company made default in the payment of the interest specified in said gold bond mortgage, and thereupon suit was instituted by the Metropolitan National Bank of the city of New York, one of the owners and holders of the bonds secured by said mortgage in the Court of Common Pleas of Lucas county, Ohio, and also in the Circuit Court of Cass county, Indiana, and in the Circuit Court of Vermillion county, Illinois, praying the foreclosure of said gold bond mortgage. The said trustee, Valentine H. Ketcham, filed his cross-bill or petition as trustee of said last-mentioned mortgage, also praying the foreclosure thereof, and it so proceeded in said causes that decrees for the foreclosure of said mortgage and the sale of said prop-

erty were entered as follows: In the said Ohio court on or about the fourteenth day of September, 1875, and in the said Indiana and Illinois courts during the February terms thereof, 1876.

By the terms of said decrees and each of them the said mortgage of September 8, 1853, of which your orator is trustee as aforesaid, and the other mortgages hereinbefore recited, were decreed to be prior and superior to the lien of said gold bond mortgage upon the line of railroads and other property formerly owned by said the Toledo & Illinois Railroad Company, as hereinbefore set forth and referred to, and it was further decreed that said property should be sold subject to the lien of said mortgage, of which your orator is a trustee, and of the other mortgages hereinbefore set forth.

In pursuance of said decree, sale was had on the tenth day of June, 1876, of all the property, effects, rights and franchises of the Toledo, Wabash & Western Railway Company, subject as aforesaid as to so much thereof as was covered by the said mortgage, and the property so sold was purchased by John W. Ellis and others acting with him, as a committee of the holders of the gold mortgage bonds; and on or about the first day of January, 1877, a deed of conveyance was duly executed and delivered to said purchaser by Jacob D. Cox,
948 who had been appointed by said courts special master commissioner to execute said decrees.

And by said deed there were conveyed to said purchasers all the railroads of the Toledo, Wabash & Western Railway Company, extending from the city of Toledo, in the state of Ohio, southwesterly to and through the state of Indiana, and to East St. Louis and Hamilton on the Mississippi river, and to Naples and Camp Point in the state of Illinois, an aggregate length of 601 miles, and including the line of railroad and other property mentioned and described in said Exhibit "A," hereto attached, but subject to the lien of the mortgage of which your orator is trustee, together with all the property of the Toledo, Wabash & Western Railway Company of every description and all its franchises and all its equities, debts and demands, and all the franchises of its several original corporations.

Fourteenth. On or about the twenty-eighth day of December, 1876, a corporation entitled the Wabash Railway Company of Ohio was duly organized in said last-named state, the incorporators therein being the persons who purchased the railroad and other property as aforesaid, and about the same time there was duly organized in the state of Indiana a corporation entitled the Wabash Railway Company of Indiana, and about the same time a like corporation was duly organized in the state of Illinois entitled the Wabash Railway Company of Illinois. The said companies were severally organized for the purpose of taking, using and operating all the railroad and property purchased as last aforesaid, and of taking possession of, owning and exercising the said franchises. During the month of January, 1877, the said three corporations so organized in Ohio, Indiana and Illinois were duly consolidated under the laws of said three states under the name of the Wabash Railway Company. On or about the twelfth day of January, 1877, said John W. Ellis and

others associated with him as purchasers of the railroad, prop-
949 erty, rights and franchises sold as last aforesaid, conveyed all said railroad, property, rights and franchises to the Wabash Railway Company, subject, however, to the prior liens declared by said decrees.

Fifteenth. Thereafter, and on or about the seventeenth day of May, 1879, the said the Wabash Railway Company duly made, executed and issued a series of bonds bearing said date, amounting to the sum of $2,000,000, having thirty years to run, bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October of each year, said interest being represented by coupons duly attached to each bond, the principal and interest payable in New York in gold coin, said company reserving the right to pay the principal of said bonds any time after April 1, 1899, upon giving six months' notice of such purpose; and it being provided that in case of nonpayment of any semi-annual installment of interest, and the continuation of such default for six months after demand, the principal of each of said bonds upon which default should be made should become and be due and payable. All of said bonds, except $400,000, were sold for value and are now outstanding and unpaid, together with the interest thereon, to the amount of $—

To secure the payment of said bonds and of the coupons thereto attached as they severally should become due, the said obligor, the Wabash Railway Company, on the said seventeenth day of May, 1879, duly executed and delivered to the defendants Solon Humphreys and Daniel A. Lindley, its certain indenture of mortgage or deed of trust, and thereby conveyed to said Humphreys and Lindley, upon the trusts therein stated, all and singular the railroad, road-bed and right of way of the said obligor, together with all and singular the equipment, appurtenances and franchises thereto belonging or in any wise appertaining, and then or thereafter to be acquired.

Sixteenth. In the month of November, 1879, the Wabash
950 Railway Company created by the consolidation of said Ohio, Indiana and Illinois corporations, each bearing the same name, and the St. Louis, Kansas City & Northern Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Missouri, and owning and operating a line of railway extending from St. Louis to Kansas City, Missouri, and various branch lines, became duly consolidated with each other under the name of the Wabash, St. Louis & Pacific Railway Company.

Seventeenth. Thereafter, and on or about the first day of June, 1880, the said the Wabash, St. Louis & Pacific Railway Company, to secure an issue of its bonds to be issued and to amount in the aggregate to the sum of fifty millions of dollars, payable on the first day of June, 1920, with semi-annual interest at six per cent. per annum, made and executed to the defendants the Central Trust Company of New York, James Cheney, a mortgage or deed of trust, bearing date on said day, known as its general mortgage, and thereby conveyed to said trustees upon the trusts therein stated, and subject

to all the prior liens thereon, all and singular the lines of railway of said mortgagor, wheresoever situate, together with the equipment, appurtenances and franchises thereunto belonging.

Thereafter, said mortgagor, the Wabash, St. Louis & Pacific Railway Company, issued and delivered to various persons and corporations said bonds to the amount of about seventeen millions of dollars.

Eighteenth. Thereafter, and on or about the twenty-eighth day of May, 1884, the said the Wabash, St. Louis & Pacific Railway Company filed its bill in equity in the Circuit Court of the United States for the Eastern District of Missouri, against the said the Central Trust Company of New York, and James Cheney and others, alleging therein its insolvency, and praying for the appointment of receivers of its property; and thereafter and on said day, by an order of said court Solon Humphreys and Thomas E. Tutt were ap-
951 pointed receivers, with power to take possession of, operate and preserve all the railroad and other property of every nature whatsoever of the Wabash, St. Louis & Pacific Railway Company, lying or being within the jurisdiction of said court.

Thereafter a suit of a similar character was instituted by the Wabash, St. Louis & Pacific Railway Company as complainant in this court against said defendants, and a similar order made by this Court; and a like order for the Circuit Court of the United States, for the Southern District of Illinois, in a similar suit brought in that district, was made the order of said court; and in like manner said Humphreys and Tutt were appointed receivers, with power to take possession of, operate and preserve all the railroad and other property of every nature and description soever of the Wabash, St. Louis & Pacific Railway Company, lying or being within the jurisdiction of this court, and including the line of railroad and other property formerly belonging to the Toledo & Illinois Railroad Company, covered by your orator's mortgage, and acquired by the Wabash, St. Louis & Pacific Railway Company, in manner herein aforesaid.

Nineteenth. In pursuance of and compliance with said orders of said several Circuit Courts of the United States, the said Solon Humphreys and Thomas E. Tutt, appointed receivers as aforesaid, entered upon and took possession of the property of the Wabash, St. Louis & Pacific Railway Company, and operated the same, including said property mortgaged to your orator, as hereinabove alleged.

Twentieth. Thereafter, and in the months of January and February, 1884, the said the Central Trust Company, of New York, and James Cheney instituted suits in the courts of the various states in which any part of the railroad property of the Wabash, St. Louis & Pacific Railway Company was situate against said railway and others for a foreclosure of the said general mortgage.

Each of said suits was removed from the state court, in
952 which the same was pending, to the Circuit Court of the United States for the corresponding district.

With the action so removed to the Circuit Court of the United States for the eastern district of Missouri was consolidated the suit instituted therein, as hereinabove alleged, by the Wabash, St. Louis

& Pacific Railway Company against the Central Trust Company, of New York, James Cheney and others; and it so proceeded in said consolidated cause that a decree and supplemental decree were entered therein on or about January 6, 1886, and March 5, 1886, foreclosing said general mortgage of the Wabash, St. Louis & Pacific Railway Company, and ordering the sale of the railways and other property in said decree particularly described, subject to the liens of the mortgages executed prior to its said general mortgage by the Wabash, St. Louis & Pacific Railway Company, or any of its predecessors, corporations or any of said railway and other property so decreed to be sold, including said mortgage to your orator as trustee as aforesaid; and that said decree and supplemental decree were made the decree and supplemental decree of the several circuit courts of the United States, except the Circuit Court of the United States for the Northern District of Illinois, in the corresponding suits therein pending as follows: In the Circuit Court of the United States for the Southern District of Illinois, on the eighth day of January and the sixth day of March, 1886; in the Circuit Court of the United States for the District of Indiana, on or about the ninth day of January, and the sixth day of March, 1886; in the Circuit Court of the United States for the Southern District of Iowa, Eastern Division, on the twelfth day of January and the twentieth day of March, 1886; in the Circuit Court of the United States for the Northern District of Ohio, Western Division, on the twelfth day of January and the seventeenth day of March, 1886; and in the Circuit Court of the United States for the Eastern District of Michigan, on the twelfth day of January and the eighth day of March, 1886.

953 Twenty-first. Thereafter, and on or about the twenty-sixth day of April, 1886, under and in pursuance of said decree of foreclosure and the decree supplementary thereto, the said property therein directed to be sold was sold to the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, who had been and were constituted a purchasing committee under a plan of reorganization of the Wabash, St. Louis & Pacific Railway Company, entered into on the fifteenth day of July, 1885, by the bondholders of the Wabash, St. Louis & Pacific Railway Company.

On or about the fifteenth day of June, 1886, a decree was made and rendered in the Circuit — of the United States for the Eastern District of Missouri, and thereafter duly made the decree of this court, confirming said sale and directing the master to make, execute and deliver to said purchasers a deed of said railway and other property, subject in all things hereinabove alleged to the rights and equities of the holders of bonds secured by mortgages prior in date to said general mortgage of June 1, 1880, or any part of said property.

And it further decreed that the railroads, property or interests sold thereunder should remain in the custody of the receivers until such time as the court should, on motion, direct said property in whole, or from time to time in part, to be released to said purchasers.

Twenty-second. Upon application made to said Circuit Court of

the United States for the Eastern District of Missouri, by said purchasing committee, for a release and delivery to them of possession of said railroad and other property last aforesaid, it was on the thirty-first day of December, 1886, order- that said delivery be made as prayed, upon compliance of said purchasing committee with certain conditions as to payment of money into court, as set forth in said order, and that until said conditions should be complied
954 with said property should remain in the hands and under the operations and management of the said receivers, Humphreys and Tutt.

The said purchasing committee have in all respects complied with the orders and decrees of said court, and with the terms of said sale, and therefore claims to be entitled to the possession, custody and control of said property covered by your orators' mortgage or deed of trust.

Twenty-third. On or about the — day of ——, 188–, certain bondholders filed a bill in the Circuit Court of the United States for the Northern District of Illinois against the Wabash, St. Louis & Pacific Railway Company and others, to foreclose two certain indentures or mortgages, and asking the removal of said Humphreys and Tutt. One of said mortgages was made and executed on February 1, 1867, by the Toledo, Wabash & Western Railway Company to Isaac H. Knox and James R. Jesup, as trustees, to secure an issue of $2,610,000 of bonds, said mortgage covering the railroad, afterwards by consolidation becoming the main lines of the Wabash, St. Louis & Pacific Railway Company in Illinois, Indiana and Ohio, except the Chicago division, the line from Decatur, Illinois, to East St. Louis; and the lines from Naples to East Hannibal. The other mortgage was made and executed on or about May 17, 1879, by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, as trustees, to secure an issue of bonds aggregating $2,000,000, of which $1,600,000 were issued, payable on the first day of April, 1909, with semi-annual interest at seven per cent. per annum, in and by which mortgage there was conveyed to said trustees upon the uses and trusts therein stated, and subject to all prior liens thereon, all and singular the lines east of the Mississippi, which afterward became the main line of the Wabash, St. Louis & Pacific Railway Company, except the Chicago division thereof. Your orator is advised that the remaining $400,000 of said bonds are outstanding, and that there is a dispute between the hold-
955 ers of the $1,600,000 of bonds, but in that controversy your orator has no interest.

Twenty-fourth. On or about the 25th day of June, 1886, certain bondholders, on behalf of themselves and others similarly situated, filed a bill in said Circuit Court of the United States for the Northern District of Illinois, against the Wabash, St. Louis & Pacific Railway Company and others, to foreclose a certain indenture of mortgage bearing date July 1, 1880, made and executed by said last-named railway company to Henry F. Spaulding and John T. Terry, as trustees, to secure an issue of bonds aggregating $4,500,000, payable on the first day of July, 1910, with semi-annual interest at

five per cent. per annum, in and by which mortgage there was conveyed to said trustees, upon the uses and trusts therein stated, and subject to all prior liens thereon, all and singular the line of railway of the said Wabash, St. Louis & Pacific Railway Company known as the Chicago division.

Twenty-fifth. It is proceeded in said causes that on or about the sixteenth day of December, 1886, orders were entered in each of them removing the said Solon Humphreys and Thomas E. Tutt from their office as receivers of all the railroad and other property of the Wabash, St. Louis & Pacific Railway Company, lying east of the Mississippi river and appointing in their stead Thomas M. Colley, as receiver of said property, and that in pursuance of said order the said Colley duly entered upon, took possession of and operated the said property covered by the mortgage thus sought to be foreclosed, until on or about the 9th day of April, 1887, when he resigned from his said office of receiver, and by order of the said Circuit Court of the United States for the Northern District of Illinois, John McNulta was substituted in his stead, who entered into and upon, and took possession of said property, and has used and operated the same until the present time, and still is in possession of the same as such receiver.

956 Twenty-sixth. That on or about the first day of August, 1878, there were due and unpaid by the Toledo, Wabash & Western Railroad Company, the successor of the Toledo & Illinois Railroad Company, upon the bonds secured by the mortgage or deed of trust marked "A," coupons due on the first day of August, 1875, and on the first days of February and August, 1876, and on the first days of February and August, 1877, and on the first day of February, 1878; that said Toledo, Wabash & Western Railroad Company procured the holders of said coupons to deposit the same with the Metropolitan Bank of New York City, and to accept in exchange therefor a scrip certificate, which was, by the terms thereof, convertible into what are known as funded debt bonds; by the express terms of which exchange, however, it was provided that said coupons should not lose the benefit of the lien upon the railroad property secured by the said mortgage or deed of trust marked "A;" that the amount of said coupons unpaid and secured by said mortgage, as your orator is informed and believes, is the sum of $136,830.39, and which amount with interest thereon is still due and unpaid.

Twenty-seventh. The Wabash, St. Louis & Pacific Railway Company failed to pay the interest due on the said nine hundred bonds secured by said mortgage to your orator, which accrued and became due and payable on the first day of August, 1884, and all payment of interest falling due subsequent thereto, and failed to pay the coupons on said bonds maturing on said days respectively, although payment of said interest and of said coupons was duly demanded as said interest became due and said coupons respectively matured.

Twenty-eighth. Your orator would further show unto your honors that no proceedings at law have been had, nor any suit nor action commenced by your orator or to your orator's knowledge to recover

the principal of said bonds secured by said mortgage, of which
957 your orator is trustee, or the coupons attached thereto, or any interest unpaid or accrued thereon.

Twenty-ninth. To all the deeds, mortgages, decrees, legal proceedings and other matters of record hereinabove alluded to, your orator prays to refer as part of this its bill of complaint.

Thirtieth. The defendants the Central Trust Company of New York, James Cheney, Solon Humphreys, Daniel A. Lindley, James R. Jesup, Isaac H. Knox, James Compton, Isaac M. Simon, John B. Manning, William F. Redmond, Edward H. Litchfield and the Adelbert College of Western Reserve University, claim some interest or lien upon the property and interest described in said mortgage or deed of trust to your orator; but your orator says that all the right, title or interest of said defendants, or either of them, or of the defendants James F. Joy, Ossian D. Ashley, Thomas Hubbard and Edgar T. Welles, is subject to the lien of your orator's mortgage or deed of trust, and your orator holds the first and best lien upon said property.

Thirty-first. The foreclosure of the mortgage or deed of trust, of which your orator is trustee, will necessarily require this court to construe the force, effect and meaning of the said decree of foreclosure and sale of said Wabash, St. Louis & Pacific Railway and property appurtenant thereto. The foreclosure of said mortgage or deed of trust, marked "A," will require this court to finally determine the rights of various claimants to portions of the terminal properties of said railways, and the equipment of the Wabash, St. Louis & Pacific Railway Company heretofore conveyed to said purchasing committee. Disputes have arisen between the holders of bonds under the mortgages of 1867 and 1879, and the holders of bonds of prior issues as to what terminal properties and equipments
are covered by the several mortgages, and as to which of the
958 several holders of the bonds are entitled to have their interest paid out of the income. The property is not sufficient security for all the said liens, and to secure the application of the same to the first liens, your orator should have immediate possession.

In the suit of the Central Trust Company and James Cheney some of the said questions are raised, but to a final determination of all the said questions, it will be necessary for this court to take jurisdiction in this cause and to continue the same to a final decree.

Wherefore and forasmuch as your orator is remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are particularly cognizable and relievable, to the end therefore that the defendants may be required to make answers respectively to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were herein expressed, and they hereunto particularly interrogated, but not under oath, answers under oath being hereby expressly waived, your orator prays that an account may be had and taken of the bonds and coupons secured by said mortgage executed to your orator by the Toledo & Illinois Railroad Company on September 8, 1853, and of the amount due for interest thereon; that the names of the lawful holders thereof may

be ascertained; that the said mortgage may be decreed to be the first lien upon all the railroad premises and other property there described, and, therefore, a prior lien thereon to any lien, right or interest of any of the defendants herein; that said property may be sold at judicial sale thereof, free from the claims of all parties whose interests are in any manner represented by any party hereto, under the judgment or decree of this court upon such terms and conditions as to this court shall seem meet and proper; that each and all of the defendants and all persons in like situations with them, or any of them, and all persons claiming or to claim by, from or under them or any of them, from and by said sale be absolutely barred
959 and foreclosed of and from all equity of redemption of, in and to all of the said mortgaged premises and property; that the proceeds arising from such sale may be brought into court; that your orator may be paid his commissions and costs, counsel fees, charges and expenses of this action, and the amount due on said bonds with interest to the date of such payment, so far as the amount of the money applicable thereto will pay the same; that pending this suit a receiver or receivers be appointed with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises, rights, privileges and immunities connected therewith, and of the rolling stock, machinery, equipment and other property incident to the same, or the said receiver now holding possession be ordered to hold the same henceforward under your orator's deed of trust; and that said receiver or receivers may be authorized and directed to maintain and operate the said railroad and to keep the same in proper repair, and to receive, collect and preserve all the property, assets and income thereof, and that such direction may be made with respect to such receivership as may be equitable and proper; and that your orator may have such other and further relief in the premises, or both, as may be just and reasonable, and as to your orators shall seem meet.

May it please your honors to grant to your orator a writ or writs of subpœna, to be directed to the said defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, Solon Humphreys, Daniel A. Lindley, the Central Trust Company of New York, James Cheney, Isaac H. Knox, James R. Jesup, James Compton, Isaac M. Simon, John B. Manning, William F. Redmond, Edward H. Litchfield and the Adelbert College of Western Reserve University, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, and then and there severally to answer all and singular the matters aforesaid, but not under oath, and to stand to, abide and
960 perform each and all such further orders or decrees as your honors shall seem meet.

THE FARMERS' LOAN & TRUST COMPANY,

[SEAL.] By R. G. ROLSTON, *President.*

TURNER, McCLURE & ROLSTON,
Complainant's Solicitors.

HERBERT B. TURNER,
Of Counsel.

STATE OF NEW YORK, *Southern District of New York, ss:*

I, Rosewell G. Rolston, being duly sworn, depose and say that I am the president of the Farmers' Loan and Trust Company, the plaintiff above named, and have been such president for a number of years past. That I have read the foregoing supplemental and amended bill and know the contents thereof, and that the same is true to my knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

I further say that the reason why this verification is not made by the plaintiff is that it is a corporation. That I am an officer of the same, to-wit, the president, and my knowledge is derived from having taken my part in the transactions spoken of and otherwise, and my grounds of belief on information communicated to me by the agents of said corporation and others. I further say that the seal affixed to said supplemental and amended bill is the corporate seal of the said plaintiff, and was by me affixed to the same by authority of said corporation.

R. G. ROLSTON.

Sworn to before me this — day of June, 1888.

JOHN McCLURE,
Notary Public, New York County.

961 EXHIBIT "A" (COMPTON APPEAL RECORD).

Toledo & Illinois Railroad First Mortgage, $900,000.

This indenture, made this eighth day of September, in the year one thousand eight hundred and fifty-three, between the Toledo & Illinois Railroad Company, a corporation duly constituted by the laws of the state of Ohio, of the first part, and the Farmers' Loan & Trust Company of the city of New York, a corporation duly constituted by the laws of the state of New York of the second part, witnesseth:

Whereas, the party of the first part, pursuant to the terms of the statutes of said state of Ohio incorporating them, and amendatory thereto, are engaged in constructing a railroad from the city of Toledo, in the state of Ohio, to the west line of Paulding county, in the said state; and for the purpose of finishing and equipping said road, have, by resolution of their board of directors, bearing even date herewith, determined to issue, negotiate and sell their bonds of the denomination of one thousand dollars each, not to exceed nine hundred in number, bearing an interest of seven per centum per annum, payable semi-annually at the office of the said "The Farmer's Loan & Trust Company," in the city of New York; each of said bonds bearing date the first day of August, A. D. one thousand eight hundred and fifty-three, and made payable to the said Farmers' Loan & Trust Company, or bearer, at their said office on the first

day of August, in the year one thousand eight hundred and sixty-five, and containing a clause permitting the holders thereof, at any time within six years from the date thereof, to convert the principal sum into the capital stock of said railroad company at par ($50 per share) on surrender of such bond, with the unpaid interest warrants annexed, and each being authenticated by a certificate signed by the president of the said Farmers' Loan & Trust Company:

Now, therefore, the said party of the first part, in order
932 to secure the payment of the said bonds and interest, and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and transferred, and by these presents do grant, bargain, sell and transfer and convey unto the said party of the second part, and their successors in the trust hereby created and assigned, all the following property of the party of the first part; that is to say, their road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road and to be purchased or paid for with the above described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights or privileges of the said party of the first part, of, in, to or concerning the same.

But nothing herein contained shall be construed to prevent the party of the first part from selling, hypothecating or otherwise disposing of any of the property or securities received in payment of stock subscriptions or of any lands or other property of the company not necessary to be retained for their roadway, depot grounds or stations, nor required for the construction or convenient use of their road, nor from collecting moneys due or to grow due to the company on stock subscriptions or otherwise; nor from making and declaring dividends to stockholders out of the assets and earnings of the company; nor from allowing interest on stock installments paid or to be paid; provided they shall diligently proceed to collect, and faithfully apply the proper means of the company to the construction, equipment and other proper uses of their said road.

To have and to hold the said premises and every part thereof, with the appurtenances, unto the said party of the second part and their successors in said trusts upon the following trusts, that is to say:

In case the said party of the first part shall fail to pay the
963 principal or any part thereof, or any of the interest on any of said bonds, at any time when the same may become due and payable, according to the terms thereof, when demanded, then, after sixty days from such default, upon request of the holder of such bonds, the said party of the second part, or their successors in said trust, may enter into and take possession of all or any part of said premises and property; and as the attorney in fact, or agent of the said party of the first part, by themselves, or agents, or substitutes

duly constituted, have, use and employ the same, making from time to time all needful repairs, alterations and additions thereto; and after deducting the expenses of such use, repairs, alterations and additions, apply the proceeds thereof to the payment of the principal and interest of all of said bonds remaining due and unpaid; or the said party of the second part, and their successors in said trust, at their discretion, may, or on the written request of the holders of at least one-half of the bonds then unpaid and unconverted into stock, shall cause the said premises, or so much thereof as shall be necessary to pay and discharge the principal and interest of all of such bonds which may be then due and unpaid, and unconverted, as aforesaid, to be sold at public auction in the city of Toledo, in the state of Ohio, or in the city of New York, giving at least sixty days' notice of the time, place and terms of such sale, and of the specific property to be sold, by publishing the same in one newspaper of general circulation of said city of New York, and whatever else required by law; and execute to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple for the same, which shall be a bar against the party of the first part, their successors and assigns, and all persons claiming under them, of all rights, interest or claim of, in or to the premises so sold, or any part thereof; and the said trustees shall, after deducting from the proceeds of the said sale the costs and expenses thereof, and of managing such property, apply so much of the proceeds as may be necessary to the payment of the said principal and interest due and unpaid on
964 said bonds, and shall restore the residue thereof to the party of the first part; it being hereby expressly understood, that in no case shall the party of the first part claim or take advantage of any valuation or appraisement laws, nor any injunction or stay of proceedings, or any process be applied for or obtained by them to prevent such entry or sale, as aforesaid. And the said party of the first part hereby covenants, for the consideration aforesaid, to execute and deliver any further or other reasonable and necessary conveyance of the said premises, or any part thereof, to the said party of the second part, and their successors in the said trust, for more fully carrying into effect the objects hereof; particularly for the conveyance of any property subsequently to the date hereof acquired by the party of the first part, and comprehended in the description contained in the premises. And the said party of the first part hereby covenants, as aforesaid, that the money borrowed for the purposes aforesaid, upon the security of said bonds, shall be faithfully applied to the construction and equipment and other proper uses of said road; and that there is no other or former lien on their said road, or on the property hereby mortgaged. And it is hereby mutually agreed, and these presents are upon this express condition, that on payment of principal and interest of said bonds, or the conversion thereof into stock, in manner aforesaid, the estate hereby granted to the said party of the second part shall cease, determine and become void, and the right to the premises and property hereby conveyed, shall revert to and revest in the said party of the first part, without any acknowledg-

ment of satisfaction, reconveyance, re-entry or other act. And it is also further mutually agreed, that the said party of the second part, and their successors in said trust, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the wrongful act of any agent employed by them, when such agent is selected with reasonable discretion; and that said party of the second part, and their successors in the trust, shall be
965 entitled to receive proper compensation for any labor or service performed by them in the discharge of their trust, in case they shall be compelled to take possession of said premises, or any part thereof, or manage the same.

And it is further mutually agreed, that in case of the dissolution, incapacity or resignation of the above-named trustee, after the trust hereby vested shall have devolved upon them for thirty days, the holders of a majority of said bonds may apply to the District Court, or Court of Common Pleas, or other court of record of Lucas County, Ohio, to supply the vacancy in said trust; and thereupon such new trustee or trustees shall become vested for the purposes aforesaid, with all the rights and interests hereby conveyed or vested in the said party of the second part, without any further assurance or conveyance for the same; but if the same shall be necessary, both or either of the parties hereto shall execute any and all necessary releases or conveyances for that purpose.

In witness whereof, the party of the first part have caused their corporate seal to be hereto affixed, and these presents to be subscribed by their president, and countersigned by their secretary, the day and year first above written.

[SEAL.] JOHN ROSS,
President of the Toledo & Illinois R. R. Co.

Countersigned by
JOHN R. OSBORN,
Secretary.

Signed, sealed and acknowledged in presence of
J. M. GLOYD,
WM. H. CLUIR.

STATE OF OHIO, *Lucas County, ss:*

Be it remembered, that on this fourteenth day of September, A. D. one thousand eight hundred and fifty-three, personally ap-
966 peared before me, the subscriber, a notary public, duly appointed and residing in said county, and authorized to take acknowledgment of deeds and other instruments in said county, John Ross, who is known to me to be president of the Toledo & Illinois Railroad Company, and John R. Osborn, secretary, who have signed and countersigned the foregoing instrument; and acknowledged that they had executed the same for the uses and purposes therein mentioned, and for and in behalf of said company. And the said John Ross and John R. Osborn, being by me duly sworn, de-

posed that they are the president and secretary of the said Toledo & Illinois Railroad Company; that the seal hereto affixed is the seal of said company, and was affixed thereto by them by resolution of the directors of said company.

In witness whereof, I have hereunto set my hand and affixed my seal of office, this day and year above written.

J. M. GLOYD,
[SEAL.] *Notary Public.*

This mortgage is recorded in Lucas county, Ohio, Vol. 8, page 111, and is also recorded in all other counties along the line of the road.

Endorsed thereon was the following, to-wit: "Filed Oct. 22, 1888. A. J. Ricks, Clerk."

967 *Amendment to Amended and Supplemental Bill Relating to James Compton.*

On the twenty-fifth day of October, 1883, an amendment to the amended and supplemental ancillary bill was filed herein and reads and is in words and figures following, to-wit:

In the Circuit Court of the United States for the Northern District of Ohio.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Consolidated Cause.

The complainants James R. Jesup and Isaac H. Knox, by leave of the court for this purpose first had and obtained, file this amendment to their amended and supplemental ancillary bill in the above-entitled cause, and allege:

First. That on or about the sixteenth day of May, 1878, one David J. Tysen, on behalf of himself and all other creditors similarly situated, instituted an action in the Circuit Court of Fountain county, in the state of Indiana, against the said Wabash Railway Company and others, alleging that he was the owner of certain bonds theretofore issued by the said Toledo & Wabash Railway Company, bearing
date the first day of October, 1863, payable on the first day of
968 May, 1883, with interest at seven per cent. per annum, and known as equipment bonds, but not secured by any mortgage or other lien upon said property; that by reason of the consolidation of said Toledo & Wabash Railway Company with the other companies mentioned in the fifth paragraph of complainants' amended and supplemental bill, an equitable lien or charge was created in favor of the holders of said equipment bonds against all

of such railroad and appurtenances in the states of Ohio and Indiana, or that such holders were entitled in equity to the lien and security of the consolidated mortgage of 1867 executed to your orators equally with the bonds actually issued thereunder; that no interest had been paid on said equipment bonds since 1875; and praying that an account might be taken of all sums due to the holders of such bonds, that the same might be declared a lien upon the said railway and property, and that in default of the payment thereof a sale of said railways and property might be decreed.

Thereafter, and on or about the 15th day of May, 1878, on petition of the Wabash Railway Company, the said cause, in which certain other alleged holders of such equipment bonds had intervened and been made parties plaintiff with said Tyson, was duly removed to the Circuit Court of the United States for the District of Indiana, which said last-named court thereupon obtained and exercised full, complete and exclusive jurisdiction over the subject matter of the controversy involved in said action.

Thereafter such proceedings were had that the said cause duly came on for hearing before the said Circuit Court of the United States for the District of Indiana, and final decree was rendered therein for the complainant, adjudging that the said equipment bonds, and all unpaid interest thereon, were equitable liens on the line of railroad in the said states of Ohio and Indiana, subject only to the two mortgages executed to the Farmers' Loan & Trust Company as trustee and the two mortgages executed to Edwin D. Morgan
as trustee, and directing a sale of the railroads and property
969 on which such lien was declared to satisfy the amount due for principal and interest as found by said decree.

To said decree and to all the other papers, pleadings and proceedings in said cause these complainants pray reference as fully as if the same were incorporated herein.

Second. Thereafter an appeal was duly taken and perfected by said defendant the Wabash Railway Company, or its successor corporation, the Wabash, St. Louis & Pacific Railway Company, from the said decree of the said Circuit Court of the United States for the District of Indiana to the Supreme Court of the United States, and such proceedings were thereafter had that on or about the fourth day of May, 1885, the said Supreme Court rendered its opinion reversing the said decree of said Circuit Court for the District of Indiana and adjudging that, by reason of the judicial sale of said property on the tenth day of June, 1876, as alleged in the seventh paragraph of the complainants' amended and supplemental bill, any rights, liens or claims of the holders of said equipment bonds were forever cut off, barred and extinguished, and that such equipment bonds constituted no lien or charge upon any part of the railroads and property owned by the said Wabash Railway Company, and the said Supreme Court thereupon remanded said cause to the said Circuit Court with directions to proceed in accordance with the said decision.

Thereafter the mandate of reversal was filed in the said Circuit Court of the United States for the District of Indiana, and on or about the — day of May, 1888, a decree was entered by the said last-

named court in conformity therewith, finding that the equity of such cause was with the defendants; that the said Wabash, St. Louis & Pacific Railway Company held and owned the said line of railroad in the states of Ohio and Indiana, together with the appurtenances and franchises thereto belonging, entirely free from any lien, claim, encumbrance or charge of the said equipment bonds, or any of
970 them, and that the bill of the complainants should be dismissed with costs.

The said final decree of the said Circuit Court of the United States for the District of Indiana is now of record in said cause, and is a complete and final determination by a court of competent and exclusive jurisdiction of such controversy as against all holders of such equipment bonds, and is a full, absolute and perpetual bar of any and all claims, lien or charge of the said equipment bonds, or any of them, or of the interest thereon, or any part thereof, on the said railroad, property, appurtenances and franchises in the states of Ohio and Indiana.

Third. In or about the year 1880 one James Compton, as your orators are informed, became the purchaser, at a large discount and upon credit, of said equipment bonds to the amount of about one hundred and fifty thousand dollars, the said bonds having attached to each thereof nine or ten coupons for past due and unpaid interest.

The said purchase was made long after the commencement by the said David J. Tysen of the said action in the Circuit Court of Fountain county, Indiana, and long after the removal of said cause to the Circuit Court of the United States for the District of Indiana, and after the jurisdiction of said last-named court as to the subject matter of said controversy had attached and become exclusive, and with full notice to, and knowledge by, said Compton of the existence of said action.

Fourth. Thereafter, and on or about the third day of February, 1880, as complainants are informed and believe, the said James Compton, claiming to be the holder and owner of such equipment bonds of the said amount of one hundred and fifty thousand dollars, instituted in the Court of Common Pleas for Lucas County, in the state of Ohio, an action against the said Wabash, St. Louis & Pacific Railway Company and others, making similar allegations to those contained in the bill of complaint of the said Tysen in the
971 cause instituted by him as aforesaid, then still pending and undetermined, and praying similar relief.

Thereafter such proceedings were had that on or about the tenth day of March, 1882, the said Court of Common Pleas rendered a decree in said action in favor of the said James Compton, adjudging that the said equipment bonds constituted an equitable lien and charge upon all the said railroads and property in the said states of Ohio and Indiana prior to the lien of the said consolidated mortgage to your orators.

From said decree an appeal was duly taken and perfected by the defendants to the District Court of Lucas county on the twenty-sixth day of April, 1882, whereby the said decree of said Court of Common Pleas was opened and vacated, and the said cause stood for

trial in the said District Court *de novo* in all respects. The said cause came on for hearing in said district court on or about the twelfth day of March, 1883, and in view of the important and difficult questions arising therein was certified by said district court to the Supreme Court of said state of Ohio for final decision.

Thereafter and prior to the decree of the said Circuit Court for the District of Indiana, entered upon the mandate of the Supreme Court of the United States, the said cause was brought on for hearing before the said Supreme Court of the state of Ohio and a decree obtained adjudging that said equipment bonds were an equitable lien and charge upon the railroad, property and appurtenances of the said Wabash, St. Louis & Pacific Railway Company prior to the lien of the said consolidated mortgage to your orators, and directing, in case of failure to pay said bonds by a short day therein named, the said railroad and property in said state of Ohio should be sold and that such sale should cut off and defeat the title of the said Wabash, St. Louis & Pacific Railway Company to such property, and also all priority of lien or charge thereon created by said consolidated mortgage to your orators.

Your orators are informed and believe that it is the purpose
972 and intention of the said Compton, his solicitors, attorneys and agents, to undertake the enforcement of said decree and to advertise and endeavor to sell to the said property as therein directed.

Fifth. The said James Compton appeared and was represented by counsel on the argument of the said appeal to the Supreme Court of the United States from the decree of the said Circuit Court for the District of Indiana, and filed arguments and briefs for the sole purpose of sustaining said decree so appealed from, and securing to himself the benefit of the adjudication thereby made in favor of the said equipment bonds, and thereby adopted the same and became a quasi-party to said action, and was in priority therewith and with the decree of said Circuit Court for the District of Indiana entered upon the mandate of the Supreme Court of the United States, and is forever barred and precluded by virtue of the decision of the said Supreme Court of the United States and the said decree of said Circuit Court for the District of Indiana from claiming any lien or charge, equitable or otherwise, upon the said railroads and property and appurtenances in Ohio and Indiana.

Sixth. The property of the said Wabash, St. Louis & Pacific Railway Company, in the state of Ohio and Indiana, is and has been since the twenty-ninth day of May, 1884, in the custody of receivers appointed by the Circuit Court of the United States for the District of Indiana, and by the Circuit Court of the United States for the Northern District of Ohio in actions pending in said courts.

To the action instituted by the said Compton neither the present nor any predecessor receiver of said Wabash, St. Louis & Pacific Railway Company appointed in such actions, were made parties or appeared therein.

Seventh. The said James Compton claims to be a resident of the

city of Washington, in the District of Columbia, and to be a citizen of said district.

973 Eighth. Your orators further show that the Metropolitan National Bank, a corporation duly organized and existing under the laws of the United States, and a citizen of the state of New York, is the holder as trustee of certain of the funded debt bonds and said certificates issued by the Wabash Railway Company as alleged in the seventh paragraph of complainants' amended and supplemental bill, or of past due coupons entitled to be exchanged for such bonds and certificates.

Your orators therefore pray that the said James Compton and the said the Metropolitan National Bank may be cited and required to appear and answer the premises fully; that the said James Compton, his solicitor, attorneys, agents and all other persons may, during the pendency of this cause, be restrained and enjoined from making or attempting to make any sale of the railroads, property, appurtenances and franchises aforesaid, or any part thereof, under and by virtue of any decree in the action so instituted by him; that the said decree of the said Circuit Court of the United States for this District of Indiana, entered upon the mandate of the Supreme Court of the United States in the action instituted by the said David J. Tysen, may be decreed and adjudged to be an absolute and final determination of the controversy as to the alleged equitable lien or charge created by the said equipment bonds, and that the said James Compton was privy thereto and is bound thereby; that the decree obtained by the said Compton in the action instituted by him in the Court of Common Pleas in and for Lucas county, Ohio, may be declared void and of no effect; and that said James Compton may be perpetually enjoined and restrained from taking any action or proceeding or claiming any right whatever under the said decree; or making or attempting to make any sale of the said property thereunder, and from taking any action to enforce or claim any equitable lien or charge upon any of the said railroads or property for or by reason of or arising from any alleged ownership of such equipment bonds as aforesaid.

974 And your orators further allege and pray as in their said amended and supplemental bill they have already alleged and prayed.

JAMES R. JESUP,
ISAAC H. KNOX,
By FOSTER & THOMPSON,
Their Solicitors, Solicitors for Complainants.

Endorsed on said amendment to amended and supplemental bill was the following, to wit: "Filed December 14, as of October 25, 1888. A. J. Ricks, Clerk."

975 *Amendment of Humphreys and Lindley Relating to James Compton.*

Afterwards, on December 3, 1888, an amendment to cross-bill of Humphreys and Lindley was filed herein, and reads and is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio.

Consolidated Case.

Bill.

JAMES R. JESUP and ISAAC H. KNOX, Trustees,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY AND OTHERS.

Cross-bill.

SOLON HUMPHREYS and DANIEL A. LINDLEY, Trustees,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY AND OTHERS.

Amendment Making James Compton a Defendant.

The cross-complainants above named, by leave of court, file this amendment to their cross-bill:

The said cross-complainants further charge that the above-mentioned two mortgages, executed to the Farmers' Loan & Trust Company, and the two later mortgages executed to E. D. Morgan, as trustee, were the only liens or encumbrances of any kind ever subsisting against said railroad in Ohio and Indiana, and which existed when the aforesaid mortgage of 1879 was executed to the cross-complainants and recorded, and the liens and priorities
976 of your orators and all holders of bonds issued under said last-described mortgages were and are subject only to such sums as may be due on the said four mortgages firstly above described, and to no other prior liens or equitable charges whatsoever.

On May 16, 1878, one David J. Tysen instituted an action in the Circuit Court of Fountain county, Indiana, in behalf of himself and all other creditors similarly situated, against the Wabash Railway Company (which was the then owner of said railroad in Ohio and Indiana), and also Isaac H. Knox and James R. Jesup, as trustees; Edwin D. Morgan, the Farmers' Loan & Trust Company and George I. Seney. Wherein the said Tysen alleged, in substance, that, prior to 1865, the said line of railroad and its appurtenances in the states of Ohio and Indiana belonged to a corporation called the Toledo & Wabash Railway Company, which had, on October 1, 1862, issued and negotiated for value $600,000 bonds, commonly called "equipment bonds," which matured in 1883 and bore in-

terest at the rate of seven per cent. per annum, payable semi-annually, but which bonds had not been secured by any mortgage or other lien executed or created by such Toledo & Wabash Railway Company.

The said Tysen further charged that, by reason of a consolidation which was executed about May 29, 1865, between said Toledo & Wabash Railway Company of Ohio and Indiana, and three other railroad corporations of the state of Illinois, an equitable lien or charge was thereby created in favor of all holders of such $600,000 equipment bonds for the principal and interest thereof against all of such railroad and appurtenances in the states of Ohio and Indiana, subject only to the four mortgages aforesaid, or in the alternative that all such holders of equipment bonds were in equity entitled to the lien and security of the consolidated mortgage of February, 1867, executed to Jesup and Knox, as trustees as aforesaid, equally with the $2,610,000 of bonds which had been actually issued under that instrument.

That said Tysen further alleged that he was the owner of
977 divers of such equipment bonds; that no interest had been paid thereon since 1875, and he prayed that an account might be taken of all sums due on such equipment bonds to himself and all other holders, and that such sum might be declared a lien upon the said railway property, and in default of payment a sale might be decreed of the said road.

Such proceedings were afterwards had in such cause that Benjamin Ham, Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, G. M. Whitmore, Townsend Underhill, M. L. Underhill and Thomas W. Mayo appeared therein, and claiming to be the owners of divers of such equipment bonds, were made coplaintiffs with said Tysen, the original plaintiff; and thereafter, to wit, on May 15, 1878, the Wabash Railway Company appeared in said action in the Fountain Circuit Court, and under the Acts of Congress petitioned for and obtained a removal of said cause to the Circuit Court of the United States for the District of Indiana, and said last named court, on May 15, said 1878, obtained and thenceforth exercised full and exclusive jurisdiction over the subject matter of the controversy which was involved in the pleadings and record of such cause.

All of the defendants named in such suit duly appeared therein, and on September 30, 1878, plead therein and severally denied by their answers that the said equipment bonds of the class held by such Tysen and others, constituted an equitable lien or charge upon the railroad in Ohio and Indiana, or any part thereof, or that they were entitled to share in the security or lien of the consolidated mortgage of 1867, and denying that the complainants were entitled to any relief or equity whatever as against any of the defendants in said cause, or against any of such railroad property, and claiming that the Wabash Railway Company owned the said railroad property free from any lien of such equipment bonds.

Thereafter, on April 9, 1883, the said Circuit Court of the United

States for the District of Indiana, being then and there a court of competent jurisdiction as to the subject matter and all the
978 parties interested therein, heard the said cause and rendered a final decree therein for the complainant, and on May 5, 1884, the said court enrolled a final decree in such case declaring that the $600,000 equipment bonds, and all unpaid interest thereon were equitable liens on the entire railroad in Ohio and Indiana, subject only to the two first mortgages to the Farmers' Loan & Trust Company, and the two second mortgages to E. D. Morgan, which have been before recited, and also that such equipment bonds were prior to all other liens whatever, and further finding the total amount due for principal and interest on all such equipment bonds, whether held by the complainants or others, and decreeing the sale of such railroad property on which such lien was declared, to pay the sum of $1,100,110 so adjudged to be due for principal and interest held by the complainants and all other holders on the entire issue of such equipment bonds, and that the entire proceeds of the sale after the payment of costs should be brought into court for its further action. The cross-complainants pray reference to the pleadings, final decree and record of such cause in this court, as fully and to the same effect as if a complete transcript thereof were filed with this "cross-complainant."

After the rendition of such final decree of May 5, 1884, in said cause, the Wabash Railway Company prayed an appeal therefrom to the Supreme Court of the United States, and duly perfected the same, and such proceedings were had on such appeal, that on —— the said Supreme Court of the United States reversed the said decree and decided and adjudged that by reason of a judicial sale on June 10, 1876, of such railroad in Ohio and Indiana under a foreclosure of a mortgage thereon recorded February 1, 1873, which sale was plead in said answer, any rights, liens or claims of the $600,000 of equipment bonds were forever cut off, barred and extinguished, and that they constituted no debt against or lien or charge upon any part of the railroad owned by the Wabash Railway Company or the Wabash, St. Louis & Pacific Railway Company on May 5, 1885, and remanded said cause to the Circuit Court
979 of the United States for the District of Indiana, with directions to proceed therein in conformity with such opinion and to disallow the lien claimed by such equipment bondholders. And thereafter the said mandate of reversal of such decree was filed in the Circuit Court of the United States for the District of Indiana, and on the — day of May, 1888, said court, in conformity with such mandate, entered a final decree finding that the equity of such cause was with the defendants and that the said Wabash, St. Louis & Pacific Railway Company owned and held the said line of railroad in Ohio and Indiana, together with the appurtenances and franchises thereto belonging, entirely free from any lien, claim, encumbrance or charge of the said $600,000 of equipment bonds and coupons, or any of them, and further decreeing that the complain-

ant's bill and such suit should be dismissed for want of equity with costs.

And such final decree of the said last-named Circuit Court is now of record in said cause, and wholly unreversed, and was and is a full, absolute and perpetual bar of any claim for a lien or equitable charge upon said railroad in Ohio and Indiana in behalf of said equipment bonds and coupons, or any of them, and is a full and final determination of such controversy as against any and all holders or owners of such securities.

The cross-complainants show that long after the institution of the said action by said Tysen in behalf of himself and all others of the same class holding any of such equipment bonds, and long after the jurisdiction of the Circuit Court of the United States for the District of Indiana had attached and become exclusive over the whole subject matter of such controversy, to decree or disallow such claim of lien or equitable charge, one James Compton, to wit, about 1880, became the purchaser at a large discount and on credit of about $150,000 of such equipment bonds which were then and there discredited by having nine or ten unpaid coupons for interest attached to each of said bonds, and after the said decree for the full
980 amount of principal and interest on all bonds of such class had been rendered by the said Circuit Court of the United States for the District of Indiana, which said decree included, protected and enforced all the bonds and coupons "brought" *pendente lite* by the said Compton; the latter appeared by counsel in the Supreme Court of the United States, in the argument of the said appeal, and filed arguments and briefs for the sole purpose of sustaining the said decree of the Circuit Court so appealed from, and thereby securing to himself the benefit and protection of the favorable adjudication of said claim of lien which had been decreed by said Circuit Court, and thereby, with full notice of such proceedings, adopted the same and constituted himself a *quasi* party to such cause.

The cross-complainants show further that the said James Compton, having become as aforesaid the holder of such equipment bonds on February 3, 1880, instituted a suit in the Court of Common Pleas of Lucas county, Ohio, in his own name, against the said Wabash, St. Louis & Pacific Railway Company and the Jesup, Knox and Humphreys and Lindley and the said Seney as trustees, wherein and whereby he alleged that he was the owner and holder of $150,000 of such equipment bonds, and he made the same allegations and claim of equitable lien or in the alternative protection under the consolidated mortgage, and prayed the same relief as contained and prayed in and by the bill of complaint of said Tysen and others instituted as aforesaid in 1878, and which was then pending and undetermined.

And, thereafter, all the defendants to said action, so instituted by the said Compton, duly appeared therein and filed their respective answers, wherein and whereby they relied upon their titles and respective liens, and wholly denied that the said Compton, or any other holder of such equipment bonds, had any lien or charge whatever

upon the said line of railroad in Ohio and Indiana, or its appurtenances and franchises; so that by the issues made and joined the subject matter in controversy in the said Compton suit was
981 in every respect identical with the subject matter in controversy in the suit previously instituted by the said Tysen in the Circuit Court of the United States for the District of Indiana, for the benefit of all holders of equipment bonds.

Thereafter, to wit, on March 10, 1882, the said Common Pleas Court of Lucas county, Ohio, rendered a decree in favor of said Compton, adjudging the equitable lien and charge of such issue of equipment bonds upon all the railroad in Ohio and Indiana as a prior lien to the bonds issued under the mortgages of 1867 and 1879, hereinbefore recited.

Thereupon the defendants in said cause prayed on appeal to the District Court of Lucas county, which was allowed and perfected on April 26, 1882, and by the force and effect of such allowed and perfected appeal, the original decree of the Common Pleas Court was opened and vacated, and the said cause stood for trial in all respects *de novo* in the said District Court, and thereafter, to wit, on March 12, 1883, the said cause came on for hearing in the said District Court, and that court, under the statutes in that behalf enacted, in view of the important and difficult questions arising as to the proper judgment and decree to be rendered therein, certified the said cause to the Supreme Court for final decision, and thereafter the said Compton brought on the said cause for hearing in the said Supreme Court, and prior to the decree of the Circuit Court of the United States for the District of Indiana, entered under the mandate of the Supreme Court of the United States, obtained a decree adjudging that the said equipment bonds were a lien and equitable charge on the entire line of the Wabash, St. Louis & Pacific Railway in Ohio and Indiana, and its appurtenances and franchises prior to the lien of the mortgages of 1867 and 1879, and further ordering that for failure to pay the said equipment bonds by a short day, the said property in Ohio should be sold under such decree, and such sale should cut off and defeat the title of said Wabash, St. Louis & Pacific Railway Company, and also the lien and priority of
982 these cross-complainants and all other holders of bonds secured by the mortgages of 1879 so executed to them as aforesaid.

The cross-complainants charge that it is the intent and purpose of said Compton and his solicitors, agents and attorneys, to undertake to enforce and carry out such decree and advertise and sell the said property as therein provided.

The cross-complainants show that ever since January 1, 1887, the property of the Wabash, St. Louis & Pacific Railway Company in Ohio and Indiana has been, and still is, in the custody of a receiver appointed by the Circuit Court of the United States for the District of Indiana and for the Northern District of Ohio, and from October, 1884, continuously to January 1, 1887, all said property was in the custody of receivers appointed by said two courts in certain

actions wherein the Central Trust Company of New York were complainants and the said railway company was defendant.

The cross-complainants charge that neither the present or the former receivers were ever made parties to or appeared in the said Compton suit; that the final decree of the court, entered in the prior action instituted by the said Tysen, was and is a complete bar to any decree or order of any other court on the subject matter of such controversy, and that the said Compton was in privity with said cause, so brought by said Tysen, and with the decree therein, and knew of, approved and claimed the benefit of the original decree in said cause, and is forever barred and precluded by the mandate of the Supreme Court of the United States and the decree rendered thereunder, declaring that such equipment bonds had no lien on said line of railroad in Ohio and Indiana.

The premises considered, the cross-complainants pray that the said Compton may be ordered to appear and answer the premises, and that he be forthwith, together with all his attorneys, agents and others acting for him, restrained and enjoined from making any sale of any property whatever, now in the custody of this court, in, under or by force of any decree obtained by him, the said
983 action so brought by him in the Common Pleas Court of Lucas county, Ohio, and on final hearing petitioners pray that the court may order and decree that the final decree rendered in said Tysen case in obedience to the order of the Supreme Court of the United States, was and is a final termination of such controversy, and that the said Compton is bound and barred thereby, and that the decree by him obtained in his own action, was in fraud of the rights and liens of the cross-complainants as finally decreed by this court, and that the said Compton be perpetually enjoined from ever taking any action or claiming any right whatever under such decree by him so obtained, or making or attempting to make any sale of property thereunder, or from bringing any other action seeking to enforce or claim any equitable lien upon any of such railroad property, either in Ohio or Indiana, by reason of such equipment bonds or any of them, and for all other proper relief.

HUMPHREYS & LINDLEY,
Cross-Complainants.

HENRY CRAWFORD, *Solicitor.*

Endorsed on said amendment to the cross-bill of Humphreys and Lindley, trustees, was the following, to wit: Filed December 3, 1888. A. J. Ricks, Clerk.

984 *Order Consolidating Causes.*

On Friday, October 26, 1888, an order was entered on the chancery order book of this court, and reads and is in words and figures following, to wit:

Equity. No. 875.

THE FARMERS' LOAN & TRUST COMPANY, Trustee, Complainant,
vs.
JAMES F. JOY ET AL., Defendants.

This day came the complainant by its solicitors, and also came the several defendants, by their solicitors, and this cause came on to be heard upon the motion of the complainants to consolidate this cause with the cause pending in this court, wherein James R. Jesup and Isaac H. Knox, as trustees of a mortgage executed by the Toledo, Wabash & Western Railway Company in 1867, are complainants, and the Wabash, St. Louis & Pacific Railway Company, and others, are defendants, and the court having heard the arguments of counsel upon due consideration, finds that said motion should be granted, and thereupon orders, adjudges and decrees that this cause shall be consolidated with the said cause of Jesup and Knox, trustees, against the said Wabash, St. Louis & Pacific Railway Company and others, defendants, and that the consolidated cause shall proceed under the name and title of Jesup and Knox, trustees, against the Wabash, St. Louis & Pacific Railway Company, and others.

It is further ordered, adjudged and decreed that the answer of such defendants as by this order of consolidation are made parties
985 to the said suit of Jesup and Knox, and have not heretofore been parties thereto, to wit: S. Fisher Johnson, Edward Popper and J. Harsen Purdy, committee of certain bondholders under the mortgage sought to be foreclosed by this suit, known as "funded debt" bonds and scrip certificates, remain and be taken as answer to the said bill of complaint of Jesup and Knox, and to all cross-bills which are, or may be, filed to said bill of complaint of Jesup and Knox, and that, so far as said answers, or any further answer that may be filed in said consolidated cause, contain matter which may be the foundation of affirmative relief, said answers shall be deemed and taken to be cross-bills as against all other parties to said suit of Jesup and Knox, and that said Johnson, Popper, Purdy, Parsons and Herschel have leave at any time within three weeks from the date of entry of this order to file any further or supplemental answers, as they may be advised, to the said bill of complaint of Jesup and Knox, or to cross-bills, or any of them, in such consolidated cause, and any and all allegations or statements in the bill of complaint, or of any of the cross-bills in such consolidated cause, shall be deemed to be controverted by said Johnson, Popper, Purdy, Parsons and Herschel, except so far as the same may be specifically admitted by their answer filed in this cause, or to be filed in such consolidated cause.

(The above order was not signed; see letter attached to said order.)

986 *Order as to Time of Filing Amendment to Amended Bill.*

Afterwards, towit, on the twenty-seventh day of October, A. D. 1888, an order was made at chambers herein, and entered on the chancery order book November 1, 1888, and reads and is in words and figures following, to wit:

Equity. No. 552.

JAMES R. JESUP ET AL.
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Ordered that the amended and supplemental ancillary bill filed herein be filed as of the sixteenth of October in pursuance to a similar order made in the seventh circuit in the suits pending therein.

Done at chambers at Cleveland this twenty-seventh day of October, A. D. 1888.

M. WELKER,
District Judge, United States, said District.

987 *Affidavit of Henry Crawford.*

On October 27, 1888, an affidavit for service on James Compton was filed herein, and reads and is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio, Western Division.

Bill.

FARMERS' LOAN & TRUST CO.
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Consolidated Case.

JAMES R. JESUP and ISAAC H. KNOX
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

STATE OF TENNESSEE, *Davidson County, ss:*

Henry Crawford, on oath, says he is one of the solicitors in the above-entitled causes, and that the object of such actions is to enforce certain mortgage liens upon real estate situate within the Northern District of Ohio; that one of the defendants named in the original and amended bills of complaint in the first-entitled action, viz.,

James Compton, claims an equitable lien upon the said real estate, and is a necessary party to a complete determination of the suits and the entry of a proper decree of foreclosure herein, and the said James Compton is not an inhabitant of said Northern District
988 of Ohio, and cannot be found therein, and has refused by his solicitor to voluntarily appear to such suit.

HENRY CRAWFORD.

Subscribed and sworn to before me this October 22, 1888.

JNO. RUHM, JR.,
Notary Public.

[SEAL.]

Endorsed on said affidavit was the following, to wit: Filed October 27, 1888. A. J. Ricks, Clerk.

Order of Judge Jackson Thereon.

Afterwards, on the twenty-seventh day of October, A. D. 1888, an order was made and entered herein, in the order book, and reads and is in words and figures following, to wit:

FARMERS' LOAN & TRUST CO.
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

and

JAMES R. JESUP ET AL.
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

It appearing by affidavit that these actions are to enforce
989 mortgage liens upon real estate in this district and that James Compton, one of the defendants, is not an inhabitant of this district, and cannot be found therein, and will not voluntarily appear hereto, and that said Compton claims some equitable lien upon such real estate, it is ordered, on motion of the complainants, that such James Compton appear to this cause and plead, answer or demur thereto by the first rule day in December, 1888, and that certified copy of this order be forthwith seved upon him.

Approved.

HOWELL E. JACKSON,
Circuit Judge.

990 *Order of Judge Jackson as to Service on James Compton.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division:

Be it remembered, that on a hearing before the Honorable Howell E. Jackson, circuit judge, sitting at chambers, on the twenty-third day

of October, A. D. 1888, the following order was made and signed and ordered to be entered upon the records of the court, to wit:

Bill.

FARMERS' LOAN & TRUST COMPANY
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Consolidated Cause.

JAMES R. JESUP and ISAAC H. KNOX
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

It appearing by affidavit that these actions are to enforce mortgage liens upon real estate in this district, and that James Compton, one of the defendants, is not an inhabitant of this district, and cannot be found therein, and will not voluntarily appear hereto, and that such Compton claims some equitable lien upon such real estate, it is ordered, on motion of the complainants, that such James
991 Compton appear to these causes and plead, answer or demur thereto by the first rule day of December, 1888, and that certified copy of this order be forthwith served upon him.

Approved.

HOWELL E. JACKSON,
Circuit Judge.

Motion of James Compton to Dismiss Service on Him.

Afterwards, on the twenty-seventh day of November, 1888, a motion was filed herein by James Compton, and reads and is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio, Western Division.

JAMES R. JESUP and ISAAC H. KNOX, Trustees, &c.,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

Now comes James Compton, who is sought to be made a defendant herein, and appearing at this time and herein solely for the purpose of this motion and not appearing for any other purpose, moves the court to set aside the service of process made upon him herein for the reason that said service is unauthorized by law and is illegal; and that the order for service made herein by the Circuit Judge sitting at chambers in Nashville on October 23, 1888, and a copy of which order is the only service made upon him herein, was
992 unauthorized and illegal, and was made upon him in the District of Columbia and not elsewhere, and as found by said

order and recited therein he was not and is not an inhabitant of said Northern District of Ohio, not found therein and not voluntarily appearing herein.

And for the further reason that at the time of filing said bill herein, and at all times since, and when said order and service were made, and for a long time prior thereto, he was and still is a citizen and resident of the City of Washington, in the District of Columbia, and that service was made upon him in said City of Washington, District of Columbia, and not elsewhere, and that this court has not obtained jurisdiction of his person thereby.

And he expressly hereby disclaims any intention by anything herein to waive the defect and irregularity in the making of said service, in the obtaining of said order for service or in the said order, or in the manner of obtaining service on him herein, or to raise any question except the jurisdiction of this court over his person by reason of the service had upon him herein.

November 26, 1888.

JAMES COMPTON,
JOHN G. MILBURN,
JOHN H. DOYLE,
His Solicitors.

Endorsed on said motion was the following, to wit: Filed November 27, 1888. A. J. Ricks, Clerk.

993 *Affidavit of James Compton on Motion.*

Afterwards, on December 10, 1888, an affidavit was filed herein on behalf of James Compton and reads and is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio, Western Division.

Consolidated Cause.

JAMES R. JESUP and ISAAC H. KNOX
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Bill.

THE FARMERS' LOAN & TRUST COMPANY
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

THE DISTRICT OF COLUMBIA, *City of Washington, ss:*

I, James Compton, do solemnly swear that I am the James Compton named in the order hereto attached and upon whom the same was served, and that I am now and for ten years last past have been

continuously a resident of the City of Washington, District of Columbia, engaged in the transaction of business at such city and having my only residence therein.

The annexed order was served upon me in the said City of Washington by one Robert B. Brown, who delivered the same to me and no other paper except such order hereto attached was served, and the said service was made in no other way or place and the only service made upon me herein.

JAMES COMPTON.

994 DISTRICT OF COLUMBIA,
County and City of Washington, ss:

Sworn to and subscribed by said James Compton before me this fifth day of December, 1888, and I hereby certify that James Compton, who signed and executed the foregoing affidavit, to be a creditable person, of good repute for truth and veracity in the community in which he lives, and that the contents of the above affidavit were fully explained and made known to him before signing the same.

GEO. R. BYINGTON,
[SEAL.] *Notary Public, D. C.*

Order Overruling Said Motion.

Afterwards, on March 18, 1889, an order was made herein in and entered on order book, and reads and is in words and figures following, to wit:

In Equity. 552.

JAMES R. JESUP and ISAAC H. KNOX
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

This day came on for hearing the motion of James Compton, heretofore filed in said cause, to set aside the service made upon him therein for reasons in said motion set forth, and said motion being heard upon the record in said cause and affidavits filed in support of said motion, and the court being now fully advised in the premises, do overrule and deny said motion, with costs of said motion to be taxed against said James Compton, which he is ordered to pay, or execution issue therefor.

995 And thereupon said James Compton, in due time and proper form, excepted to said orders of the court denying and overruling his said motion and ordering him to pay the costs thereof, and to each of said orders.

And thereupon the said James Compton, still protesting against the jurisdiction of the court, was granted twenty days from the date of the entry hereof in which to plead, answer or demur herein, as required by said original order served upon him herein.

Approved.

HOWELL E. JACKSON,
Circuit Judge.

Order Allowing Filing of Amendment as to James Compton.

At the December Term of court, A. D. 1888—to wit, on December 20th of said year—an order was made herein and entered on the court journal, and reads and is in words and figures following, to wit:

Chancery. No. 552.

JAMES R. JESUP ET AL.
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

In this cause it is ordered that the complainants have leave to file an amendment to amended and supplemental ancillary bill making James Compton a party; the same to be filed as of October 25, 1888?

996 *Demurrers of James Compton and Certificates and Affidavits Attached Thereto.*

Afterwards—towit, on March 24, 1889—a demurrer was filed herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio.

Consolidated Case.

Bill.

JAMES R. JESUP and ISAAC H. KNOX, Trustees,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

Cross-Bill.

SOLON HUMPHREYS and DANIEL A. LINDLEY, Trustees,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

The separate demurrer of the defendant James Compton to the cross-bill filed herein by the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and to the amendment thereto, filed December 3, 1888:

997 This defendant, by protestation, not confessing all or any of the matters and things in the said cross-bill filed by said cross-complainants, and the said amendment thereto contained to be true in such manner and form as the same are therein set forth and

alleged, does demur to the cross-bill and the said amendment thereto, and for causes of demurrer shows:

First. That it appears by said cross-bill of said cross-complainants, and said amendment thereto, that this court is without jurisdiction in the premises, and of the subject matter of said cross-bill and such amendment thereto, for the reason and on the ground that it appears by said cross-bill and said amendment thereto that certain of the defendants herein, who are necessary parties, are citizens of the same state or states of which the said cross-complainants are citizens, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties solely.

Second. That it appears by said cross-bill and said amendment thereto, that this court is without jurisdiction in the premises, and of the subject matter of said cross-bill and said amendment thereto for the reason and on the ground that it is nowhere alleged in or shown by said cross-bill, or said amendment thereto, of what state this defendant is a citizen, or that this defendant is a citizen of a state other than the state or states of which the said cross-complainants are citizens, and it appears by said cross-bill and said amendment thereto that this defendant is a necessary party herein, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties solely.

Third. That this court is without jurisdiction in the premises and of the subject matter of said cross-bill and said amendment thereto, for the reason and on the ground that it appears by the record herein that this defendant was, at the time of the
998 commencement of this suit, and of the filing of such cross-bill, ever since has been and is now a resident of the City of Washington, in the District of Columbia, and a citizen of such District of Columbia; and, it appears by the said cross-bill and the said amendment thereto, that this defendant is a necessary party herein, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties solely.

Wherefore and for divers other good causes of demurrer appearing in the said cross-bill and the said amendment thereto, this defendant does demur thereto, and prays the judgment of this court whether he shall be compelled to make any further and other answer to the said cross-bill and said amendment thereto, and further prays to be dismissed from hence with his reasonable costs and charges in this behalf sustained.

JOHN H. DOYLE,
JOHN G. MILBURN,
Solicitors for Defendant James Compton.

JOHN H. DOYLE,
JOHN G. MILBURN,
Of Counsel.

I hereby certify that, in my opinion, the foregoing demurrer of the defendant James Compton to the cross-bill filed herein by the cross-

complainants Solon Humphreys and Daniel A. Lindley, trustees, and to the said amendment thereto is well founded in point of law.

JOHN H. DOYLE,
Of Counsel for the Defendant James Compton.

UNITED STATES OF AMERICA,
District of Columbia, City of Washington, ss:

James Compton, being duly sworn, doth depose and say that he has read the foregoing demurrer interposed by him to the
999 cross-bill herein of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and to the said amendment thereto, and that said demurrer is not interposed for delay.

JAMES COMPTON.

Sworn to before me and subscribed in my presence this eighteenth day of March, 1889.

[SEAL.]

EWELL A. DICK,
United States Commissioner in and for the District of Columbia.

Endorsed on said demurrer was the following, to wit Filed March 24, 1889. A. J. Ricks, Clerk.

Afterwards, to wit, on March 24, 1889, a demurrer was filed herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Consolidated Cause.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

The separate demurrer of the defendant James Compton to the plaintiff's amended and supplemental ancillary bill herein and the amendment thereto filed on the twenty-fourth day of De-
1000 cember, 1888, as of October 25, 1888.

This defendant, by protestation, not confessing all or any of the matters and things in the complainants' said amended and supplemental ancillary bill and the said amendment thereto contained, to be true in such manner and form as the same are therein set forth and alleged, does demur to the said amended and supplemental ancillary bill and the said amendment thereto, and for causes of demurrer shows:

First. That it appears by said amended and supplemental ancillary bill and said amendment thereto, that this court is without jurisdiction of the subject matter of this suit, for the reason and on the

ground that it appears by said bill and amendment that certain of the defendants herein who are necessary parties to this suit are citizens of the same state of which the plaintiff James R. Jesup is a citizen, and that certain of the defendants herein who are necessary parties to this suit are citizens of the same state of which Isaac H. Knox is a citizen, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties to this suit solely.

Second. That it appears by said amended and supplemental ancillary bill and said amendment thereto, that this court is without jurisdiction in the premises, for the reason and on the ground that it is nowhere alleged in or shown by said bill or such amendment thereto of what state this defendant is a citizen, or that this defendant is a citizen of a state other than the state or states of which the complainants herein are citizens, and it appears by said bill and amendment that this defendant is a necessary party to this suit, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties to this suit solely. And.

Third. That this court is without jurisdiction in the premises and of the subject matter of this suit, for the reason, and on the
1001 ground, that it appears by the record in this suit that this defendant was at the time of the commencement of this suit, ever since has been, and is now, a resident of the City of Washington, in the District of Columbia; and a citizen of such District of Columbia; and it appears by the said amended and supplemental ancillary bill and the said amendment thereto, that this defendant is a necessary party to this suit, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties to this suit solely.

Wherefore, and for divers other good causes of demurrer, appearing in the said amended and supplemental ancillary bill, and the said amendment thereto, this defendant does demur thereto, and prays the judgment of this court whether he shall be compelled to make any further and other answer to the said bill and said amendment thereto, and further prays to be dismissed from hence with his reasonable costs and charges in this behalf sustained.

JOHN H. DOYLE,
JOHN G. MILBURN,
Solicitors for Defendant James Compton.
JOHN H. DOYLE,
JOHN G. MILBURN,
Of Counsel.

I hereby certify that, in my opinion, the foregoing demurrer of the defendant James Compton to the complainants' amended and supplemental ancillary bill herein, and to the amendment thereto filed on the fourteenth day of December, 1888, as of October 25, 1888, is well founded in point of law, and proper to be filed in the above cause.

JOHN H. DOYLE,
Of Counsel for the Defendant James Compton.

1002 UNITED STATES OF AMERICA,
District of Columbia, City of Washington, ss:

James Compton, being duly sworn, doth depose and say that he is the above-named defendant in the above-entitled suit; that he has read the foregoing demurrer to the complainants' amended and supplemental ancillary bill herein and the amendment thereto, filed December 24, 1888, as of October 25, 1888, and that said demurrer is not interposed for the purpose of delaying said suit or any proceeding therein.

JAMES COMPTON.

Sworn to before me and subscribed in my presence this eighteenth day of March, 1889.

EWELL A. DICK,
[SEAL.] *United States Commissioner in and for the District of Columbia.*

Endorsed on said demurrer was the following, to wit: Filed March 24, 1889. A. J. Ricks, Clerk.

1003 Afterwards, to-wit, on March 24, 1889, a demurrer was filed herein, and reads and is in words and figures following, to-wit:

In the Circuit Court of the United States for the Northern District of Ohio—Western Division.

Consolidated Case.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

Cross-bill.

THE FARMERS' LOAN & TRUST COMPANY
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others.

The separate demurrer of the defendant James Compton, to the cross-bill filed herein by the above-named cross-complainant the Farmers' Loan & Trust Company.

The defendant, by protestation, not confessing all or any of the matters and things in the said cross-bill of the cross-complainant, the Farmers' Loan & Trust Company contained, to be true in such manner and form as the same are hereinbefore set forth and alleged, does demur to the said cross-bill and for causes of demurrer shows:

1004 First. That it appears by said cross-bill of said cross-complainants that this court is without jurisdiction in the premises and of the subject matter of said cross-bill for the reason and on the ground that it appears by said cross-bill that certain of the defendants herein, who are necessary parties, are citizens of the same state of which the said cross-complainant is a citizen, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties solely.

Second. That this court is without jurisdiction in the premises and of the subject matter of said cross-bill for the reason and on the ground that it appears by the said cross-bill herein that this defendant was at the time of the commencement of this suit and of the filing of such cross-bill, ever since has been, and is now a resident of the City of Washington, in the District of Columbia, and a citizen of such District of Columbia; and it appears by the said cross-bill that this defendant is a necessary party herein, and that the jurisdiction of this court herein is dependent upon the citizenship of the parties solely.

Wherefore, and for divers other good causes of demurrer appearing in the said cross-bill, this defendant does demur thereto, and prays the judgment of this court whether he shall be compelled to make any further and other answer to the said cross-bill, and further prays to be dismissed from hence with his reasonable costs and charges in this behalf sustained.

JOHN H. DOYLE,
JOHN G. MILBURN,
Solicitors for Defendant James Compton.
JOHN H. DOYLE,
JOHN G. MILBURN,
Of Counsel.

I hereby certify that, in my opinion, the foregoing demurrer of the defendant James Compton to the cross-bill filed herein by the cross-complainant, the Farmers' Loan & Trust Company, is well founded in point of law.

JOHN H. DOYLE,
Of Counsel for the Defendant James Compton.

1005 UNITED STATES OF AMERICA,
District of Columbia, City of Washington, ss:

James Compton, being duly sworn, doth depose and say that he has read the foregoing answer interposed by him to the cross-bill herein of the cross-complainant the Farmers' Loan & Trust Company, and that said demurrer is not interposed for delay.

JAMES COMPTON.

Sworn to before me and subscribed this eighteenth day of March, 1889.

[SEAL.] EWELL A. DICK,
United States Commissioner in and for the District of Columbia.

Endorsed on said demurrer was the following, to wit: Filed March 24th, 1889. A. J. Ricks, Clerk.

Order Overruling Demurrers.

Afterwards, to wit, on the twenty-fourth day of March, A. D. 1889, an order was made and entered herein, and reads and is in words and figures following, to wit:

Equity. No. 552.

JAMES R. JESUP ET AL.
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

James Compton, by leave of the court, filed his separate demurrers herein, to the amended and supplementary ancillary bill of the complainant herein, and the amendment thereto filed on the fourteenth day of December, 1888, as of October 25, 1888, and to the cross-bill filed herein by the cross-complainants, Solon
1006 Humphreys, and Daniel A. Lindley, trustees, and to the amendment thereto, filed December 3, 1888; and to the cross-bill filed herein by the cross-complainant, the Farmers' Loan & Trust Company; and now said separate demurrers coming on for hearing, and being argued by counsel, and the court being now fully advised in the premises to overrule the said demurrers and each of them separately; and the said James Compton, in due time and form excepted to the said ruling and orders of the court aforesaid, overruling his said demurrers and each of them; and said James Compton is hereby given leave to file his answer herein on or before April 5, 1889.

Approved:

HOWELL E. JACKSON,
Circuit Judge.

Answer of James Compton to Amended and Supplemental Bill.

On March 28, 1889, an answer was filed herein by James Compton to the cross-bill of the Farmers' Loan & Trust Company, and reads and is as follows, to wit:

In the United States Circuit Court, Northern District of Ohio, Western Division.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Consolidated Cause.

The Separate Answer of James Compton to the Cross-bill of the Farmers' Loan & Trust Company.

This defendant, saving and reserving to himself all and all
1007 manner of benefit and advantage of exception to the many errors, uncertainties and other imperfections and in the said cross-bill of complaint contained, for answer thereto, or unto so much and such parts thereof as this defendant is advised is, or are material or necessary for him to make answer unto, for answer says:

Referring to the amended cross-bill herein filed making him a party hereto, to the order authorizing service to be made upon him, and, to the service and return thereof, this defendant says, that he is a citizen and resident of the City of Washington, in the District of Columbia, and has been a citizen and resident at all times since the commencement of this suit, and prior thereto, and was served with a copy of the order for service made herein in said City of Washington and District of Columbia; and this defendant still insists, as by his motion heretofore filed herein he did insist, that this court is without jurisdiction of this action, of the subject matter thereof, or of the person of this defendant, and that by appearing herein and answering in obedience to the orders of the court, he does not waive any question of jurisdiction or in any manner consent to the hearing or determination by this court, of any matter or thing in any wise affecting the lien of this defendant, or its rights in the premises to enforce his decree, hereinafter set forth, by ordinary process, out of the state court of Ohio; and this defendant by answering herein does not intend to waive any question of right, exception or objection which may or might be taken as to the jurisdiction of this court, and claims the same advantage as if he had raised such question of jurisdiction by demurrer.

First. He admits that the cross-complainant is a corporation organized and existing under the laws of the state of New York,

and that this defendant is a resident of the District of Columbia, residing in the City of Washington therein, and a citizen thereof. Except as thus admitted, he has no knowledge or information, except as alleged in said cross-bill, as to the truth of the
1008 allegations contained in the first paragraph of said bill.

Second. He further admits that at and prior to September 8, 1853, the Toledo & Illinois Railroad Company was a corporation duly created and existing under the laws of Ohio, and, as such owned the line of railway known as the Toledo & Illinois Railway, extending from Toledo, Ohio, to the west line of Paulding county, in said state.

Third. He further admits the execution and delivery of the nine hundred bonds, as alleged in paragraph third of said cross-bill. The extension of the time of payment thereof until August 1, 1890, in the manner alleged in said third paragraph of the cross-bill, but except as thus admitted, he has no knowledge or information, aside from the allegations of said cross-bill, as to the truth of the allegations of said third paragraph of said cross-bill.

Fourth. He admits the execution and delivery of the deed of trust, as alleged in the fourth paragraph of said cross-bill, but, except as thus admitted, he has no knowledge or information except as alleged in said cross-bill, as to the truth of the allegations of said fourth paragraph, and requires proof thereof, especially as to the allegation that the holders of more than one-half of said bonds had or have united in a request in writing to said cross-complaint to proceed to enforce the provisions of said trust deed and to foreclose said mortgage and take possession of said property. And this defendant has no knowledge or information, aside from the allegations of said cross-bill, as to the truth of the allegations contained in the fifth paragraph of said bill.

Fifth. This defendant admits the consolidation, foreclosure, sale and acquirement of the title of said property in the state of Ohio by the Toledo & Wabash Railroad Company, and in Indiana by the Wabash & Western Railroad Company, and the incorporation
1009 of such companies as alleged in the sixth paragraph of said bill. And he also admits the execution and delivery, on the fifteenth day of October, 1858, of the bonds and deed of trust to secure the same to Edwin D. Morgan, trustee; the death of said Morgan, and the substitution of said Joy, as such trustee, as alleged in the seventh paragraph of said cross-bill; and the consolidation in October, 1858, of said two railroad companies under the name of the Toledo & Wabash Railway Company, as alleged in the eighth paragraph of said cross-bill. He also admits the incorporation and consolidations of the various railway and railroad companies, as alleged in the ninth and tenth paragraphs of said cross-bill.

He further admits that the Toledo, Wabash & Western Railway Company, on or about February 1, 1867, resolved to issue its bonds to the amount of $15,000,000, as alleged, and executed a deed of trust, to Isaac H. Knox and James R. Jesup, trustees, to secure the same, but he has no sufficient information or knowledge, aside from

the allegations of said cross-bill, as to the truth of the allegations of the eleventh paragraph of said cross-bill, except as thus admitted.

Sixth. This defendant also admits that about the year 1876, by virtue of decrees of foreclosure and sale, made in the Court of Common Pleas of Lucas county, Ohio, and in the Circuit Courts of Cass county, Indiana, and Vermillion county, Illinois, the railway of the Toledo, Wabash & Western Railway Company, in the states of Ohio, Indiana and Illinois, was sold to holders of bonds, secured by liens as found and determined in said foreclosure proceedings, and that the purchasers reorganized under certain corporations in said states, and consolidated under the name of the Wabash Railway Company, and that by the terms of said decrees and proceedings said property in Ohio was sold and remained subject to the lien of the complainant's mortgage, and that deeds were executed to the purchasers under said proceedings.

1010 That thereafter, and about May 17, 1879, the Wabash Railway Company made and executed its two thousand bonds for $1,000 each, and secured the same by a trust deed to Solon Humphreys and Daniel A. Lindley, but defendant has no knowledge or information, except as alleged in said cross-bill, as to the terms of said mortgage, or as to the amount of bonds issued thereunder, or except as herein admitted, as to the truth of the allegations of said bill contained in the twelfth, thirteenth, fourteenth and fifteenth paragraphs of said bill; but this defendant avers that in the said decrees of foreclosure in said Court of Common Pleas of Lucas county, Ohio, and Circuit Court of Cass county, Indiana it was ordered, adjudged and decreed "that the sale of said railroad property, equipment and franchises be made subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds, called the equipment bonds, referred to in the petition as to which all questions arising are left open." And that a similar provision was contained in all of the deeds made under said decrees. And that the lien of all mortgages, trust deeds or other encumbrance upon the said property is subject, junior and inferior to the lien of this defendant hereinafter averred, except the liens of complainant and said Joy, trustee, under the mortgage to said Edwin D. Morgan, which liens rest upon a portion only of the property covered by the lien of this defendant.

Seventh. Defendant admits the consolidation of the Wabash Railway Company with other corporations under the name of the Wabash, St. Louis & Pacific Railway Company. The execution by said last-named company of the trust deed to the Central Trust Company of New York, to secure an issue of bonds proposed to be made, aggregating $50,000,000, upon the trusts stated and subject to prior encumbrances. That suit was instituted to foreclose the same. That Humphreys and Tutt were appointed receivers; that a decree was entered in said suit or suits in the Eastern District of

1011 Missouri ordering the sale of certain of the railway property in said decree particularly described, subject to all liens prior to said general mortgage, and that a sale was made to James F. Joy,

Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, a purchasing committee, on a plan of reorganization of said last-named company, and that said sale was confirmed. He admits that in October, 1886, Thomas B. Atkins and others filed their bill against said Wabash, St. Louis & Pacific Railway Company, and the appointment of Thomas M. Cooley, receiver, and the succession of John McNulta, to such receivership; but, except as herein admitted, this defendant has no knowledge or information, except as alleged in said cross-bill, as to the terms or provisions of the various mortgages, decrees or proceedings above referred to, or as to the truth of the allegations of said cross-bill of complaint, in the sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth and twenty-fifth paragraphs of said cross-bill.

Eighth. This defendant has no information or knowledge, except as alleged in said cross-bill as to the arrangement or existence of any of the funded debt or scrip securities, or the truth of any of the allegations in the twenty-sixth paragraph of said cross-bill.

He denies, upon information and belief, that the interest coupons on the bonds secured by cross-complainant's mortgage, maturing August 1, 1884, and all falling due subsequently thereto, have remained unpaid, but avers, on the contrary, that all of the interest coupons maturing on all of said bonds up to and including those maturing in February, 1887, have been paid, and he has no information or knowledge sufficient to form a belief as to whether those since maturing, or any of them, are unpaid, or as to the truth of any of the allegations of the twenty-seventh paragraph of said cross-bill.

1012 Ninth. Defendant has no knowledge or information, except as alleged in said cross-bill, as to the truth of the allegations in the twenty-eighth and thirty-first paragraphs of said cross-bills.

Tenth. He admits the allegations of the thirteenth paragraph of said cross-bills, but as he has heretofore denied that the amount claimed or alleged by complainant is due or unpaid on the lien of complainant, he asks that strict proof be required of said amount.

Eleventh. This defendant, further answering, avers that in the decree made in the case of the Central Trust Company of New York against the Wabash, St. Louis & Pacific Railway Company and others, in the Circuit Court for the Eastern District of Missouri, and under which said Joy, Ashley, Hubbard and Welles, as purchasing committee, claim title, it was expressly provided as a part of said decree, as follows:

"The court further finds that there is now pending in the Supreme Court of the State of Ohio, a certain cause in which James Compton and certain other persons named in the record thereof, seek to establish and maintain a lien adjudged in their favor by the Court of Common Pleas of Lucas County, in the state of Ohio, upon the line of railroad of said Wabash Company, extending from Toledo, Ohio, the eastern boundary of the state of Indiana, an appeal having been taken from the said judgment and decree of

said court of Lucas county to the Supreme Court. It is ordered that this decree shall in no way affect the rights of said Compton and his co-complainants as the same shall be determined by said Supreme Court. Any sale of the property aforesaid under this decree, shall be subject to such rights and interests as said Supreme Court shall adjudge in said cause."

Which provision of said decree was in full force and effect at the time of the sale to and purchase by said Joy, Ashley, Hubbard and Welles, and still continues in full force and effect. Said cross-
complainant was a party to the action in which such decree
1013 was rendered, and the other suits auxiliary thereto, was duly served with process and appeared therein.

Twelfth. This defendant, further answering, says that on the third day of February, 1880, he filed his petition in the Court of Common Pleas of Lucas County, Ohio, against the Toledo, Wabash & Western Railway Company; the Wabash Railway Company; the Wabash, St. Louis & Pacific Railway Company; James R. Jessup and Isaac H. Knox, trustees; George I. Seney, trustee; and Solon Humphreys and Daniel A. Lindley, trustees; being the same corporation and trustees under the same mortgages and deeds of trust upon the same property as alleged in said cross-bill and herein, being then all of the parties interested in the said railroad and property of said Wabash, St. Louis & Pacific Railway Company in states of Ohio and Indiana, except the cross-complainant and said Edwin D. Morgan, trustee, alleging that the plaintiff therein (the answering defendant herein) was the owner of certain of the equipment bonds hereinafter referred to. That on the first day of November, 1862, the Toledo & Wabash Railway Company, then being the owner of and operating said railroad, and a corporation duly organized, issued a series of bonds aggregating the sum of six hundred thousand ($600,000) dollars, of which those owned by plaintiff (this defendant) constituted a part, and that by reason of the consolidation agreement and other equities accruing to and arising in favor of plaintiff therein, he became vested with and held a lien upon all of the property which said Toledo & Wabash Railway Company owned prior to and at the time of the consolidation of 1865, under the name of the Toledo, Wabash & Western Railway Company; and that said lien was prior, senior and superior to all other liens on said property, except the liens of the Farmers' Loan & Trust Company under said $900,000 mortgage, and the lien of said Edwin D. Morgan under said $1,000,000 mortgage.

That all of said defendants were duly served with process
1014 in said action and appeared therein, and answers were filed therein by said Toledo, Wabash & Western Railway Company; the Wabash Railway Company; the Wabash, St. Louis & Pacific Railway Company; Issac H. Knox and James R. Jesup, trustees; and Solon Humphreys and Daniel A. Lindley, trustees. That by said answers the lien of plaintiff, this defendant was denied, and issues were made upon the allegations of plaintiff's petition therein, and by the answers of said trustees, the deed of trust, or mortgages by them respectively held, and which are the same re-

cited in the cross-bill and the several answers of said trustees herein filed, were set up and alleged to be liens on said property prior and superior to any lien of plaintiff (this defendant), which allegations were properly replied to and denied by plaintiff therein, this defendant.

And this defendant avers that said action was pending, and service upon all defendants had and *lis pendens* established thereinbefore the general mortgage hereinbefore referred to, or any mortgage was executed by said Wabash, St. Louis & Pacific Railway Company, to the Central Trust Company of New York, James Cheney or any one else.

And this defendant avers that at the January Term, 1882, of said Court of Common Pleas, a decree was rendered in said cause finding the amount due plaintiff therein, this defendant, upon the bonds by him held and adjudging and decreeing that the same constituted a just and valid lien upon the property aforesaid, owned by the Toledo & Wabash Railway Company at the time of the consolidation of 1865, prior and superior to any right or lien of any of the defendants aforesaid, thereto, and superior to all liens, except the mortgages aforesaid executed to the Farmers' Loan & Trust Company, and the mortgage of Edwin D. Morgan, trustee, and ordering said property sold to pay the same. That an appeal was taken by said defendants from said judgment and decree to the District Court of Lucas County, Ohio, and at the March Term, 1883, of
1015 said court, said cause pursuant to the statute in that case made and provided, was reserved for decision in the Supreme Court of the State of Ohio.

And this defendant avers that said cause was regularly heard and determined in said Supreme Court of Ohio, and at the January Term, 1888, of said court, a final decree was entered in said cause, finding and adjudging that there was due to this defendant, the plaintiff therein, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, which amount was to draw interest at six per cent. from the first day of May, 1888. That upon the consummation of the consolidation of 1865, under the name of the Toledo, Wabash & Western Railway Company, all the money due and to become due upon said equipment bonds, and among them such as were owned by plaintiff therein, this defendant, and the moneys due and to grow due thereon, became an equitable lien upon all of said railroad and real property, and the structures thereupon and the fixtures and appurtenances thereto belonging or appertaining, which were owned by the said the Toledo & Wabash Railway Company at the time of the said consolidation of 1865, and which through said consolidation passed to and vested in the said the Toledo, Wabash & Western Railway Company, and which afterwards passed to and vested in the defendant, the Wabash, St. Louis & Pacific Railway Company, which last-named company was, at the time of the commencement of said suit, in possession thereof; being all of the railroad and property connected therewith, commencing in the city of Toledo, in the state of Ohio, and extending therefrom through the counties of Lucas,

Henry, Fulton, Defiance and Paulding, in said state of Ohio, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the state of Indiana, to and terminating at a point on the west line of State Line City, in said last-named county, and that said bonds are now a lien on said railroad and property, and the plaintiff is entitled to enforce the same. That the said lien of said bonds is prior and su-
1016 perior to the rights, interests, estates, claims and liens of the defendants in that action, and each of them, in and upon said railroad and property upon which said lien was thereby declared; and is prior and superior to the rights, interests, estates, claims and liens of all persons and corporations who have derived such rights, estates, claims and liens from, by and through said defendants, or any of them, since the commencement of such action or otherwise; but as to that part of the property within the state of Ohio, said lien is subject and inferior, but subject and inferior only to the mortgages, one executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & [Trust] Company, September 8, 1853, to secure $900,000 of bonds, extended to August 1, 1890, interest at seven per cent., payable semi-annually; and the other executed by the Toledo & Wabash Railroad Company to Edwin D. Morgan, trustee, October 5, 1858, to secure $1,000,000 with interest at seven per cent., payable semi-annually.

And this defendant avers that it was further ordered, adjudged and decreed thereby that said defendants, or any of them, pay to plaintiff therein (this answering defendant), said sum of three hundred and thirty-nine thousand eight hundred and twenty dollars and forty cents, the amount found due on the bonds owned by the plaintiff aforesaid, with interest thereon to the day of payment, within ten days from the entry of said decree; and if default shall be made in such payment that an order of sale issue, for the sale as upon execution at law, of all said railroad and real property, together with the structures thereupon, and the fixtures and appurtenances thereto belonging or appertaining, upon which the lien of said bonds was declared to exist, which is situate in the state of Ohio and in the jurisdiction of said court, subject only to the lien of the two mortgages hereinbefore mentioned to the Farmers' Loan & Trust Company and Edwin D. Morgan, trustee, with other provisions as to the manner of conducting said sale.

That a mandate duly issued from said Supreme Court, to the Court of Common Pleas of said Lucas County, commanding
1017 said Court to carry said decree into execution and effect, which mandate was dated on the twelfth day of May, 1888, and was duly filed in said Court of Common Pleas on the eighteenth day of May, A. D. 1888. That said judgment and decree is in full force and effect, unreversed and unsatisfied, and this defendant has now a good, valid and subsisting lien upon all of said property for the amount aforesaid, together with the costs of said suit.

That said Court of Common Pleas, District Court and Supreme Court of Ohio, each had full and complete jurisdiction of all the parties to said suit, and the subject matters thereof, and this defend-

ant files herewith a full and complete transcript of the record in said cause, authenticated according to law, and to which he makes full reference for all the purposes of this answer.

Thirteenth. This defendant further answering says that said Toledo & Wabash Railway Company, at the date of the consolidation aforesaid in 1865, was in possession of and owned a large amount of rolling stock and equipment, of the value, as he is informed and believes, of over two millions of dollars, over one-half of which was not owned by said Toledo & Illinois Railroad Company at the time of the execution of the mortgage to the cross-complaint or purchased with the proceeds of the bonds secured by said mortgage, and not subject to the lien of said mortgage, and not owned by the Toledo & Wabash Railroad Company at the time of the execution of the mortgage to said Edwin D. Morgan, and not subject to the lien thereof. That a large part of which was purchased by said Toledo & Wabash Railway Company, and in no way subject to either of said mortgages; that said equipment was sufficient for the use of said railroad, in its operation between Toledo and the said State Line City in the State of Indiana.

That, in the foreclosure suit in the Court of Common Pleas of Lucas County, Ohio, referred to in the thirteenth paragraph
1018 of cross-complainant's cross-bill, it was found and decreed by the court, and, as defendant is informed and believes was true, that the said Toledo, Wabash & Western Railway Company was the owner of the following rolling stock, machinery, implements and property, to wit: 196 locomotive engines, 61 passenger cars, 32 baggage cars, 3,485 freight box cars, 401 freight platform cars, 489 coal cars, 96 caboose cars, 30 dump cars, 6 wrecking cars; also, machinery, tools, furniture and other personal property used in connection with said Toledo, Wabash & Western Railway Company, and that the value of all said rolling stock, machinery, implements and property was found by said decree to be not less than $3,000,000. That it was also therein decreed that at the time the said several parts and divisions of such railroad were consolidated into and became part of the line of railroad of the Toledo, Wabash & Western Railway Company, the said railway company likewise, and by virtue of said agreement, became and was possessed of the rolling stock and machinery, implements and furniture used in connection therewith, as aforesaid, all of which, by the terms of said mortgage, were and continued to be subject to the liens created thereby. Said rolling stock and other property has been so used and commingled and renewed by said Toledo, Wabash & Western Railway Company that the lien of said mortgage, then being foreclosed, could not be charged upon said property otherwise than as a whole. But that there was reserved, however, to all parties such legal or equitable rights or liens or otherwise on the whole, or any part of such personal property as may in any proceeding to foreclose and sell, under either of the prior mortgages, be found secured to them by the facts and the terms of said mortgages.

Fourteenth. Defendant says that it will be necessary herein to determine what proportion said rolling stock bears to the whole

now in use, and what proportion was covered by the liens of the two mortgages prior to the lien of defendant, and what proportion his lien covers that is not covered by said prior mortgages. That
1019 the value of said rolling stock, equipment and machinery and the amount thereof was largely increased by said the Toledo & Wabash Railway Company before the consolidation of 1865, and the portion of the said property allowable to the Ohio property, and which is subject to the lien of cross-complainant's mortgage, and that of said Joy, trustee under the Morgan mortgage, as well as the lien of this defendant, should be ascertained and determined herein, before [a] final decree is rendered.

Fifteenth. And defendant further avers that a large amount of the terminal property, shops and yard property in the city of Toledo and elsewhere, and other real property in the state of Ohio, on the line of said railroad, which was owned by said Toledo & Wabash Railway Company at the time of the consolidation of 1865, and used in connection therewith, was purchased long after the mortgage to said cross-complaint, and is in no way covered by or included in said mortgage or deed of trust to complainant, and a large part of it purchased after the mortgage to said Edwin D. Morgan, trustee, and not covered by the mortgage or deed of trust to said Edwin D. Morgan, but belonged to said various corporations owning and operating said railroad prior to the consolidation of 1865, including the Toledo & Illinois Railroad Company, the Toledo & Wabash Railroad Company, and said Toledo & Wabash Railway Company, and is all subject to the lien of this defendant and upon which the lien of this defendant is prior and superior to the liens of all other persons and corporations. That a large part of said property was acquired by said Toledo & Wabash Railway Company, either by direct purchase or condemnation, and is in no way affected by said prior mortgages, but is subject to the lien of this defendant. This defendant avers that it is necessary before any decree can be entered herein that there shall be ascertained and determined just the property upon which each of said several liens attach and the respective priorities thereof.
1020 That he is unable at this time to give an accurate description of said property, the dates of purchase and the value of the same; that a careful examination of the records will have to be made, and evidence received for the purpose of accurately ascertaining the same.

Sixteenth. This defendant, further answering, says that the income and earnings from the portion of said property covered by said cross-complainants' mortgage, and said mortgage to Edwin D. Morgan has at all times been sufficient to pay the interest on the bonds secured by said mortgages, and should have been so applied, but, as he is informed and believes, the same, or a large portion thereof, has been used by the receiver or other persons in charge, and by the railroad officials before the appointment of said receivers, on other portions of said railroad system, both to keep up the running expenses and to make repairs and betterments upon such other portions. This defendant is unable now to give the exact amount thereof,

but that the same can be determined only by an accurate accounting and evidence.

And that in equity defendant is entitled to have the same applied to the reduction of the amount of the liens of said prior mortgages, and that such just and equitable accounting of the said income and earnings will be necessary to a complete adjudication of the equities of the parties.

Seventeenth. And this defendant avers that all of the coupons described in said cross-complainants' mortgage were fully paid at and before the year 1865, and the said corporate existence of said Toledo & Illinois Railroad Company ceased in 1858 by virtue of the foreclosure and sale of its property, and the entire principal of such bonds matured by the terms of such mortgage in 1867, and more than twenty years has elapsed since the full right accrued to foreclose such mortgage for the principal thereof; that neither such mortgage to the cross-complainant, or that to the said Edwin D. Morgan, trustee, cover any after-acquired property or contain any
1021 clause of covenant of further assurance, nor does either of them create any contract or other lien upon the income or revenue of such property or any part thereof.

Eighteenth. And this defendant denies each of the allegations in said cross-bill not hereinbefore specifically admitted or denied, and all those allegations, wherein this defendant charges that he has no knowledge or information except as alleged in said cross-bill, he asks that strict proof thereof be made.

And this defendant avers that the railroad and other property in the state of Ohio, upon which the lien of this defendant exists, as before stated, ought not in equity to be sold in connection with, or as a part of, any entire or connected system of railroad; that the liens existing upon the Ohio division of the said railroad are entitled to a separate and distinct sale thereof for the payment of the same if not paid by the defendants, or any of them; and this defendant insists upon and prays the court that in such order and decree as may be rendered herein the same will properly and equitably settle the priority of liens upon all of said Ohio property as between this defendant and said two mortgages, the one to cross-complainant and the other to said Edwin D. Morgan, trustee; the amount due said division for earnings used for any purpose, for interest, operating expenses, repairs, betterments or otherwise, on any other division or property; the amount of rolling stock and equipment properly applicable to the said Ohio division and the value thereof; and in all things that the equities of the lienholders on said Ohio division or property may be determined as between themselves and all other parties hereto, and that said property, if sold under any decree herein, may be subjected to separate sale to pay the same. By the Ohio division is meant that part of said railroad property situated in the state of Ohio.

But this defendant expressly reserves the right to enforce his said decree in said state court, by the usual process of sale as upon
1022 execution as directed by said decree, and does not in any manner waive any right which said decree gives him.

Nineteeth. And this defendant denies all the said bill charged, without this that there is any other matter, cause or thing in the said cross-complainants' said cross-bill of complaint contained material or necessary to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed or avoided or denied, is not true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to maintain, aver and prove, as this honorable court shall direct; and, having fully answered, he prays to be hence dismissed with his reasonable costs.

JAMES COMPTON, *Defendant.*
JOHN H. DOYLE,
JOHN G. MILBURN,
Defendant's Solicitors.

John H. Doyle, Toledo, Ohio.
John G. Milburn, 28 Erie St., Buffalo, N. Y.

Endorsed thereon was the following, to wit: Filed March 28, 1889. A. J. Ricks, Clerk.

1023 *Answer of James Compton to Bill of the Farmers' Loan & Trust Company.*

On the twenty-eighth day of March, 1889, the answer of James Compton to complainants' amended and supplementary ancillary bill and the amendment thereto, was filed herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio—Western Division.

Consolidated Cause.

JAMES R. JESUP and ISAAC H. KNOX, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Answer of James Compton to the amended and supplemental ancillary bill herein, filed October 16, 1888; and to the amendment to the said amended and supplemental ancillary bill, filed December 14, 1888, as of October 25, 1888.

This defendant now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainants' said amended and supplemental ancillary bill of complaint contained, and in the said amendment thereto, for answer thereto, or unto so much and such
1024 parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, saith:

Referring to the said amendment to the amended and supplemental ancillary bill making him a party hereto, to the order authorizing service to be made upon him, and to the service and return thereof, this defendant says that he is a citizen and resident of the City of Washington, in the District of Columbia, and has been such citizen and resident at all times since the commencement of this suit, and prior thereto, and was served with a copy of the order for service made herein in said City of Washington and District of Columbia; and this defendant still insists, as by his motion heretofore filed herein he did insist, that this court is without jurisdiction of this action, of the subject matter thereof, or of the person of this defendant, and that by appearing herein and answering in obedience to the orders of the court he does not waive any question of jurisdiction or in any manner consent to the hearing or determination by this court of any matter or thing in anywise affecting the lien of this defendant, or his rights in the premises to enforce his decree, hereinafter set forth, by ordinary process, out of the state court of Ohio; and this defendant by answering herein does not intend to waive any question of right, exception or objection which may or might be taken as to the jurisdiction of this court, and claims the same advantage as if he had raised such question of jurisdiction by demurrer.

First. This defendant admits each and all of the allegations of said amended and supplemental ancillary bill (hereinafter referred to as "said bill"), contained in the paragraphs thereof numbered respectively as first, second and third.

Second. This defendant has no information aside from the allegation of said bill as to the truth of the allegations contained in the fourth paragraph of said bill; but defendant avers that none of the bonds secured by said consolidated mortgage were issued or
1025 used to take up, pay or retire any of the equipment bonds hereinafter referred to as the basis of the lien of this defendant.

Third. This defendant admits the allegations contained in the fifth paragraph of said bill, except that he avers that he has no information, aside from the allegations contained in said bill, as to the amount of bonds issued and outstanding under the various mortgages therein recited, or as to the amount due and unpaid thereon.

Fourth. This defendant admits the allegations contained in the sixth paragraph of said bill, except such of said allegations as relate to the amount of bonds issued and outstanding under the mortgage therein recited, as to which allegations he avers that he has no information aside from the allegations of said bill.

Fifth. This defendant also admits that about the year 1876, by virtue of decrees of foreclosure and sale, made in the Court of Common Pleas of Lucas County, Ohio, in the Circuit Courts of Cass County, Indiana, and Vermillion County, Illinois, for the foreclosure of a mortgage junior and subsequent to the said consolidated mortgage, the railway of the Toledo, Wabash & Western Railway Company, lying in the states of Ohio, Indiana and Illinois, and its property and equipment, were sold to holders of bonds, secured by liens

in said actions foreclosed, and that the purchasers reorganized under the laws of the said states corporations which were consolidated under the name of the Wabash Railway Company, and said consolidated company became vested with all the lines of railway property and equipment of said Toledo, Wabash & Western Railway Company, subject to the lien of the complainants' mortgage; but this defendant avers that in the said decrees of foreclosure rendered by said Court of Common Pleas of Lucas County, Ohio, and said Circuit Court
1026 of Cass County, Indiana, it was ordered, adjudged and decreed "that the sale of said railroad property, equipment and franchises be made subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds, called the equipment bonds, referred to in the petition, as to which all questions arising are left open;" that a similar provision was contained in all of the deeds made under said decrees; and that the lien of all mortgages, trust deeds or other encumbrances upon the said property, to the extent that it was owned by the Toledo & Wabash Railway Company at the time of the said consolidation of 1865, is subject, junior and inferior to the lien of this defendant hereinafter averred, except the liens of the two mortgages to the Farmers' Loan & Trust Company, and the two mortgages to said Edwin D. Morgan, the liens of which mortgages rest upon a portion only of the property covered by the said lien of the defendant.

As to the remaining allegations contained in the said seventh paragraph of said bill, this defendant says that he has no information with respect thereto, or any of them, apart from the allegations contained in said bill.

Sixth. This defendant admits each and all of the allegations contained in the eighth and ninth paragraphs of said bill.

Seventh. This defendant admits each and all of the allegations contained in the tenth paragraph of said bill, excepting the allegation as to the number of bonds issued and delivered under the mortgage referred to in said paragraph, as to which allegation said defendant says that he has no information aside from the allegation in said bill.

Eighth. This defendant admits each and all of the allegations contained in the eleventh and twelfth paragraphs of said bill.
1027 Ninth. This defendant admits each and all of the allegations contained in the thirteenth paragraph of said bill, but said defendant avers that said decree referred to in said thirteenth paragraph contained the provision hereinafter referred to and set forth in the twenty-first paragraph of this answer.

Tenth. Said defendant admits the allegations contained in the fourteenth paragraph of said bill, but he avers that the sale and deed therein referred to were by the express terms of said decree made subject to the lien of this defendant hereinafter set forth.

Eleventh. This defendant admits the allegations contained in the fifteenth paragraph of said bill, but avers that as to a considerable portion of the rolling stock and equipment therein referred to, this

defendant has a lien upon and rights therein, prior and superior to the lien of the complainants and all other lienholders.

Twelfth. This defendant says that he has no information as to the allegations contained in the sixteenth paragraph of said bill, aside from the allegations of said bill.

Thirteenth. This defendant says that he has no information as to the allegations contained in the seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third paragraphs of said bill, aside from the allegations of said bill.

Fourteenth. This defendant, answering the amendment of the complainants to their amended and supplemental ancillary bill herein, filed December 14, 1888, as of October 25, 1888, admits that one David T. Tysen, on or about the sixteenth day of May, 1878, instituted an action in the Circuit Court of Fountain County, Indiana, against the said Wabash Railway Company and others, but this defendant denies that said Tysen instituted said suit on behalf of himself and all other creditors similarly situated, but, on
1028 the contrary, defendant avers that said suit was, by the terms of the bill filed by said Tysen, and by the terms of the said amended and supplemental bills filed therein, and at all times, limited to such other bondholders similarly situated, with said Tysen and the other parties subsequently made parties plaintiff in such suit, as might desire to come into said suit and contribute to the expenses thereof, and that such limitation was contained in all the pleadings filed in said suit by the original complainant therein and by each and all of the parties plaintiff at any time prosecuting the same. This defendant admits that said Tysen alleged in said suit that he was the owner of certain of the bonds described in said amendment as equipment bonds; that, by reason of the consolidation of the Toledo & Wabash Railway Company with the various other companies mentioned in the fifth paragraph of complainants' said amended and supplemental ancillary bill, an equitable lien or charge was created in favor of the holders of said equipment bonds against the property referred to in the first paragraph of said amendment, or that such holders were entitled in equity to the lien and security of the consolidated mortgage of 1867, executed to the complainants herein equally with the bonds actually issued thereunder; that no interest had been paid on said equipment bonds since 1875, and praying as in that behalf alleged in said first paragraph of said amendment. This defendant admits that on or about the fifteenth day of May, 1878, on petition of the Wabash Railway Company, the said cause was removed to the Circuit Court of the United States for the District of Indiana, but the defendant denies that thereupon the said last-named court obtained full, complete or exclusive jurisdiction over the subject matter of the controversy involved in said action. This defendant admits that thereafter said cause came on for hearing before said Circuit Court of the United States for the District of Indiana, and that a final decree was rendered therein, as in that behalf alleged in said first paragraph of said amendment.

1029 Fifteenth. This defendant admits that an appeal was taken and perfected from said decree by the said Wabash Railway Company, or the Wabash, St. Louis & Pacific Railway Company, to the Supreme Court of the United States, and that said Supreme Court reversed said decree on or about May 4, 1885, and remanded said cause to the said Circuit Court with directions to proceed in accordance with said decision; but this defendant denies that said Supreme Court adjudged the matters and things alleged in the second paragraph of said amendment to have been adjudged by it.

This defendant admits that thereafter the mandate of reversal was filed in said Circuit Court of the United States for the District of Indiana, and that thereafter a final decree was entered by said last-named court; but this defendant says that he has no information of the findings contained in or the contents of said decree aside from the allegations of said amendment. This defendant denies that said final decree of said Circuit Court is a complete or final determination by a court of competent or exclusive jurisdiction of such controversy as against all holders of such equipment bonds, and denies that said decree is a full, absolute or perpetual bar of any and all claims, lien or charge of said equipment bonds, or of the interest thereon on the said railroad property, appurtenances or franchises in the states of Ohio and Indiana.

Sixteenth. This defendant denies each and all of the allegations contained in the third paragraph of said amendment.

Seventeenth. This defendant admits that, on the third day of February, 1880, he instituted a suit in the Court of Common Pleas of Lucas County, Ohio, in his own name against the said the Wabash, St. Louis & Pacific Railway Company and others, such others being the Toledo, Wabash & Western Railway Company, the Wabash Railway Company the said Jesup and Knox, as trustees,
1030 and the said George I. Seney, as trustee, and avers that thereafter said Humphreys and Lindley, as trustees, were, by an order of said court, duly made parties defendant to said suit. The defendant admits that in the suit so instituted by him, he alleged that he was the owner and holder of $150,000 of such equipment bonds, and that he claimed an equitable lien upon the railroad and other property and appurtenances particul-rly described in his petition in said suit by virtue of the facts in said petition alleged; but he avers that he has no information aside from the allegations of said amendment, as to whether he made the same allegations or claimed the same relief as contained and prayed in and by the bill of complaint of said Tysen.

This defendant admits that thereafter, to-wit, on March 10, 1882, the said Court of Common Pleas of Lucas County, Ohio, rendered a decree in favor of this defendant in such suit instituted by him adjudging that said equipment bonds constituted an equitable lien and charge upon all the said railroad and property in the states of Ohio and Indiana prior to the lien of the said consolidated mortgage to the said complainants.

This defendant admits that an appeal was duly taken and perfected by the defendants in that suit on April 26, 1882, said action

to the District Court of Lucas County; but he denies that said appeal, under the laws and practice of the state of Ohio, opened or vacated said decree, or that said cause stood for trial in said District Court *de novo;* but, on the contrary, this defendant avers that by section 5235 of the Revised Statutes of Ohio it was, and is, provided that said appeal suspends the said judgment and decree, and by section 5236 of said Revised Statutes it was, and is, provided that the lien of said judgment, which term judgment under the laws of Ohio includes all decrees in equity, shall not be removed or vacated by the appeal, but the same shall remain, and the real estate of the appellant be bound in the same manner as if said appeal was not taken
1031 until final determination. That said statutes were, during all of said proceedings, and are still, in force in said State of Ohio.

This defendant admits that on the twelfth day of March, 1883, the said cause came on for hearing in the said district court, and that that court, under the statutes in that behalf enacted, in view of the important and difficult questions arising as to the proper judgment and decree to be rendered therein, reserved the said cause to the Supreme Court of the state of Ohio for final decision.

This defendant admits that thereafter the said cause came on regularly for hearing in said Supreme Court of the state of Ohio, but this defendant has no information whether before or after the decree of the Circuit Court of the United States for the state of Indiana was entered in the Tysen suit on the mandate of the Supreme Court of the United States, but defendant avers it was long after the decision in said Tysen suit, rendered by said Supreme Court of the United States.

This defendant avers that the said judgment and decree of the Supreme Court of the State of Ohio is incorrectly set forth in the fourth paragraph of said amendment, and that the same was, and is, a final decree adjudging the said equipment bonds to be a lien upon all of the railroad and real property and the structures thereupon, and the fixtures and appurtenances thereto appertaining, which were owned by said Toledo & Wabash Railway Company at the time of the said consolidation of 1865, as hereinafter alleged and as shown by the exemplified transcript herewith filed.

This defendant further avers that said decree was final and conclusive and binding on all the parties to the suit in which it was rendered, all of the parties defendant thereto having appeared in said suit and answered, and that the Supreme Court directed that a mandate issue to the Court of Common Pleas of Lucas County, to carry said decree into execution and effect, which is according to the laws and practice of said state and said court, and that said mandate accordingly issued and was filed as hereinafter alleged.
1032 This defendant admits that it is the intent and purpose of this defendant, his solicitors, attorneys and agents to undertake the enforcement of said decree, and to advertise and endeavor to sell the said property directed to be sold as in said decree directed.

Eighteenth. This defendant denies each and every allegation in

the fifth paragraph of said amendment contained, and especially denies that this defendant appeared, or was represented by counsel, in the Supreme Court of the United States, on the argument of the said appeal to said Supreme Court, from the decree of said Circuit Court for the District of Indiana; or that he made himself a *quasi* party to said cause; or that he filed arguments and briefs for the purpose of sustaining said decree so appealed from, and securing to himself the benefit of the adjudication thereby made in favor of the said equipment bonds; or that he adopted the same; or that he was in privity therewith, or with the decree of said Circuit Court entered upon said mandate of the Supreme Court; or that this defendant is barred or precluded by the decision of the said Supreme Court of the United States, or the said decree of said Circuit Court for the District of Indiana; or that he is precluded by any suit, proceeding or otherwise from claiming or enforcing any lien or charge, equitable or otherwise, as against the said railroad property or appurtenances in Ohio and Indiana.

On the contrary, this defendant avers that he had no interest whatever in said suit pending in said Circuit Court of the United States for the District of Indiana, or in the said appeal taken from the decree rendered therein to the Supreme Court of the United States, and was never a party thereto in any form. And he avers that long before any decree had been rendered in said suit in the Circuit Court of the United States for the District of Indiana, or any other court, to wit, on February 3, 1880, he had commenced the action aforesaid in the Court of Common Pleas of Lucas County, Ohio, to enforce the lien of the equipment bonds held and owned by him, and had obtained a decree in his favor therein, at
1033 the January term of said Court in the year 1882, and which has, by due course of proceedings, resulted in the said final decree in his favor rendered by the Supreme Court of the State of Ohio. That his said action was in his own behalf only, and upon certain specific bonds owned by him, the numbers thereof being stated in his petition in said suit. This defendant avers that the counsel who represented in the said suit instituted by him were permitted by the Supreme Court of the United States, with the consent of the counsel for the appel-ant, to file a brief with the Supreme Court on the argument of said appeal taken in said suit instituted by the said Tysen, and did so, but said counsel in the brief thus filed stated that they were not counsel in that case and had no interest in it; that their client, this defendant, was not a party or interested therein, or in the result thereof, but had an independent action in the state court of Ohio, and by courtesy of counsel, but without in any manner becoming a party to said suit, or entering their appearance therein, they filed their brief with the consent and on the invitation of counsel representing the appellants who had taken said appeal.

Nineteenth. This defendant admits that the property of said Wabash, St. Louis & Pacific Railway Company is and has been since the twenty-ninth day of May, 1884, in the custody of receivers, as alleged in the seventh paragraph of said amendment.

This defendant admits that neither the present nor any former receivers, appointed in any action or actions against the Wabash, St. Louis & Pacific Railway Company, to take the custody of the property of such company were ever made parties to or appeared in the said action instituted by this defendant; but he avers that his said action was pending as against all necessary parties in February, 1880, and ever will since until final decree, and that long before the appointment of any of said receivers, or the commencement of any of the suits in which they were appointed, the said
1034 courts of the state of Ohio, in which defendant's action was pending, had complete jurisdiction of both the parties thereto and the subject matter thereof. This defendant further avers that he was not made a party and did not appear in any suit or proceeding in which said receivers, or any of them, were appointed, but that the complainant's in each and all of said suits and proceedings, who had any interest at the time defendant's said action was commenced, were personally, or by their trustees, parties to the suit of this defendant long before the commencement of any of such order suits or proceedings in which such receivers were appointed, and were bound thereby and by the decrees rendered therein.

Twentieth. This defendant admits that he claims to be a resident of the City of Washington, District of Columbia, and to be a citizen of said District, and avers that he has been such resident and citizen of said District of Columbia for fifteen years last past and is now.

Twenty-First. This defendant, further answering said amended and supplemental ancillary bill and said amendment thereto, avers that in the decree made in the case of the Central Trust Company of New York against the Wabash, St. Louis & Pacific Railway Company and others, referred to in the thirteenth paragraph of said bill, and under which said Joy, Ashley, Hubbard and Welles, referred to in the fourteenth clause of said bill as purchasing committee, claim title it was expressly provided as a part of said decree, as follows:

"The court further finds that there is now pending in the Supreme Court of the State of Ohio a certain cause in which James Compton and certain other persons named in the record thereof seek to establish and maintain a lien adjudged in their favor by the Court of Common Pleas of Lucas County, in the State of Ohio, upon the line of railroad of said Wabash Company, extending from Toledo, Ohio, to the eastern boundary of the State of In-
1035 diana, an appeal having been taken from the said judgment and decree of said Court of Lucas County to the Supreme Court. It is ordered that this decree shall in no way affect the rights of said Compton and his co-complainants, as the same shall be determined by said Supreme Court. Any sale of the property aforesaid under this decree shall be subject to such rights and interests as said Supreme Court shall adjudge in said cause."

That such provision of said decree was in full force and effect at the time of the sale to and purchase by said Joy, Ashley, Hubbard and Welles, and still continues in full force and effect. This defendant further avers that the complainants herein were parties to the action in which such decree was rendered and to the other suits

instituted as ancillary thereto, and were duly served with process or appeared therein.

Twenty-second. This defendant, further answering, says that on the third day of February, 1880, he filed his petition in the Court of Common Pleas of Lucas County, Ohio, against the Toledo, Wabash & Western Railway Company; the Wabash Railway Company; the Wabash, St. Louis & Pacific Railway Company; James R. Jesup and Isaac H. Knox, trustees; George I. Seney, trustee, and Solon Humphreys and Daniel A. Lindley, trustees, being the same corporations and said trustees being the same trustees under the same mortgages and deeds of trust upon the same property alleged in said bill, and being then all of the parties interested in the said railroad and property of the Wabash, St. Louis & Pacific Railway Company in the states of Ohio and Indiana, except the Farmers' Loan & Trust Company, trustee, and said Edwin D. Morgan, trustee, alleging that the plaintiff therein (the answering defendant herein) was the owner of certain of the equipment bonds hereinafter referred to; that on the first day of November, 1862, the Toledo & Wabash Railway Company, then being the owner of and operating a railroad extending from Toledo, in the state of Ohio, to State Line City,
1036 Warren county, in the state of Indiana, and a corporation duly organized, issued a series of bonds aggregating the sum of six hundred thousand ($600,000) dollars, of which those owned by the plaintiff therein (this defendant) constituted a part; and that by reason of the agreement of consolidation entered into by said Toledo & Wabash Railway Company and various other companies, to form the Toledo, Wabash & Western Railway Company in the year 1865, and of other equities accruing to and arising in favor of the plaintiff therein, he became vested with and held a lien upon all of the property which said Toledo & Wabash Railway Company owned prior to and at the time of said consolidation of 1865, and that said lien was prior, senior and superior to all other liens on said property, except the liens of the Farmers' Loan & Trust Company, trustee, and of said Edwin D. Morgan, trustee.

That all of said defendants were duly served with process in said action and appeared therein and answers were filed therein by said the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis & Pacific Railway Company, Isaac H. Knox and James R. Jesup, trustees, and Solon Humphreys and Daniel A. Lindley, trustees. That by said answers the lien of said plaintiff (this defendant) was denied and issues were made upon the allegations of plaintiff's said petition, and that by the answers of said trustees the deeds of trust or mortgages by them respectively held, and which are the same recited in the said herein bill, were set up and alleged to be liens on said property prior and superior to any lien of said plaintiff (this defendant), which allegations were properly replied to and denied by the plaintiff therein.

And this defendant avers that said action was pending, and service upon all defendants had and *lis pendens* established therein,

before the general mortgage hereinbefore referred to, or any mortgage was executed by said Wabash, St. Louis & Pacific Railway Company to the Central Trust Company of New York or any one else.

1037 And this defendant avers that at the January term, 1882, of said Court of Common Pleas a decree was rendered in said cause finding the amount due the plaintiff therein upon the bonds by him held and adjudging and decreeing that the same constituted a just and valid lien upon the property as aforesaid owned by the Toledo & Wabash Railway Company at the time of said consolidation of 1865, prior and superior to any right or lien of any of the defendants to said action aforesaid, and superior to all liens except the mortgages executed to the Farmers' Loan & Trust Company, and the mortgages executed to Edwin D. Morgan, trustee, all of which mortgages are referred to in the said bill herein, and ordering said property sold to pay the same. That an appeal was taken by said defendants therein from said judgment and decree to the District Court of Lucas County, Ohio, and at the March term, 1883, of said court, said cause was, pursuant to the statute in that case made and provided, reversed for decision to the Supreme Court of the State of Ohio.

And this defendant avers that said cause was regularly heard and determined in said Supreme Court of Ohio, and at the January term, 1888, of said court a final decree was entered in said cause, finding and adjudging that there was due to this defendant, the plaintiff therein, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, which amount was to draw interest at six per cent. from the first day of May, 1888; that upon the consummation of the consolidation of 1865, forming and creating the Toledo, Wabash & Western Railway Company, all the money due and to become due upon said equipment bonds, and among them such as were owned by the plaintiff therein (this defendant) and the moneys due and to grow due thereon, became an equitable lien upon all the railroad and real property, and the structures thereupon and the fixtures and appurtenances thereto belonging or appertaining, which were owned by the said the Toledo & Wabash Railway Company at the time of the said consolidation of

1865, and which, through said consolidation, passed to and

1038 vested in the said the Toledo, Wabash & Western Railway Company, and which afterwards passed to and vested in the defendant the Wabash, St. Louis & Pacific Railway Company, which last-named company was, at the time of the commencement of said suit, in possession thereof; being all of its railroad and property connected therewith, commencing in the city of Toledo, in the state of Ohio, and extending therefrom through the counties of Lucas, Henry, Fulton, Defiance and Paulding, in said state of Ohio, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the state of Indiana, to and terminating in a point in the west line of State Line City, in said last-named county; and that said bonds were then a lien on said

railroad and property, and the plaintiff therein was entitled to enforce the same; that the said lien of said bonds were prior and superior to the rights, interests, estates, claims and liens of the defendants in that action, and each of them in and upon said railroad and property upon which said lien was thereby declared; and was prior and superior to the rights, interests, estates, claims and liens of all persons and corporations who have derived such rights, estates, claims and liens from, by and through said defendants, or any of them, since the commencement of such action or otherwise; but that as to that part of the property within the state of Ohio said lien was subject and inferior, but subject and inferior only to the two mortgages—one executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company, September 8, 1853, to secure $900,000 of bonds, extended to August 1, 1890, interest at 7 per cent., payable semi-annually; and the other executed by the Toledo & Wabash Railroad Company to Edwin D. Morgan, trustee, October 5, 1858, to secure $1,000,000, with interest at 7 per cent., payable semi-annually.

And this defendant avers that it was further ordered, adjudged and decreed thereby that said defendants in such action, or any of them, pay to the plaintiff therein, this answering defendant, 1039 said sum of three hundred and thirty-nine thousand eight hundred and twenty dollars and forty cents, the amount found due on the bonds owned by him on the first day of May, 1888, with interest thereon to the day of payment, within ten days from the entry of said decree, and that if default should be made in such payment that an order of sale issue, for the sale as upon execution at law, of all said railroad and real property, together with the structures thereupon, and the fixtures and appurtenances thereto belonging or appertaining, upon which the lien of said bonds was thereby declared to exist, which is situated in the state of Ohio and in the jurisdiction of said court, subject only to the lien of the two mortgages hereinbefore mentioned, to the Farmers' Loan & Trust Company and Edwin D. Morgan, trustee, with other provisions as to the manner of conducting said sale.

That a mandate duly issued from said Supreme Court to the Court of Common Pleas of said Lucas County commanding said court to carry said decree into execution and effect, which mandate was dated on the twelfth day of May, 1888, and was duly filed in said Court of Common Pleas on the eighteenth day of May, A. D. 1888. That said judgment and decree is still in full force and effect, unreversed and unsatisfied, and that this defendant has now a good, valid and subsisting lien upon all of said property for the amount aforesaid, together with the costs of said suit.

That said Court of Common Pleas, District Court and Supreme Court of Ohio, each had full and complete jurisdiction of all of the parties to said suit, and the subject matter thereof, and this defendant files herewith a full and complete transcript of the record in said cause authenticated according to law, and to which he makes full reference for all the purposes of this answer.

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Twenty-third. This defendant, further answering, says that said Toledo & Wabash Railway Company, at the date of the consolidation aforesaid in 1865, was in possession of and owned a large
1040 amount of rolling stock and equipment, of the value, as he is informed and believes, of over two millions of dollars, over one-half of which was not owned by said Toledo & Illinois Railroad Company at the time of the execution of the mortgage aforesaid to the Farmers' Loan & Trust Company, trustee, or purchased with the proceeds of the bonds secured by said mortgage, and was not subject to the lien of said mortgage, and which was not owned by the Toledo & Wabash Railroad Company at the time of the execution of the mortgage aforesaid to said Edwin D. Morgan, and not subject to the lien thereof. That a large part of said rolling stock and equipment was purchased by said Toledo & Wabash Railway Company, and was in no way subject to either the last-mentioned mortgages; and that said equipment was sufficient for the use of said railroad in its operation between Toledo and the said State Line City, in the state of Indiana.

That in the foreclosure suit in the Court of Common Pleas of Lucas County, Ohio, referred to in the seventh paragraph of complainants' said bill, it was found and decreed by the court, and as defendant is informed and believes was true, that the said the Toledo, Wabash & Western Railway Company was the owner of the following rolling stock, machinery, implements and property, to wit, 196 locomotive engines, 61 passenger cars, 32 baggage cars, 3485 freight box cars, 401 freight platform cars, 96 caboose cars, 30 dump cars, 6 wrecking cars.

Also machinery, tools, furniture and other personal property used in connection with said Toledo, Wabash & Western Railway Company; and that the value of all said rolling stock, machinery, implements and property was found by said decree to be not less than $3,000,000. That it was also therein decreed that in the year 1865, at the time the said several parts and divisions of such railroad were consolidated into and became the railroad of the Toledo, Wabash & Western Railway Company, the said railway company, by virtue of the agreement of consolidation, became and was possessed of
1041 the rolling stock and machinery, implements and furniture used in connection therewith, all of which, by the terms of the mortgages in said decree referred to, were and continued to be subject to the liens created thereby; that said rolling stock and other property had been so used and commingled and renewed by said Toledo, Wabash & Western Railway Company that the lien of the mortgage, for the enforcement of which said foreclosure suit was brought, could not be charged upon said property otherwise than as a whole. But that there was reserved, however, to all parties such legal or equitable rights or liens or otherwise on the whole or any part of such personal property as might in any proceeding to foreclose and sell, under either of the prior mortgages, be found secured to them by the facts and the terms of said mortgages.

And this defendant says that it will be necessary herein to determine what proportion said rolling stock bears to the whole now in

use, and what proportion was covered by the liens of the said two mortgages prior to the said lien of this defendant, and what proportion his lien covers that is not covered by said prior mortgages. That the value of said rolling stock, equipment and machinery and the amount thereof was largely increased by said the Toledo & Wabash Railway Company before the said consolidation of 1865, and the portion of the said property allowable to the Ohio property, and which is subject to the lien of the said two mortgages executed respectively to said Farmers' Loan & Trust Company and said Edwin D. Morgan, as well as to the lien of this defendant, should be ascertained and determined herein before any final decree is rendered.

Twenty-fourth. And this defendant further avers that a large amount of the terminal property, shops and yard property in the city of Toledo and elsewhere and other real property in the state of Ohio, on the line of said railroad, which was owned by said Toledo & Wabash Railway Company at the time of the said consolidation of 1865, and used in connection therewith, was purchased long
1042 after the said mortgage executed to said Farmers' Loan & Trust Company, and is in no way covered by or included in said mortgage or deed of trust; that a large amount thereof was purchased after the mortgage to said Edwin D. Morgan, trustee, was executed and is not covered by the said mortgage or deed of trust to said Edwin D. Morgan; but that the same belonged to said various corporations owning and operating said railroad prior to the consolidation of 1865, including the Toledo & Illinois Railroad Company, the Toledo & Wabash Railroad Company and said Toledo & Wabash Railway Company, free and clear of the lien of said two mortgages, but subject to the said lien of this defendant, and upon which the said lien of this defendant is prior and superior to the liens of all other persons and corporations. That a large part of said property was acquired by said Toledo & Wabash Railway Company, either by direct purchase or condemnation, and is in no way affected by said two prior mortgages, but is subject to the said lien of this defendant. This defendant avers that it is necessary before any decree can be entered herein that there shall be ascertained and determined just the property upon which each of said several liens attach and the respective priorities thereof. That this defendant is unable at this time to give an accurate description of said property, the dates of purchase and the value of the same; and that a careful examination of the records will have to be made, and evidence received for the purpose of accurately ascertaining the same.

Twenty-fifth. This defendant, further answering, says that the income and earnings from the portion of said railroad and property covered by said mortgage to said Farmers' Loan & Trust Company, and said mortgage to Edwin D. Morgan, has at all times been sufficient to pay the interest on the bonds secured by said mortgages, and should have been so applied, but, as he is informed and believes, the same, or a large portion thereof, has been used by the receiver or other persons in charge, and by the railroad officials, before the ap-
1043 pointment of said receivers, on other portions of said railway systems, both to keep up the running expenses of, and to make

repairs and betterments upon, such other portions. That this defendant is unable now to give the exact amount thereof, and that the same can be determined only by an accurate accounting and evidence. That in equity this defendant is entitled to have the same applied to the reduction of the amount of the liens of said two prior mortgages, and that a just and equitable accounting of the said income and earnings will be necessary to a complete adjudication of the equities of the parties.

Twenty-sixth. And this defendant denies each of the allegations in said bill and amendment not hereinbefore specifically admitted or denied, and as to all those allegations, wherein this defendant charges that he has no information aside from the allegations of said bill, he asks that strict proof thereof be made.

Twenty-seventh. And this defendant avers that the railroad and other property in the state of Ohio, upon which the said lien of this defendant exists, as before stated, ought not in equity to be sold in connection with or as a part of any entire or connected system of railroads. That the holders of the liens existing upon the portion of the said railway system of the defendant the Wabash, St. Louis & Pacific Railway Company, situate in the state of Ohio, are entitled to a separate and distinct sale thereof for the payment of the same, if not paid by the defendants or any of them. And this defendant insists upon and prays the court that in such order and decree as may be rendered herein, the same should properly and equitably settle the priority of liens upon all of said Ohio property as between this defendant and said two mortgages, the one to the Farmers' Loan & Trust Company and the other to said Edwin D. Morgan, trustee, and any and all mortgages which are a lien thereon, the amount of the earnings of said portion of said railway, situated in the state of Ohio, used for interest, operating expenses, re-
1044 pairs, betterments, or any other purpose, or any other division of property; the amount of rolling stock and equipment properly applicable to the payment of the liens on the said portion of said railway situated in the state of Ohio, and the value thereof; and in all things that the equities of the lien holders on the portion of said railroad and property situated in the state of Ohio may be determined as between themselves and all other parties hereto, and that said property, if sold under any decree herein, may be subjected to separate sale to pay the same.

But this defendant expressly reserves the right to enforce his said decree in said state court by the usual process of sale as upon execution as directed by said decree, and does not in any manner waive any right which said decree gives him.

And this defendant denies all the said bill and amendments charged, without this: that there is any other matter, cause or thing in the said complainants' said amended and supplemental ancillary bill, and said amendment thereto contained, material or necessary to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed or avoided or denied, is not true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to maintain, aver and

prove as this honorable court shall direct; and, having fully answered, he prays to be hence dismissed with his reasonable costs.

JAMES COMPTON,
Defendant,
By JOHN H. DOYLE,
JOHN G. MILBURN,
His Solicitors.

Endorsed thereon was the following, to wit: Filed March 28, 1889. A. J. Ricks, Clerk.

1045 *Replications to Two Answers of James Compton.*

Afterwards, on April 12, 1889, a replication was filed herein by Farmers' Loan & Trust Company to the answer of James Compton, and reads and is as follows, to wit:

Circuit Court of the United States for the Northern District of Ohio—Western Division.

Original Bill in Equity.

JAMES R. JESUP and ISAAC H. KNOX
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Cross-bill.

THE FARMERS' LOAN & TRUST COMPANY
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Replication to answer of defendant James Compton to cross-bill of the Farmers' Loan & Trust Company.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says that it will aver and prove its said cross-bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever, in the said answer contained, material or effectual in
1046 the law to be replied unto, confessed and avoided, traversed or denied is true.

All which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct and humbly prays as in and by its cross-bill it has already prayed.

Dated New York, April 5, 1889.

TURNER, McCLURE & ROLSTON,
Cross-Complainants' Solicitors.

20 Nassau Street, New York.

Endorsed thereon was the following, to wit: Filed April 12, 1889. A. [illegible] Ricks, Clerk.

Afterwards, on May 17, 1889, a replication to answer of James Compton was filed herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio.

In Equity. Consolidated Cause.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

The replication of James R. Jesup and Edward H. Dixon, complainants, to the answer of James Compton, defendant.

1047 These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of exception to the manifold insufficiencies of said answer of the said defendant for replication thereunto, say that they will aver and prove their said amended and supplemental bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants.

Without this, that any other matter, cause or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied is true.

All which matters and things these repliants are and will be ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray as in their said amended and supplemental bill they have already prayed.

FOSTER & THOMSON,
Solicitors for Complainants.

52 Wall Street, New York.

1048 *Order Confirming Sale of Property under the Decree of Foreclosure.*

At the December term of court, A. D. 1888, to wit, on the sixteenth day of May, 1889, an order was made herein, and entered on the court journal and reads and is in words and figures following, to wit:

Consolidated Cause.

JAMES R. JESUP ET AL.
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

And now on this day this cause came on further to be heard on the application of the complainants to confirm the sale made by Bluford Wilson and A. J. Ricks, esquires, the special masters appointed by the decree heretofore entered in this cause for that purpose, to James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, purchasing committee, for fifteen millions five hundred and fifty thousand dollars, and upon producing the said report of sale made by the special masters which report bears date the fifteenth day of May, 1889, and the court having fully examined the same, and the proceedings of the said special masters in pursuance of the decree heretofore entered in this cause, finding the same correct in all respects and in conformity with law and said decree and the amount bid at the sale of the railways, premises and property mentioned and described in the said decree as reported by the said special masters, in their said report of sale, to wit, the sum of fifteen millions five hundred and fifty thousand dollars, is the highest and best bid that could be obtained for the said railways, premises and property so ordered to be sold, and exceeds the aggregate amount of the highest bids received for the several
1049 properties, when offered separately as directed by the said decree, and the solicitors for the several parties consenting and waiving all exceptions and right of exception to the said report.

On motion of Foster & Thomson, solicitors for the complainants, it is ordered, adjudged and decreed that the said report of the said Bluford Wilson and A. J. Ricks, special masters as aforesaid, be, and the same hereby is, in all things confirmed; that the said bid of the said James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, purchasing committee, be and the same hereby is, accepted; that the said sale be, and the same hereby is, in all things ratified, approved and confirmed, and that all of the proceedings of the said special masters in regard to the said sale be, and the same hereby are, approved and confirmed.

It is further ordered, that the sum of nine hundred thousand dollars heretofore paid to the special masters in accordance with the terms of said decree of sale by the said purchasers, as a pledge that they would make good their said bid, if accepted by the court, and comply with the terms and conditions of the said sale, be, and the same hereby is, accepted in part payment of the said purchase price of the said railways, premises and property.

It is further ordered, that the remainder of the said bid, after the payment of the said sum of nine hundred thousand dollars so made at the time of the said sale, viz., the sum of fourteen millions six hundred and fifty thousand dollars be paid by the said purchasers as directed by the said decree of foreclosure and sale in cash, and in the outstanding bonds and funded debt bonds and

scrip certificates, secured by the several mortgages in this action foreclosed, together with the unpaid and overdue coupons thereto appertaining as provided in the decree and as shall be determined and required by the court under the decree, and to the extent that the said purchase price shall be paid in bonds and shall not be required or directed by the court to be paid in cash, the same shall be received at such proportion or value as the holder thereof would be
1050 entitled to received thereon in case the said purchase price were wholly paid in cash.

It is further ordered, that upon the full payment to the said special masters of the remainder of the said bid, either in cash or in bonds as herein provided, the said special masters shall convey to the said purchasers, or to their assigns, all and singular, the railways, premises and property described in and covered by the said several mortgages foreclosed in this action and sold as aforesaid under the decree in this cause, and all right, title, and interest and estate of all the parties in this cause of, in and to the same, and each and every part thereof, except as particularly reserved in and by the said decree of foreclosure and sale, by a good and sufficient deed therefor, which deed shall first be approved by this court as to form if the said purchasers shall so require.

It is further ordered, that upon presentation to John McNulta, the receiver heretofore appointed in this cause, of the said masters' deed, the receiver in this cause deliver to the grantee therein mentioned the railways, premises and property thereby conveyed.

It is further ordered, that all the bonds and coupons received by the said special masters in payment of the said purchase price shall be stamped as follows: "This bond is held as further assurance of title derived under foreclosure and sale of the property covered by the mortgage therein mentioned and for no other purpose," and that such bonds be then delivered to the grantee in said masters' deed mentioned to be held as a muniment of title.

It is further ordered, that upon payment out of the proceeds of said sale to the holder or holders of any of the bonds secured by the several mortgages foreclosed in this cause, and not used as above provided in part payment of the purchase price of said railways, premises and property, or the cash dividend to which such bonds shall be entitled, the same shall be marked or stamped as is hereinabove directed with regard to bonds so received by the special masters in part payment, and shall thereupon be delivered to the
1051 said grantee in said Masters' deed mentioned to be held as a muniment of title.

It is further ordered that the said special masters be, and they are hereby, authorized to receive payment of the residue of the said purchase price without the Northern District of Ohio.

It is further ordered, that all questions in regard to the accounts of the receiver in this cause and of the distribution of the fund arising from the said sale, including all questions as to the amounts and payments of costs, counsel fees, allowances and expenses, be, and they hereby are, reserved.

(Signed) W. Q. GRESHAM.

Endorsed thereon was the following, to wit: Filed May 17, 1889. A. J. Ricks, Clerk.

Order for Receiver to Deliver Possession of Property to Purchasers.

(Printed *ante* p. 418.)

1052 *Order Sending Issues Relating to James Compton's Claim to Bluford Wilson, Master.*

Afterwards, on the seventeenth day of August, A. D. 1889, a day of the June term of said court for said year, an order was made and entered herein, and reads and is in words and figures, to wit:

JAMES R. JESUP ET AL.
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Now, on this day came the complainant, by Foster & Thompson, their solicitors: the purchasing committee, Ashley, Hubbard, Welles and Joy, by Butler, Stillman & Hubbard, their solicitors; Humphreys and Lindley, trustees, by their solicitors; Henry Crawford, the Farmers' Loan & Trust Company, by Turner, McClure & Ralston, its solicitors; and James Compton, by John G. Milburn and John H. Doyle, his solicitors, and upon their motion, and the court now being fully satisfied in the premises, it is ordered that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein, upon and concerning said claim and lien and reserved in the former decree herein, saving the rights of said Compton, be, and the same are hereby referred to Bluford Wilson, on account of his experience in such accounting and matters as special master, to take and report, with all convenient speed, all of the evidence upon all matters involved in such issues and pertinent thereto.

Said master shall fix the time and place of hearing under this
1053 order, giving at least twenty days' written notice to the solicitors of the parties hereto interested in said issues.

Said master may, if he deems it necessary, or if demanded by counsel, direct the printing of a sufficient number of the copies of the testimony so taken, which is not already printed in the reports of the masters heretofore filed herein, for the use of the court and counsel, and said testimony and the findings of said master shall be reported by the master to the court and filed herein according to the rules and practice of this court in like cases.

Application of Wabash Railroad Company to be Made Party.

Afterwards, on September 10, 1889, an application was filed herein by the Wabash Railroad Company, and reads, and is in words and figures following, to wit:

In the United States Circuit Court for the Northern District of Ohio, Western Division.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.

Now, comes the Wabash Railroad Company, by Dillon & Swayne, its attorneys, and respectfully shows to the court:

1054 That it is a consolidated corporation composed of constituent corporations of the states of Ohio, Michigan, Indiana, Illinois and Missouri. That as such consolidated railway corporation it is the owner, and in possession of and operating the system of lines of railway formerly belonging to the Wabash, St. Louis & Pacific Railway Company and known as the Wabash, St. Louis & Pacific Railway. That it duly acquired title to the same from James F. Joy, Thomas H. Hubbard, Ossian D. Ashley and Edgar T. Welles, a purchasing committee, and purchasers of the same at the foreclosure sale under decree rendered in this cause on the fifteenth day of May, 1889, in the city of Chicago, Illinois. That by virtue of the said conveyance and the said foreclosure decree and sale it is now duly possessed of the right, title and interest in said property formi*ng* belonging to the Farmers' Loan & Trust Company, Alexander M. White, Henry H. Worden, Edward H. Dixon, James R. Jesup, John T. Terry, Alfred T. White and the Central Trust Company, trustees under the various mortgages foreclosed in this action in the said decree of foreclosure.

That as such owner of said property said party is interest in the claim made by James Compton, defendant herein, to a lien upon a portion of the said lines of railway situated in the states of Ohio and Indiana, and to a first or prior lien upon certain portions of said property situated within the state of Ohio and known as terminal properties.

It therefore asks that it may appear in this suit by its attorneys and may have benefit and advantage of all pleadings filed by said Compton, setting forth his said claims and may take such other and further proceedings in the cause in the protection of its interests in said property as it may be advised.

THE WABASH RAILROAD COMPANY,
By DILLON & SWAYNE, *Its Attorneys.*
Its Attorneys.

1055 STATE OF NEW YORK, *City and County of New York, ss:*

Ossiam D. Ashley, being duly sworn, says that he is president of the Wabash Railroad Company; that he has read the foregoing application, and that the same is true to the best of his knowledge and belief.

O. D. ASHLEY,
President Wabash Railroad Company.

Sworn to before me this fourth day of September, 1889.
[SEAL.] WM. J. HARDING,
Notary Public, New York and Kings Counties.

Endorsed thereon was the following, to wit: Filed September 10, 1889. M. W. Sanders, Clerk.

Order of Court Thereon.

Afterwards, to wit, on the twelfth day of September, A. D. 1889, an order was made at chambers herein and reads and is in words and figures following, to wit:

In Equity. No. 552.

JAMES R. JESUP and EDWARD H. DIXON
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

On reading the application of the Wabash Railroad Company, it is ordered that it have leave to appear in this cause, through its attorneys, Dillon & Swayne, and on the hearing before the special master in the matter of the claim of James Compton, and may take advantage of and use as its own all allegations the original, 1056 amended or supplemental bills of complaint filed in this cause or in the pleadings of the Farmers' Loan & Trust Company and James F. Joy relating to or bearing upon the claim of said James Compton.

Done at chambers in the city of Cleveland, in said district, on this twelfth day of September, 1889.

AUGUSTUS J. RICKS,
United States District Judge, Northern District, Ohio.

Report of Bluford Wilson, Master.

On June 11, 1891, Bluford Wilson, special master, filed his report on the lien and claim of James Compton herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States, District of Indiana, Northern District of Ohio, Western Division. In Chancery.

Consolidated Cause and Ancillary Causes.

JAMES R. JESUP and ISAAC H. KNOX
against
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

To the Honorable the Judges of the Circuit Court for said District:

The order of reference entered in the above consolidated cause on the seventeenth day of August, 1889, in the said Northern District of Ohio, Western Division, was as follows:

1057 "Now on this day, the complainants, by Foster & Thomson, their solicitors; the purchasing committee, Ashley, Hubbard and Welles and Joy, by Butler, Stillman & Hubbard, their solicitors; Humphreys and Lindley, trustees, by their solicitor, Henry Crawford; the Farmers' Loan & Trust Company, by Turner, McClure & Ralston, its solicitors; and James Compton, by John G. Milburn and John H. Doyle, his solicitors; and upon their motion, and the court being now fully satisfied in the premises, it is ordered that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein, upon and concerning said claim and lien, and reserved in the former decree herein, saving the rights of the said Compton, be, and the same are hereby, referred to Bluford Wilson, on account of his experience in such accounting and matters, as special master, to take and report with all convenient speed all of the evidence upon all matters involved in such issues and pertinent thereto. Said master shall fix the time and place of hearing under this order, giving at least twenty days' written notice to the solicitors of the parties hereto interested in said issues.

"Said master may, if he deems it necessary, or if demanded by counsel, direct the printing of a sufficient number of the copies of the testimony so taken which is not already printed in the reports of the masters heretobefore filed herein, for the use of the court and counsel, and the said testimony and the findings of the master shall be reported by the master to the court and filed herein, according to the rules and practice of this court in like cases."

On the fifth day of November, 1889, upon stipulation of the parties by counsel, entered into before me October 21, 1889, the same order of reference was entered in the said consolidated cause also pending in United States Circuit Court for the District of Indiana, as of the latter date.

The inquiry under these orders was rendered necessary by reason of the reservations as to the claim of the defendant James
1058 Compton, especially made in the final decree of foreclosure (pp. 101 to 103) entered in the consolidated cause herein by the judges of the sixth and seventh circuits, March 23, 1889, as follows:

"All other questions arising under any of the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication, including the claim for unearned interest on bonds not yet due.

"And the defendant James Compton, having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issues raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton, to be filed herein, have not been tried and determined, the court overrules such objection, and the defendant James Compton duly excepts to such ruling and the entry of

this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

"If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the Supreme Court of the State of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis & Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered and affected by said lien or the successors in the title of said purchaser or purchasers shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent.
1059 per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct.

"And it is further ordered and adjudged, that notwithstanding the entry of this decree the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul or abridge any right, claim or interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

"Any sale, conveyance or assignment of the railway and property hereinabove described, made under this decree, shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for cost and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis & Pacific Rail-
1060 way Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and General John McNulta, or upon

intervening claims allowed, or to be allowed, or upon any other claims and allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis & Pacific Railway Company or any part thereof, or said receiver or either of them, or the adjustment of any equities arising out of the same between the parties hereto, or their successors either by this court or by the Circuit Court of the United States for Eastern District of Missouri or by any United States Circuit Court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis & Pacific Railway Company, or any part thereof, or by any United States Circuit Court to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis & Pacific Railway Company and others in the Circuit Court of the United States for the Eastern District of Missouri, including the receivers, have been by said Circuit Court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last named court or otherwise.

"Nor shall any such sale, conveyance, transfer or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof or said receivers shall not be paid within a reasonable time after being required by order of this or said other courts.

"The conveyance and transfer of said property sold under
1061 this decree shall be subject to the powers and jurisdiction of the said courts and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said company or any part thereof, or said receivers, by order of said courts, shall be fully paid and discharged.

"The provisions aforesaid shall apply to the purchasers of the same under this decree and all persons taking said property through or under them, but the foregoing provisions shall not nor shall any reservation in this decree contained have the effect or be construed, nor are they or any of them intended to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist.

"The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right

and lien of such claims and all allowances if found and decreed to exist.

"And the court reserves the right to make such further order and direction at the foot of this decree as may seem proper.

"W. Q. GRESHAM,
"Judge Seventh Circuit.
"HOWELL E. JACKSON,
"Circuit Judge."

As such special master, in obedience to the terms of the said orders, I gave due notice of hearing to all the parties in interest, and, upon subsequent agreement of counsel, we met at the office of the
1062 president of the Wabash Railroad Company, No. 195 Broadway, in the city of New York, October 21, 1889. Messrs. John G. Milburn and John H. Doyle appeared as solicitors for James Compton, and Messrs. Rush Taggart and Henry Crawford appeared for the purchasing committee, the Wabash Railroad Company and the other litigants in the cause.

In behalf of the Wabash Railroad Company, Mr. Taggart offered the following testimony, to all of which and to each item of which counsel for Compton entered formal objection on the ground of irrelevancy:

1. Articles of association of the Toledo & Illinois Railroad Company, dated April 20, 1853 (See vol. II., report of Special Masters Ricks and Wilson in said consolidated cause, exhibit 1, pp. 1-4).

2. First mortgage of the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company, trustee, September 8, 1853 (Exhibit 2, pp. 4-11).

3. Articles of association of the Lake Erie, Wabash & St. Louis Railroad Company, June 24, 1852 (Exhibit 3, pp. 11-13).

4. Mortgage of the Lake Erie, Wabash & St. Louis Railroad Company to the Farmers' Loan & Trust Company, August 1, 1853 (Exhibit 4, pp. 13-20).

5. Agreement of the Lake Erie, Wabash & St. Louis Railroad Company for consolidation, forming the Toledo, Wabash & Western Railroad Company, June, 1856 (Exhibit 5, pp. 20-26).

6. Decree of the Circuit Court of the United States for the Northern District of Ohio, in the suit of the Farmers' Loan & Trust Company, Joseph B. Varnum and Russell Sage *vs.* the Toledo & Lake Erie Railroad Company, the Toledo, Wabash & Western Railroad Company, the Lake Erie, Wabash & St. Louis Railroad Com-
1063 pany and John H. Drummond, August 15, 1858 (Exhibit 6, pp. 26-46).

7. Decree of the Circuit Court of the United States for the District of Indiana, in a suit of identical title with the foregoing, May 28, 1858 (Exhibit 7, pp. 47-75).

8. Articles of association of the Toledo & Wabash Railroad Company, a corporation of Ohio, July 1, 1858 (Exhibit 8, pp. 76-79).

9. Articles of association of the Wabash & Western Railway Company, a corporation of the state of Indiana, July 15, 1858 (Exhibit 9, pp. 84-87).

10. Deed of Azariah Boody and wife to the Toledo & Wabash Railroad Company October 8, 1858 (Exhibit 8*a*, pp. 79-81).

11. Deed of Azariah Boody and wife to the Wabash & Western Railway Company, October 5, 1858 (Exhibit 9*a*, pp. 87-89).

12. Mortgage of the Toledo & Wabash Railroad Company to Edwin D. Morgan, October 15, 1858 (Exhibit 10, pp. 92-98).

13. Order of appointment of Joy as trustee instead of Morgan, deceased, April 3, 1888 (Exhibit 13, pp. 90-100).

14. Mortgage of Wabash & Western Railway Company to Edwin D. Morgan, October 15, 1858 (Exhibit 12, pp. 101-107).

15. Order of appointment of Joy as trustee in place of Morgan, deceased, May 9, 1888 (Exhibit 13, pp. 108, 109).

16. Consolidation agreement of Wabash and Western Railway Company and the Toledo & Wabash Railroad Company,
1064 forming the Toledo & Wabash Railway Company, October 7, 1858 (Exhibit 14, pp. 110-115).

17. Articles of Consolidation of the Toledo & Wabash Railway Company, the Great Western Railroad Company of 1859, the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company, forming the Toledo, Wabash & Western Railway Company, May 16, 1865 (Exhibit 23, pp. 178-193).

Ossian D. Ashley, John G. Milburn, James Compton and George Arents were then called, sworn and examined in behalf of the said Wabash Railroad Company.

In the testimony of the witness, Ashley, the following exhibits should appear:

18. Toledo & Illinois mortgage bond, dated August 1, 1853 (Exhibit 70, pp. 536-538), with extension to August 1, 1890.

19. Lake Erie, Wabash & St. Louis mortgage bond, dated August 1, 1853 (Exhibit 71, pp. 539-542), with extension to August 1, 1890.

20. Records of the railway companies covering such extensions.

21. Circular showing origin of funded debt bonds and scrip certificates (Exhibit 52, pp. 492-501).

22. Funded debt bond of the Wabash Railway Company (Exhibit 38-53, pp. 321-324 and 501).

23. Certificate of deposit of coupons of Toledo & Illinois Railroad Company bonds, and of the coupons of the Lake Erie, Wabash & St. Louis Railroad bonds (Exhibits 125 and 126, pp. 743-747).

24. Journal entries from the Wabash Railway Company's books, showing amount of coupons funded into scrip certificates
1065 (Exhibits 85, 86, 87, 88, pp. 563-579).

25. Decree of foreclosure March 23, 1889, as to the amounts due under the first and second mortgages of Ohio and Indiana, and as to consolidated mortgages of 1867 and 1879.

Toledo & Wabash Railroad Company second mortgage bond, dated October 15, 1858, and extension to November 1, 1893. (Vol. I., Exhibit L 1, pp. 593-596.)

26. Deed of Wilson and Ricks to the purchasing committee.

27. Deed of purchasing committee to the Toledo & Western Railway Company of Ohio.

28. Deed of purchasing committee to the Wabash Eastern Railway Company of Indiana, and deeds of the said committee to Michigan, Illinois and Missouri corporations.

29. Articles of consolidation of these several corporations into the Wabash Railroad Company.

To these several exhibits, and the testimony in relation thereto, counsel for Compton objected as irrelevant.

Following the testimony of Ashley, counsel for the Wabash Railroad Company then offered in evidence.

30. The transcript of record in the case of Benjamin F. Ham, Edward De Rose, Henry A. Mott, John W. Ferrand *et al. vs.* the Wabash, St. Louis & Pacific Railway Company *et al.*, originally brought in the Fountain County Circuit Court, Indiana, and removed to the Circuit Court of the United States for the District of Indiana, and then appealed to the Supreme Court of the United States, including the decision of the said Supreme Court, its mandate and the judgment of the Circuit Court of the United States at the foot of the mandate.

1066 The case is reported in 114 U. S., 587-598, and was submitted to the said Supreme Court January 8, 1885, and decided May 4, 1885.

In connection with the cross-examination of the witness Milburn the following exhibit should appear:

31. Brief filed by John G. Milburn, Esq., in the Ham case in the Supreme Court of the United States, with special memorandum attached.

At the close of the testimony of the witness Milburn, John H. Doyle, of counsel for James Compton, offered in evidence:

32. The exemplified transcript of the record and proceedings in the case of James Compton, plaintiff, *vs.* The Toledo, Wabash & Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis & Pacific Railway Company, James R. Jesup and Isaac H. Knox, as trustees, George I. Seney, as trustee, and Solon Humphreys and Daniel A. Lindley, as trustees, defendants in the Common Pleas Court and District Court of Lucas County, Ohio, and Supreme Court of Ohio, with mandate of said Supreme Court, dated May 12, 1888, to the Court of Common Pleas of Lucas County.

The case is reported in 45 Ohio state, 592.

33. Certified copy of the condemnation proceedings by the Toledo & Wabash Railway in 1865 of six acres of ground in Toledo.

34. In connection with the cross-examination of the witness Compton, the original equipment bonds and coupons claimed by Compton and constituting the basis of his claim, as the same are scheduled at page seven of the record in the Compton case, were produced to the master for examination and identification and were accepted without objection.

35. At the close of the testimony of the witness Arents Mr. Crawford offered in evidence the affidavits of James Comp-

1037 ton made in the consolidated cause, together with the motion to set aside the service of process upon him, which, without objection, was made part of the record herein.

And thereupon the complainants rested.

36. Mr. Milburn then placed in evidence for the defendant the stipulation and "agreed statement of facts" found at pages 134-147 of the said record in the Compton case, showing, among other things, that the "equipment bonds" were put upon the market at the time of their issue, and sold, and the plaintiff Compton was at the commencement of said suit and is now the *bona fide* holder for value of bonds of this series having a par value of one hundred and fifty thousand dollars, upon which no interest has been paid since November 1, 1874; and also of the coupons payable on the said bonds since said last-mentioned date.

37. Also the articles of consolidation between the Toledo & Wabash Railway Company, the Great Western Railroad Company of 1859, the Quincy & Toledo Railroad Company and the Illinois & Southern Iowa Railroad Company, May 16, 1865 (Vol. II, Exhibit 23, pp. 178-193).

38. Also, the decree in the case of the Metropolitan National Bank *vs.* The Toledo, Wabash & Western Railway Company *et al.*, including as defendants the Farmers' Loan & Trust Company and Edwin D. Morgan, as trustee (Exhibits 28, 29, pp. 256-281).

And thereupon the further hearing of testimony was adjourned to Toledo, Ohio, November 8, 1889.

The foregoing testimony is included in schedule "A," filed herewith.

By agreement of counsel, the hearing was not resumed until January 31, 1890, when the following evidence was taken at Toledo, Ohio, in behalf of defendant Compton.

William S. Lincoln was sworn and testified.

1068 39. In connection with his testimony, certain of the maps or plats introduced in the testimony of Charles Hansel in the foreclosure suit were produced and made part of the record (Vol. I., Exhibit A, pp. 107-125).

There was also submitted in the same connection the following:

40. Certified copy or lease from the Michigan Southern & Northern Indiana Railroad Company to the Toledo & Wabash Railway Company, December 9, 1859, as recorded in volume "C" of leases, page 141, Lucas county, Ohio.

41. Certified copy of amended lease from same to the Toledo, Wabash & Western Railroad Company, July 6, 1867, as recorded in volume "C" of leases, page 149, Lucas county, Ohio.

42. Certified copy of directors' approval of said lease, as recorded in volume "C" of leases, page 184, Lucas county, Ohio.

43. Schedule No. 5, Hansell's testimony above.

At the close of the witness Lincoln's testimony, the following exhibits and documents were offered:

44. The decree in the case of the Central Trust Company *et al. vs.* the Wabash, St. Louis & Pacific Railway Company *et al.*, especially that portion thereof relating to the Compton claim (Vol. II., exhibit 44, pp. 442-443).

45. The report of sale pursuant to said decree and confirmation thereof (Vol. II., exhibit 44, pp. 484-489).

46. The order that the master make a deed to the purchasers (Vol. II., exhibit 50, pp. 490, 491).

47. The deed of the master to the purchasing committee, dated September 21, 1886.

1069 48. The answers of the purchasing committee under that decree, filed in this cause.

49. The notice by said purchasing committee to the Farmers' Loan & Trust Company (Vol. II., exhibit 89, p. 581).

50. The exhibit 82, Vol. II., p. 560*a*, showing the equipment of the Toledo & Wabash at the time of the consolidation in 1865.

51. The exhibit 80, Vol. II., p. 560, showing the disposition of the Toledo & Illinois engines.

52. The exhibits 73 and 79, Vol. II., pp. 542*a* and 550-570.

53. The maps showing the property condemned by the Toledo & Wabash Railway Company.

54 The copies of three leases from the Lake Shore.

On February 15, 1890, counsel for defendant Compton offered as original testimony certain documents printed in the record of the "Compton suit" as follows:

55. The resolution for the issue of the equipment bonds.

The fact of the issue of six hundred thousand dollars of the equipment bonds and their negotiation and sale. It was admitted that default was made in the payment of the interest which fell due on the equipment bonds in May, 1875, and that no interest has been paid on the same since then, and the principal has not been paid.

56. The consolidated mortgage of 1867.

57. Mr. Doyle also called attention to the conveyances as shown in the exhibits, to the various railroad companies between the

1070 date of the first mortgage of the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company and the date of the consolidation agreement of 1865, and offered them in evidence.

Afterwards, John G. Milburn was recalled for the defendant, and was further examined, which closed the evidence on both sides.

Later, however, on April 24, 1890, the counsel for the Wabash Railroad Company and other litigants opposing the claim of the defendant Compton transmitted to the master certified copies of two newly-discovered mortgages, as follows:

58. Certified copy of mortgage from Toledo & Wabash Railroad Company to Edwin D. Morgan, October 12, 1858, as recorded in Lucas county, Ohio, volume 12, mortgages, page 260, October 20, 1856.

59. Certified copy of mortgage from Wabash & Western Railway Company to Edwin D. Morgan, October 12, 1858, as recorded in mortgage record No. 3, pp. 508, 509, 510, of Tippecanoe county, Indiana.

These documents were submitted to the master subject to any objection from the counsel for the defendant Compton, and no objection having been heard, they have been received and incorporated as part of the evidence and record.

The foregoing testimony, beginning with that of the witness William S. Lincoln, comprises schedule "B," filed herewith, and the said schedules A and B include all the evidence taken, offered or identified in this hearing.

Nearly, if not quite all, the documents and exhibits herein identified, have already been printed in the reports of masters heretofore filed herein, and it is believed that, if, for any reason, it shall be found desirable to print an entire and separate record of this cause, counsel will find it easy from the foregoing report of testimony, to avoid duplications, and select, if necessary, such portions as may be material.

After hearing all the evidence and the arguments of coun-
1071 sel, and upon consideration thereof, I respectfully report as follows:

On the seventh day of October, 1858, the Toledo & Wabash Railroad Company of Ohio, and the Wabash & Western Railway Company of Indiana, were duly consolidated under the laws of Ohio and Indiana, as the Toledo & Wabash Railway Company. At the date of such consolidation the railroad property owned by the constituent company and in operation in the State of Ohio, was subject to the two mortgages made by prior companies. One by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company, of New York, for $900,000, dated September 8, 1853, and known as the Toledo & Illinois Railroad first mortgage; the second by the Toledo & Wabash Railway Company to Edwin D. Morgan, for $1,000,000, dated October 15, 1858, and which mortgage was subject and subordinate to the foregoing mortgage. In like manner the railroad property then owned by the constituent company, and in operation in the state of Indiana, was covered by two mortgages made by pre-existing companies—one by the Lake Erie, Wabash & St. Louis Railroad Company to the Farmers' Loan & Trust Company, of New York, for $2,500,000, dated August 1, 1853, and the second by the Wabash & Western Railway Company to Edwin D. Morgan, for $1,500,000, dated October 15, 1858, and which was subject and inferior to the said mortgage of August 1, 1853.

Subject to the lien of the said several underlying mortgages, the consolidated Toledo & Wabash Railway Company thus came into possession of and owned and operated a line of railway extending from the city of Toledo, in the state of Ohio, through the states of Ohio and Indiana to State Line City, in the county of Warren, Indiana.

On November 1, 1862, the said Toledo & Wabash Railway Company, for the purpose of providing further equipment and satisfying other requirements of said company, issued a series of bonds
amounting to $600,000, payable to bearer on the first day of
1072 May, 1883, with interest at seven per centum per annum, to be paid on the first day of May and the first of November in each year. The said bonds were convertible into the common stock of said company at par at any time within five years from their date.

They were put upon the market and sold, and subsequently $150,000 of them, in face value, passed into the possession of the defendant James Compton.

On the sixteenth day of May, 1865, the said Toledo & Wabash Railway Company was duly consolidated with the Great Western Railroad Company, of 1859; the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company, under the laws of the states of Illinois, Indiana and Ohio, into the Toledo, Wabash & Western Railway Company, and by virtue of said consolidation the said consolidated company thereafter owned and operated a line of railroad extending from Toledo, in the state of Ohio, to and through the state of Indiana, and thence in the state of Illinois to Meredosia, with a branch to Naples, and from Meredosia to Camp Point, in said state, and with a branch from Clayton, in said state, to the east bank of the Mississippi river at Hamilton, in said state.

All the property of each of the said constituent railroad companies was at the date of consolidation incumbered by underlying mortgages, and the articles of consolidation contained a statement of the outstanding mortgage and stock indebtedness of each company, and a specific provision "that the bonds and other debts hereinabove specified, in the manner and to the extent specified and not otherwise provided for in this agreement shall, as to principal and interest thereof, as the same shall respectively fall due, be protected by the said consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The mortgaged indebtedness of the constituent Toledo & Wabash Railway Company, as scheduled in the said articles of consoli-
1073 dation, included $3,400,000 of first mortgage bonds, representing the $900,000 first mortgage Toledo & Illinois bonds secured by the mortgage on the Ohio line to the Farmers' Loan & Trust Company, dated August 1, 1853, and the $2,500,000 first mortgage Lake Erie, Wabash & St. Louis bonds secured by the mortgage on the Indiana line to Edwin D. Morgan, dated August 1, 1853; and also included $2,500,000 of second mortgage bonds, representing the $1,000,000 second mortgage Toledo & Wabash bonds secured by the mortgage on the Ohio line to Edwin D. Morgan, dated October 15, 1858, and the $1,500,000 second mortgage Wabash & Western bonds secured by the mortgage on the Indiana line to Edwin D. Morgan, dated October 15, 1858; and finally included also the said $600,000 convertible equipment bonds, on which the interest had been regularly paid and continued so to be paid by the new consolidated company during its existence as such.

On the first day of February, 1867, the said Toledo, Wabash & Western Railway Company for the purpose of "consolidating into one and the same mortgage debt upon equitable principles" the several classes of underlying mortgages, and providing for taking up and discharging certain funded indebtedness and obtaining money for completing its lines, and to purchase additional equipment, made and executed to Isaac H. Knox and James R. Jesup a mortgage for $15,000,000 covering its line of railway in the states of Ohio, Indiana

and Illinois as above described. The mortgage was known as the consolidated mortgage, but only $2,700,000 of the bonds were ever issued, and of these $90,000 were subsequently retired by sinking fund provided in said mortgage, leaving outstanding at the date of the foreclosure proceedings herein $2,610,000.

Among the bonds specially mentioned to be included in the benefits of the consolidated mortgage scheme were the said "bonds of the Toledo & Wabash Railway Company, due May 1, 1883, for the sum of six hundred thousand dollars, and known as "equipment bonds."

1074 On the third day of June, 1869, a further consolidation, under the laws of Illinois, but without change of name, was made with the Decatur & East St. Louis Railroad Company.

On the first day of February, 1873, the said Toledo, Wabash & Western Railway Company made and delivered to the New York Guaranty and Indemnity Company, as trustee, a further mortgage on its said entire line of railroad for $5,000,000, payable in gold. This was known as the "gold mortgage," and defaults in interest having occurred, suits to foreclose the same were commenced in 1875, in the Court of Common Pleas of Lucas County, Ohio, and in the courts of Indiana and Illinois, under which decrees of foreclosure were duly entered in 1876, and all of the mortgaged property was sold, but expressly "subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds called the equipment bonds, as to which all questions arising are left open."

The purchasers of the said railway property, under and subject to the terms of the foreclosing decrees of foreclosure, organized several corporations under the respective laws of the States of Ohio, Indiana and Illinois, and these several corporations were subsequently, in January, 1877, duly consolidated under the name of the Wabash Railway Company, to which was duly conveyed all of the above-described railway property, but subject in all things to the liens thereon of said consolidated mortgage of 1867, and to the liens of mortgages prior thereto, as specially recited and set forth in said decrees, and without prejudice to the rights of said equipment bonds.

On the thirteenth day of January, 1877, the said Wabash Railway Company made and delivered to George I. Seney, as trustee, a certain mortgage to secure various promissory notes, amounting in all to $1,026,555.42.

1075 On the first day of February, 1877, the said Wabash Railway Company, pursuant to agreement between the holders of certain past due coupons of the said underlying mortgages, including said consolidated mortgage, issued certain new bonds, known as funded debt bonds, to the holders of said coupons, the amount of which, as issued against coupons due on the above-described mortgages to the Farmers' Loan & Trust Company and to Edwin D. Morgan, will hereafter appear.

On the seventeenth day of May, 1879, the said Wabash Railway Company made and executed to Solon Humphreys and Daniel A. Lindley, as trustees, a further mortgage for $2,000,000, covering

all and singular its railroad property in the states aforesaid, but subject in all things to the said pre-existing mortgages.

On the fourteenth day of August, 1879, the said Wabash Railway Company consolidated, under the name of the Wabash, St. Louis & Pacific Railway Company with the St. Louis, Kansas City & Northern Railway Company, a corporation existing under the laws of the state of Missouri, and owning and operating a line of railway extending from St. Louis to Kansas City, in said state. The said Wabash, St. Louis & Pacific Railway Company thereby came into existence, owning a railroad extending from Toledo to Council Bluffs and Kansas City, on the Missouri river, and became liable for all and singular the outstanding bonds and obligations of the several original and constituent companies as hereinbefore set forth and described.

On the first day of June, 1880, the said Wabash, St. Louis & Pacific Railway Company executed to the Central Trust Company of New York and James Cheney, as trustees, its general mortgage on all its property, wherever situated, to secure $50,000,000 of bonds, and on the bonds issued thereunder, the said company afterwards, on the first day of May, 1884, made default in the interest then falling due.

By reason of such default proceedings for the foreclosure of said mortgage were instituted on the twenty-ninth day of May, 1884, in the Circuit Court of the United States for the Eastern District of Missouri, and afterwards at the September term, 1885 of said
1076 court, a decree of foreclosure and sale of all the property of said railway was entered. This decree contained the following reservation as to the claim of the defendant James Compton:

"The court further finds that there is now pending in the Supreme Court of the State of Ohio, a certain cause in which James Compton and certain other persons named in the record thereof seek to establish and maintain a lien adjudged in their favor by the Court of Common Pleas of Lucas County, in the state of Ohio, upon the line of railroad of said Wabash Company extending from Toledo, Ohio, to the eastern boundary of the state of Indiana, an appeal having been taken from the said judgment and decree of said court of Lucas county to said Supreme Court. It is ordered that this decree shall in no way affect the rights of said Compton and his co-complainants, as the same shall be determined by said Supreme Court. Any sale of the property aforesaid under this decree shall be subject to such rights and interests as said Supreme Court shall adjudge in said cause."

At the sale made April 26, 1886, pursuant to said decree, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as a purchasing committee, became the purchasers of the entire consolidated property from Toledo to Council Bluffs. The said sale was afterwards confirmed by said court, and the master, Edmund T. Allen, conveyed the property to said purchasing committee by deed dated September 21, 1886.

On the sixteenth day of December, 1886, by an order entered by the Circuit Court of the United States for the Southern District of

Illinois, at the suit of Thomas B. Atkins and others *vs.* The Wabash, St. Louis & Pacific Railway Company and others therein pending, said court, by its receiver, took possession of all the property pertaining to the Wabash system east of the Mississippi river and extending from Toledo to East St. Louis and Hamilton, on the said Mississippi. The said Atkins' cause and other suits on bonds and coupons secured by the mortgages underlying the said general mort-

gage on property east of the Mississippi were afterwards
1077 consolidated into the present-entitled cause, and such proceedings were had, as shown by the record herein, as resulted in the foreclosure decree of March 23, 1889, and the sale of all the property described therein, including the railway in Ohio and Indiana, covered by the said several mortgages to the Farmers' Loan & Trust Company and Edwin D. Morgan. The said decree of March 23, 1889, contained, as we have seen, the special reservation as to the claim of defendant James Compton, shown on pages 2, 3 and 4 of this report, and also the general reservations appearing on the pages immediately following the above. At this sale also the said Joy, Ashley, Hubbard and Welles became the purchasers. The sale was confirmed, and by proper legal steps and conveyances from the said purchasers, the present Wabash Railroad Company was created and succeeded to the possession of and now operates the line of railway from Toledo to Council Bluffs and from Chicago to St. Louis. As such corporation, standing, as it were, in the shoes of the purchasing committee, it now appears, by counsel herein, in opposition to the claim of the defendant Compton.

Such are the facts from the general history of the Wabash system so far as they appear material to this controversy. They disclose the common origin of the rights of the respective parties to this litigation and bring the defendant Compton as the holder of one-fourth in par value of the equipment bonds created and sold in 1862 by the old Toledo & Wabash Railway, and the present Wabash Railroad Company, the successor by devolution in the ownership and possession of the property of that company, face to face in a controversy as to priority of right to a certain portion thereof or its proceeds.

There is absolutely nothing in these facts to the prejudice in any way of the equipment bonds, or to the validity of the lien claimed thereunder by the defendant Compton. On the contrary, the companies upon which the railway property in Ohio and elsewhere was

successively devolved, and the state and federal courts deal-
1078 ing with the same carefully recognized and protected the rights of the equipment bonds, as the following summary clearly shows:

The equipment bonds were issued and sold by the Toledo & Wabash Railway Company in 1862. Interest was paid on them by said company until it became merged in the Toledo, Wabash & Western Railway Company.

The agreement of consolidation, creating the latter company, dated May 16, 1865, specifically mentioned and protected the equipment bonds, principal and interest, according to the true meaning

and effect of the instrument by which they were evidenced, and the interest was regularly paid on said bonds by the said company until it became insolvent in November, 1874.

In addition to the payment of interest the consolidated mortgage for $15,000,000, to Knox and Jesup, executed February 1, 1867, by the said Toledo, Wabash & Western Railway Company, particularly named, and included the equipment bonds as entitled to its protection and benefits.

The foreclosure decree, following the insolvency of the said company, and entered by the Court of Common Pleas of Lucas County, Ohio, in 1876, on the "gold bond mortgage," was without prejudice to any claim which might be made by the holders of equipment bonds, as to which all questions arising were expressly left open. The deed made thereunder in January, 1877, by the purchasers at the sale under said decree, by which the title of the said Toledo, Wabash & Western Railway Company was devolved upon the newly organized Wabash Railway Company was therefore without prejudice to the rights of said equipment bonds.

This saving was necessarily carried into the $2,000,000 mortgage executed by the said Wabash Railway Company, May 17, 1879, to Humphreys and Lindley, and was in turn devolved upon the new Wabash, St. Louis & Pacific Railway by the agreement of consolidation creating said company, August 14, 1879.

The general mortgage executed by the said last-named
1079 company, June 1, 1880, to the Central Trust Company and James Cheney for $50,000,000, must have been subject to the rights reserved to the equipment bonds by the said decree in 1876 of the Court of Common Pleas of Lucas County, inasmuch as the Circuit Court of the United States for the Eastern District of Missouri, in its decree entered in September, 1885, foreclosing said general mortgage, particularly found, and provided that said decree should not in any way affect the rights of said Compton as the same might be determined by the Supreme Sourt of Ohio, and that the sale under said decree of so much of the railway property in controversy as was situated in Ohio "should be subject to such rights and interests as said Supreme Court of Ohio should adjudge."

Between the date of that decree on the general mortgage and the sale thereunder and the foreclosure decree entered herein March 23, 1889, against the railway property east of the Mississippi, the Supreme Court of Ohio, on the twelfth day of May, 1888, formally rendered its judgment in favor of Compton on the equipment bonds held by him, for the principal and interest thereof, amounting to $339,920.40.

So far, then, as the rights of the purchasing committee, Joy, Ashley, Welles and Hubbard, and therefore of their successor, the present Wabash Railroad Company, are summed up in the history of the Wabash system and determined under the said decree of the United States Circuit Court for the Eastern District of Missouri, and are derived from the sale and purchase thereunder, said purchasers must be held to be concluded by the said judgment of the Supreme Court of Ohio. They bought subject to it. The United States Cir-

cuit Court, in its said decree, distinctly recognized the jurisdiction of the Supreme Court of Ohio to determine the controversy as to Compton and bind the property in that state by the adjudication. When the decree in the Eastern District of Missouri was entered in September, 1885, the decision of the Supreme Court of the United States in the Ham case had been for some time announced, and was doubtless familiar alike to court and to counsel for the Wa-
1080 bash system, and yet the court, in full view of that decision and without objection from any quarter, remitted the Compton claim and all questions arising under it to the ultimate decision and judgment of the Supreme Court of Ohio. If there had been no other proceedings against the railway property east of the Mississippi and no decree of March 23, 1889, the said purchasers and their successor, the Wabash Railroad Company, would have had nothing to do but to accept and submit to the judgment of the Ohio Supreme Court as to the Compton claim, according to the specific terms of that judgment.

It was in view of that judgment that this court, in its said decree of March 23, 1889, made the reservation set out on page 3 above, providing that upon the determination of the issues herein, if it should be adjudged that the said judgment and lien continues in full force and effect, then the purchasers at the sale under the said decree should pay to said Compton or his solicitors said $339,820.40, with interest.

On the foregoing general issues the judgment of the Supreme Court of Ohio stands, and the defendant Compton must be paid, unless the final decree on the mandate of the Supreme Court of the United States in the Ham case is controlling and is a bar.

The particular and material facts in the two cases respectively appear to be as follows:

The principal of the equipment bonds fell due on May 1, 1883. As we have seen, the semi-annual interest was regularly paid from their date, November 1, 1862, to November 1, 1874, twelve years. The coupon falling due May 1, 1875, was permitted to default, and no interest has since been paid.

On the thirteenth day of May, 1878, David J. Tysen, Jr., began a suit against the said Wabash Railway Company and others on certain of the equipment bonds in the Circuit Court of Fountain County, Indiana. The suit was brought for himself and for other bondholders similarly situated "who may desire to come into this suit and contribute to the expense thereof." The complaint
1081 set forth the Lake Erie, Wabash and St. Louis first mortgage to the Farmers' Loan & Trust Company on the Indiana line, for $2,500,000, dated August 1, 1853, and extended to August, 1890, and the Wabash & Western extended mortgage on the same line for $1,500,000, and also the Toledo, Wabash & Western consolidated mortgage, dated February 1, 1867. The only claim made in the bill as to the equipment bonds, was that they should be held to be secured by the said consolidated mortgage of 1867, which had been issued in part to retire them as part of the outstanding mortgage debt of said Toledo, Wabash & Western Railway Company. No

claim of lien for equipment bonds was made by Tysen, based on the consolidation agreement of May 16, 1865, creating the said Toledo, Wabash & Western Railway Company, taken in connection with the statute of the state of Ohio, authorizing the consolidation of railways. But a receiver was prayed, the foreclosure of the consolidated mortgage was also prayed, and that the equipment bonds might be held and permitted to share in the security of that mortgage.

To this bill Edward DeRose, Henry A. Mott, John W. Ferrand, Thomas Mayo, Charles Jackson, G. M. Whitmore, Townsend Underhill and L. M. Underhill, claiming also to be owners of equipment bonds, were on the same day admitted on their petition to be parties plaintiff, and prayed the same relief.

On the fifteenth day of May, 1878, this suit was removed into the United States Circuit Court for the District of Indiana on the petition of the Wabash Railway Company.

In June, 1878, Samuel Barton having been added as a party plaintiff, the complainants filed in the United States Circuit Court an amended complaint, in which they declared that the amended suit was brought "on their own behalf as well as on behalf of all others having like interests who may come in and contribute to the expenses of and join in the prosecution of this suit."

In the amended bill, as in the original the prayer was for the foreclosure of the consolidated mortgage as securing the
1082 equipment bonds, but no claim was as yet made that the equipment bonds were an equitable lien by virtue of and as a result of the consolidation agreement of 1865.

On the fifth day of August, 1878, the Wabash Railway Company and the other defendants entered their appearance, and on the thirtieth day of September, 1878, they filed their answers, to which replications were subsequently filed and the case put at issue.

But, on the twenty-second day of July, 1879, of the May term of the court, the parties, by their solicitors, appeared before the Honorable Walter Q. Gresham, Circuit Judge, and the complainant David J. Tysen dismissed the bill, and at the same time Samuel Barton, one of the intervening complainants, also dismissed his bill.

On the twenty-third day of January, 1880, of the November term, 1879, before Judge Gresham, the following entry in all respects regular on its face was made in said cause:

"Comes now the complainant, by his solicitors, and upon his motion it is ordered that the above-entitled cause be, and the same is hereby, dismissed. And also come the intervenors and dismiss their intervening petition herein."

It stood thus dismissed on the record until the May term of that year, when on July 13, 1880, nearly a year after the original complainant Tysen had dismissed his bill, and nearly six months after the foregoing general order of dismissal, and after the November term, 1879, had been closed, DeRose and others obtained an order vacating the order of January 23, 1880, and granting them leave to file a supplemental and amended bill, which was filed on the same day.

It was in this interval, as will hereafter more fully appear, during which an inspection of the records of the United States Circuit Court of Indiana would have disclosed the entire dismissal and end of the Tysen suit that the defendant began his said suit in the Court of Common Pleas of Lucas County, Ohio.

1083 Upon the filing in the federal court by DeRose and others of their said supplemental and amended bill, as above, Benjamin F. Ham appeared as a complainant and thereafter the cause became known as the Ham suit.

This supplemental and amended bill also purported to be brought in behalf of the complainants "as well as in behalf of all those in like interest who may come in and contribute to the expenses of, and join in the prosecution of this suit."

In it a lien was, for the first time, asserted for the equipment bonds in connection with the consolidation agreement of 1865, and the ground of relief was otherwise, they, to conform more nearly to that upon which the Compton suit had already been founded. The newly organized Wabash, St. Louis & Pacific Railway Company, created August 14, 1879, to succeed the Wabash Railway, was made a party defendant, as was also the old Toledo, Wabash & Western Railway Company, both of which companies had previously appeared and answered in the Compton case in the Ohio court.

After the answer of the Wabash, St. Louis & Pacific Railway Company was filed in the Ham case, November, 1880, the complainants therein filed their replications December 3, 1880, and thereafter, for a year, until November 16, 1881, nothing further was done, and then the complainants moved for a decree.

On the ninth day of April, 1883, long after the Compton case had been decided in his favor in the Ohio Court of Common Pleas, Judge Gresham decided the Ham case, also in favor of the lien of the equipment bonds, both decisions resting substantially on the legal effect of the consolidation agreement of 1865.

On the fifth day of May, 1884, a petition for reargument by the Wabash, St. Louis & Pacific Railway Company, having been meanwhile denied, final decree was entered in favor of the complainants Ham and others, and the case was appealed to the Supreme Court of the United States and submitted, under rule 20, January 8,

1084 1885, and was decided May 4, 1885. The Supreme Court held that the equipment bonds were not a lien, reversed the Circuit Court, and remanded the cause with directions to dismiss the bill, but final decree on the mandate was not entered in the Circuit Court until May 7, 1888.

Prior jurisdiction in the matter of the equipment bonds is claimed for the Supreme Court of the United States, and on its decision against their validity the counsel for the Wabash Railroad Company chiefly rest their defense to the enforcement of the judgment in the Compton case.

It is not claimed that James Compton was ever specifically a party complainant to the litigation in the federal courts, coming in under the invitation to contribute to the expenses or join in the prosecution of the suit. Nor is it claimed that he was ever a defendant *in in-*

vitum, or that he voluntarily appeared, or was otherwise named as a party to the record.

The claim that he was a party and therefore concluded by the final decree in the Ham case, rests solely on the contention that the filing of the bill in equity in the Tysen suit in the year 1879, to assert the lien of the equipment bonds upon the railroad property in Ohio and Indiana secured to the United States Circuit Court for the District of Indiana full jurisdiction of the matter, and that the said court, notwithstanding it did not impound the property, thereafter retained exclusive jurisdiction, both of persons and property, to hear and determine the rights of all the holders of such bonds. The suit, it is claimed, was a representative or class suit, and from its very nature it is contended that Compton was as much bound by the final decree as though named on the record.

Stress was also laid by Mr. Crawford in his oral argument on the fact that counsel for Compton had filed a brief in the Ham case while it was pending before the Supreme Court. The report of the case in 114 U. S. shows the fact, and the circumstances appear fully in the testimony of John G. Milburn.

Aside from these contentions as to the quasi presence of
1085 Compton as a party to the federal litigation as to the equipment bonds, the facts of record in the Tysen-Ham case disclose the names of all holders of the bonds who availed themselves of the supposed benefits of that suit, and of the particular defendants who joined issue with them herein, and in the record of that cause Compton was not and never was a party.

Before considering these contentions further it is necessary now to go back and bring up the history of the Compton case in the Ohio courts.

The equipment bonds, $150,000 in par value, which are the foundation of the Compton claim, were listed on the New York Stock Exchange, and were bought in open market by Arents & Young, 29 Wall street, some time prior to their transfer to Compton. It has already appeared that the interest was in default on the coupon due May 1, 1875, and subsequent coupons. The question of suit for the collection of interest had confronted Arents & Young, and had been under consideration between them and their counsel, John G. Milburn, Esq. The latter had a distinct preference, by reason of the questions involved, that the necessary litigation should be instituted and prosecuted in the Ohio State Courts. The result was the sale of the bonds to Compton.

In October, 1879, the defendant James Compton, an acquaintance of Arents & Young, was a manufacturing agent and merchandise broker residing in Washington City, in the District of Columbia, and some time in that month, the bonds being then nearly four years in default, all of the bonds in question were sold and transferred by Arents & Young to Compton for an alleged consideration of 66 cents on the dollar, amounting to $99,000, for which amount Compton executed and delivered his note, payable one day after date, bearing six per cent. interest. The note has never been paid, either in whole

or in part. Compton does not claim to be able to pay it entire, and it represents the whole consideration for the transfer.

Both Compton and Arents rely largely upon the collection
1086 of the bonds for the payment of the note, but they concur in the declaration that the transfer of the title of the bonds was absolute, and the statements of Mr. Milburn were to the same effect. These facts did not, however, arise in the course of the active litigation that followed the institution of the Compton suit in the Court of Common Pleas of Lucas County, Ohio, but were called out in the hearing before me in the course of the examination by Mr. Crawford of the witnesses, Compton, Milburn and Arents, and under the objection of counsel for Compton, in reply, also introduced an important item of evidence from the record in the Compton cause, which will appear at the proper place.

On the third day of February, 1880, during the lapse in the Tysen suit, James Compton began his suit in the Court of Common Pleas of Lucas County, Ohio, against the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis & Pacific Railway Company, which had succeeded the Wabash Railway Company, August 14, 1879, as the result of consolidation.

James R. Jesup and Isaac H. Knox, as trustees, under the consolidated mortgage of February 1, 1867, were also made defendants, as was also George I. Seney, the trustee under the mortgage of January 13, 1877, to secure certain promissory notes. The suit did not pretend to be a class suit, and was brought solely on behalf of Compton. The bill or petition claimed that Compton was the *bona fide* holder for value of equipment bonds of the par value of $150,000. It set out the history of the creation of these bonds by the Toledo & Wabash Railway, and claimed an equitable lien for them by virtue of the consolidation agreement of 1865, by which the Toledo, Wabash & Western Railroad Company came into existence. It claimed that said last-named company distinctly recognized the lien of said bonds on the first day of February, 1867, by the execution of the consolidated mortgage for the purpose of consolidating into one
1087 mortgage debt the said equipment bonds with many others, as recited in the mortgage. It claimed for said equipment bonds a lien upon all of the property of the Wabash, St. Louis & Pacific Railway Company in the states of Ohio and Indiana, so far as the same was owned by the Toledo & Wabash Railway Company at the time the property and purchases of the company last named were transferred to the Toledo, Wabash & Western Railway Company. It was prayed that the lien thus claimed might be adjudged priority over all other liens on said property, except as to the liens of the Toledo & Illinois mortgage for $900,000, and of the Toledo & Wabash mortgage for $1,000,000 on the property in Ohio, and the liens of the Lake Erie, Wabash & St. Louis mortgage for $2,500,000, and of the Wabash & Western mortgage for $1,500,000, on the property in Indiana.

On the first day of June, 1880, the defendants, the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, and the Wabash, St. Louis & Pacific Railway Company, having been

duly served with process, appeared by John R. Osborn, and filed their answers.

On the seventh day of June, 1880, the defendants, Jesup and Knox, appeared by Osborn, and answered.

It is to be noted that during this time, and until July 13, 1880, the Tysen suit stood dismissed on the record.

On the fourteenth day of January, 1881, under leave of court, previously granted, counsel for Compton amended his petition making Humphreys and Lindley, as trustees under the $2,000,000 mortgage of May 17, 1879, defendants, and to the amended petition the Wabash, St. Louis & Pacific Railway Company and the said Humphreys and Lindley, by Wager Swayne, filed their separate answers.

On the tenth day of March, 1882, a decree was rendered in said cause in favor of Compton adjudging said equipment bonds to be an equitable lien from the confirmation of the consolidation of 1865, "upon all the railroad and real property and the structures thereupon, and the fixtures and appurtenances thereto ap-
1088 pertaining, which were owned by said Toledo & Wabash Railway Company at the time of said consolidation, and which, through such consolidation, passed to and vested in the said Toledo, Wabash & Western Railway Company, and which has since passed to and vested in the defendant, the Wabash, St. Louis & Pacific Railway Company, which last-named company is now in possession of the same, being all of its railroad and property connected therewith, commencing in the city of Toledo, in the state of Ohio, and extending through the counties of Lucas, Henry, Fulton, Defiance and Paulding, in said state, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the state of Indiana, to and terminating at a point in the west line of State Line City, in said last-named county, and that said bonds are now a lien on such line, and the plaintiff entitled to enforce the same. That the said lien of said bonds is prior and superior to the rights, interests, estates claims and liens of the defendants in this action, and each of them, in and upon said railroad and property upon which said lien is hereby declared, but as to all that part of said railroad which is situated within the state of Ohio, such lien is inferior and subject to the two mortgages mentioned in the petition herein," one, the Toledo & Illinois mortgage for $900,000, and the other, the Toledo & Wabash mortgage for $1,000,000, as above described.

On the twenty-sixth day of April, 1882, all of the defendants, including George I. Seney, appealed from this decree to the District Court of Lucas County, Ohio.

On the twelfth day of April, 1883, there was filed in said District Court, and made part of the record, an "agreed statement of facts," signed by counsel for Compton, and by counsel for all of the aforesaid defendants. Among other things set out in said agreement will be found the paragraph covered by exhibit 36 above, to the effect that the plaintiff Compton was, at the commencement of

the litigation, and was then, the *bona fide* holder for value
1089 of the $150,000 equipment bonds in controversy. Upon this agreed statement of facts upon which the cause was to be heard, the District Court reserved the case to the Supreme Court of Ohio for final determination.

Neither in the answers of the several defendants filed in the cause while pending in the Court of Common Pleas, nor in the said agreed statement of facts assented to and signed by counsel for all the defendants and filed in the said district court, upon which the cause was therein heard and reserved to the Supreme Court, and upon which it was afterwards heard and decided in said Supreme Court of Ohio, is there any allusion made to the Tysen-Ham suit. Nor does any objection based on the Ham suit anywhere appear in behalf of the defendants, or either of them, in the progress of the Compton suit to the jurisdiction of the Court of Common Pleas, the District or the Supreme Court to hear and determine the controversy as between Compton and the said defendants.

On the twelfth day of May, 1888, at the January term of that year, the Supreme Court of Ohio rendered its decision. The case had been three times argued; twice after the decision by the United States Supreme Court in the Ham case.

On the eighteenth day of May, 1888, there was filed in the Court of Common Pleas of said county of Lucas, in the Compton cause a mandate from the Supreme Court of the State covering its judgment, upon the pleadings, proof, exhibits and "agreed statement of facts" filed in the court below, against the several defendants—to wit, the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis & Pacific Railway Company, James R. Jesup and Isaac H. Knox, as trustees, and Solon Humphreys and Daniel A. Lindley, as trustees. The judgment as entered was substantially identical with the original judgment of the Court of Common Pleas set out above, but contained an additional clause declaring that the lien of said equipment bonds "is
prior and superior to the rights, interests, estates, claims
1090 and liens of all persons and corporations who have derived any such rights, estates, claims and liens from, by or through the said defendants, or any of them, since the commencement of this action or otherwise," but that it was otherwise inferior, as found by the Court of Common Pleas, to the lien of the said first and second mortgages on the Ohio property. The judgment further directed that, in default of the payment to Compton by the defendants, or any of them, the sum of $339,920.40, then found "due on said bonds owned by the plaintiffs," within ten days from the entry of the decree, all the railroad and property upon which the lien of the equipment bonds was declared to exist, so far as it was situated in the state of Ohio, within the jurisdiction of the Court, should be sold, subject, however, to the lien of the two mortgages hereinbefore mentioned.

From this statement of the course of the Compton litigation in the Ohio state courts, it is apparent, if the judgment of the Supreme Court of that state remains in force, that the issues raised therein

touching the rights of James Compton as complainant to priority of lien as to the railway property in Ohio over the lien of consolidated mortgage in 1867, represented by the trustees, James R. Jesup and Isaac H. Knox, as defendants, and over the lien of the $2,000,000 mortgage of 1879, represented by Solon Humphreys and Daniel A. Lindley, must be considered as finally determined and settled by that judgment, not only as to the parties themselves, but as to all in privity with them.

In like manner, as between Compton, as complainant, and the Wabash, St. Louis & Pacific Railway Company, the then owner of the said property, and its predecessors therein, also named and appearing as defendants, that adjudication was conclusive and bound the parties.

In like manner it is apparent that as between Compton and the Farmers' Loan & Trust Company, as trustee under the first (Toledo & Illinois) mortgage on the said railway property situated in Ohio, and James F. Joy, as trustee and successor to Morgan, under
1091 the second (Toledo & Wabash) mortgage thereon, no controversy has arisen or can arise, for the reason that Compton always recognized and conceded the undoubted priority of those mortgages over the lien of the equipment bonds, and, at his own suit, the Supreme Court of Ohio has in its said judgment expressly found and affirmed the same.

The legal status of the several parties in their relations to each other and to the property having thus been fully determined in that adjudication, it follows that the mere transplanting of the parties or their assigns for the purposes of settlement to the present litigation should not, if the Ohio judgment remains in force, in the least change, alter or modify the respective priorities of the parties of those in privity with them as to property or proceeds.

It follows, also, that the Wabash Railroad Company, as the successor of the purchasing committee, Ashley, Joy, Welles and Hubbard, acquired privity as against Compton only such title to the railway property in Ohio as the company owning it and the trustees of the mortgage liens upon it could convey, and must, therefore, have taken it subject to his unpaid lien, as adjudged by the Supreme Court of Ohio, if in force, ordered by this court to be respected and paid by said purchasers.

It follows, also, that this court, in the event of sale to enforce the lien of Compton, would find the balances between the parties or their assigns already carefully adjusted by the judgment of the Supreme Court of Ohio, and would appropriate the property in Ohio to the payment of Compton, subject only to the recognized liens of the first and second mortgages.

The paramount question remains: Has James Compton a lien by virtue of the judgment of the Supreme Court of Ohio on his equipment bonds, notwithstanding the decision of the Supreme Court of the United States in the Ham case, which this court will enforce?

Upon a most attentive examination of the authorities cited
1092 on the very able briefs of counsel, and after a diligent consideration of the subject in the light of the facts, I am constrained to report my conclusion in the affirmative.

The dominant fact, as a conclusion both from the evidence and the law, is that Compton was never either an actual or *quasi* party to the record of the Tysen-Ham suit in the federal courts, while all the defendants in the latter suit were also defendants to the Compton litigation in the state courts, and neither objected to the jurisdiction of the state courts nor plead in bar the decree in the Ham suit as they might have done before the Supreme Court of Ohio rendered its final judgment.

In point of priority of time the Compton suit had been pending in the Court of Common Pleas nearly six months before the Tysen suit had been resurrected and reconstructed in the federal court as the Ham suit. Even admitting the very doubtful right of the United States Circuit Court to exercise such control over its decrees, after the lapse of the term as that exercised in this connection, the rule seems to be well settled that so far as the pendency of a suit can affect either a party to it or strangers, matter brought into it by an amendment dates not from the filing of the original bill, but from the time of the amendment.

The failure of the Wabash, St. Louis & Pacific Railway Company, of Jesup and Knox, trustees of the consolidated mortgage, of Humphreys and Lindley, trustees of the mortgage of 1879, to plead as defendants in the Compton suit, the pendency of the Ham suit, or the decree rendered in it, waived any defense growing out of it or the final decree rendered in it. In the present hearing they stand in precisely the relations to Compton that they occupied at the end of the Compton suit.

In view of the stipulation in the "agreed statement of facts" covering the good faith of Compton's acquisition and ownership of the bonds in controversy, over the signature of counsel for the railway company and for Jesup, Knox, Humphreys and Lindley as
1093 trustees, it is now too late for them or those in privity with them to attack Compton as an actor, or to assail the original Compton suit in the state courts as a mere device to evade the federal courts as such. But it is right to add that the evidence as a whole, while it may create a suspicion that such was the object, yet does not warrant any such conclusion.

Following these propositions, and even assuming the Tysen-Ham case to have been a representative suit, and that Compton was a quasi party to it, the jurisdiction of the Indiana federal court was, as a conclusion of law, in no sense exclusive, nor does it affect or bar the lien of Compton as decreed by the Supreme Court of Ohio. Both decrees are in full force—the federal decree, as against Ham and other holders of the equipment bonds, who were clearly parties to it, and the decree in the state court as in favor of Compton and the particular equipment bonds held by him. The conflict involves the construction of a state statute in which as a rule the conclusions of the State Supreme Court survive.

The only issues before me for determination are those raised in the pleadings between Compton, a defendant herein on the one side, and Jesup and Knox, trustees, on the other—defendants in the Compton suit, and complainant herein—and between Compton, com-

plainant then and defendant now, on the one side, and Humphreys and Lindley, trustees, on the other—defendants then and defendants now—who unite with Jesup and Knox in assailing the Compton decree as not in force. The trustees of the first and second Ohio mortgages were not, in fact, parties, and were not necessary parties to those issues. Holding the undoubted and recognized first liens, neither they nor their assigns were or are in position to raise any issue with Compton, nor have they ever done so on the record. There is nothing, therefore, to consider or to determine as to them, and as the issues offered should on the facts of record be determined in favor of Compton, whose judgment remains in full force, it follows that the purchasers, Ossian D. Ashley, James F. Joy,
1094 Edgar T. Welles and Thomas H. Hubbard, or their successor, the Wabash Railroad Company, in accordance with the foreclosure decree of March 23, 1889, subject to which they bought, should be ordered to pay the whole amount of the Compton judgment and lien, $339,920.40, with interest thereon at six per cent. per annum, from May 1, 1888, or in default thereof the court should sell the railroad and property in Ohio covered by it, and without requiring him to redeem from prior mortgages.

If asked to fix the priority of liens as between the Compton judgment and the several mortgages in controversy as to real estate embraced in terminal property at Toledo, the rule should be to regard such real estate as accessions to that division, and, as such, subject to the Compton lien and the underlying and successive general mortgages in the order of the respective priorities adjudged by the Supreme Court of Ohio.

The amounts respectively due on the first and second mortgages upon the railway from Toledo to State Line City, up to February 1, 1889, are as follows:

	Amount.	Interest.	Total.
Ohio—Toledo & Illinois:			
First Mortgage.....	$900,000 00	$166,950 00	$1,066,950 00
Funded Debt.....	72,000 00	13,356 00	85,356 00
Scrip.....	64,830 39	11,889 90	76,720 29
	$1,036,830 39	$192,195 90	$1,229,026 29
Toledo & Wabash:			
Second Mortgage..	$1,000,000 00	$331,100 00	$1,331,100 00
Funded Debt.....	105,000 00	31,752 00	136,752 00
Scrip.....	70,052 50	20,063 03	90,115 53
	$1,175,052 50	$382,915 03	$1,557,967 53
Total, First and Second.....	$2,211,882 89	$575,110 93	$2,788,993 82

	Amount.	Interest.	Total.
Indiana — Lake Erie, Wabash & St. Louis:			
First Mortgage	$2,500,000 00	$463,750 00	$2,963,750 00
Funded Debt.....	200,000 00	37,100 00	237,100 00
Scrip.....	180,362 83	33,078 54	213,441 37
1095	$2,880,362 83	$533,928 54	$2,414,291 37
Wabash & Western:			
Second Mortgage..	$1,500,000 00	$496,650 00	$1,996,650 00
Funded Debt.....	164,500 00	49,744 80	214,244 80
Scrip.....	97,853 00	28,025 10	125,878 10
	$1,762,353 00	$574,419 90	$2,336,772 90
Total, First and Second.....	$4,642,715 83	$1,108,348 44	$5,751,064 27
Grand Total—Ohio Mortgages.....		$2,788,993 82	
Indiana Mortgages.....		5,751,064 27	
			$8,540,858 09

All of which is respectfully submitted.

BLUFORD WILSON,
Special Master.

Dated June 9, 1891.

Endorsed thereon was the following, to wit: Filed June 11, 1891. Irvin Belford, Clerk.

Exceptions of Wabash Railroad Company to Report of Bluford Wilson.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

Consolidated Cause and Ancillary Causes.

JAMES R. JESUP and EDWARD H. DIXON, Plaintiffs,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In the Matter of the Claim of JAMES COMPTON.

And now come the Wabash Railroad Company, James F. Joy, and the purchasing committee, and except to the report filed
1096 herein by Bluford Wilson, master in chancery, on the eleventh day of June, 1891, and, by way of objection and exception to said report, state the following:

1. That in and by the order appointing the said master, there was referred to said master, in the matter of the claim of said Compton, the issues relating thereto, with instructions to said master simply to take and report, with all convenient speed, all of the evidence upon all of the matters involved in such issues and pertinent thereto; whereas the said master not only reported the evidence taken before him and pertinent to such issue, but also made and reported special findings of fact, and also conclusions of law relating to the lien of the said Compton.

2. The Wabash Railroad Company, James F. Joy and the purchasing committee further except to so much of said report as is contained between the top of the seventeenth page and the conclusion of said report, as being matters beyond the powers conferred upon the said master, and not forming any part of the evidence introduced before the master, under any issue made relating to the lien of said James Compton; and asks the court to strike that portion of the said report from the files of this cause.

3. The said Wabash Railroad Company, James F. Joy and the purchasing committee, without waiving any of their rights to the objections hereinbefore interposed, and exceptions taken to the action of the said master in finding facts and reporting conclusions of law, further except to the finding in the report of the said master on pages 28 and 29 of said report, in that the said master finds that the rights of the purchasing committee, Joy, Ashley, Welles and Hubbard, and of their successor, the Wabash Railroad Company, are determined by the decree of the United States Circuit Court for the Eastern
1097 District of Missouri; and that their rights are derived from the sale and purchase under said decree, and that the said purchasers must be held to be concluded by the judgment of the Supreme Court of Ohio; that they bought the said railroad property subject to the said judgment of the Supreme Court of Ohio; and also in that the said master held that the Circuit Court of the United States for the Eastern District of Missouri remitted the Compton claim and all questions arising under it by said decree to the ultimate decision and judgment of the Supreme Court of Ohio; whereas the said master should have found that the said purchasing committee, Joy, Ashley, Welles and Hubbard, in the purchase made by them on the fifteenth day of May, 1889, were not concluded by the judgment of the Supreme Court of Ohio in the said Compton case, and that they did not buy the said property subject to said judgment, and that they were not concluded as such purchasers by the decree entered in the United States Circuit Court for the Eastern District of Missouri, and that said Circuit Court of the United States did not remit to the Supreme Court of Ohio the lien of the said Compton claim and all questions arising thereunder, and that the said railroad company was likewise not concluded by the judgment of the Supreme Court of Ohio.

4. Said Wabash Railroad Company, James F. Joy and the purchasing committee, also excepts to said report in that the said master found that, at the time the said Compton suit was begun in the Common Pleas Court of Lucas County, Ohio, the Ham suit in the

United States Circuit Court for the District of Indiana was not pending, the same having been dismissed; whereas the master should have found that the said suit was begun on the thirteenth day of May, 1878, and was continuously prosecuted from said date, and that from the fifteenth day of May, 1878, the said suit was at all times, and until the rendition of the final decree therein, on the seventh day of May, 1888, within the jurisdiction and under the exclusive
1098 control of the United States Circuit Court for the District of Indiana.

5. The said Wabash Railroad Company, James F. Joy and the purchasing committee also except to the said report, in that the said master finds that the prior jurisdiction in the matter of determining the lien of the said equipment bonds, including the lien of the bonds of the said James Compton, was not in the United States Circuit Court for the District of Indiana, and that the said Compton was not concluded by the decree rendered in the said Ham suit; whereas the said master should have found that the prior jurisdiction in the matter of the determination of the lien of the entire issue of the said equipment bonds was in the Circuit Court of the United States for the District of Indiana and its final decree rendered therein on the seventh day of May, 1888, was a bar to all other proceedings on behalf of any holder of the said equipment bonds, whether named as a party to the said suit or not.

6. The said Wabash Railroad Company, James F. Joy and the purchasing committee also except to the said report in that the said master found that the said Compton was not a party to the said litigation in the United States Circuit Court for the District of Indiana or to the same litigation in the Supreme Court of the United States; whereas the said master should have found that the said Compton had made himself a party thereto by entering his appearance therein and filing a brief upon the argument of said cause in the Supreme Court of the United States and that the said Compton is therefore bound by the judgment entered in said United States District Court for the District of Indiana.

7. The said Wabash Railroad Company, James F. Joy and the purchasing committee also except to the said report in that the said master held that the Farmers' Loan & Trust Company and
1099 James F. Joy as trustee under the first and second mortgages upon the railway property in Ohio, or their successor in interest, the Wabash Railroad Company, have no controversy with the said Compton and that no controversy can arise between them and the said Compton; whereas the said master should have held that the said Wabash Railroad Company as the successor in interest of the Farmers' Loan & Trust Company and James F. Joy under the said first and second mortgages in Ohio, is entitled in this cause to controvert and contest the question of the existence of any lien on behalf of said equipment bonds in favor of said James Compton.

8. The said Wabash Railroad Company, James F. Joy and the purchasing committee also except to the said report in that the said master found that the said judgment of the Supreme Court of Ohio in favor of Compton remains in full force and may be enforced as

against the said Wabash Railroad Company and the said purchasing committee Ossian D. Ashley, James F. Joy, Edgar T. Welles and Thomas H. Hubbard, subject only as to the railway property in Ohio to the lien of the mortgages known as the Toledo & Illinois and Toledo & Wabash mortgages respectively, or the first and second mortgages in said state; whereas the said master should have found that the Farmers' Loan & Trust Company as trustee under the first mortgage executed upon the railway property in the state of Indiana and James F. Joy, as trustee and successor to Edwin D. Morgan under the second mortgage existing upon the property in the said state of Indiana were not parties to the said judgment in favor of said Compton nor in any way named therein, and were not, therefore, concluded by the said judgment; but, that by the articles of consolidation under which the said Compton claims an equitable lien on said property, the said first and second mortgage bonds in Indiana were included with the first and second mortgage bonds upon the said railway in Ohio, and an equitable lien was declared on behalf
1100 of the entire amount of said first and second mortgage bonds superior to any lien on behalf of said equipment bonds.

9. The said Wabash Railroad Company, James F. Joy and the purchasing committee also except to the said report in that the said master found that the said James Compton has a lien by virtue of the Supreme Court of Ohio, notwithstanding the decision of the Supreme Court of the United States and the judgment entered in the Circuit Court of the United States for the District of Indiana in the Ham case, and that this court in this cause will enforce the said judgment; whereas the said master should have found that the said Compton acquired no lien by virtue of the judgment of the Supreme Court of Ohio, and that this court ought not and will not enforce on his behalf, as against the decree and judgment of the Circuit Court of the United States for the District of Indiana, the said judgment of the Supreme Court of Ohio.

10. The Wabash Railroad Company, James F. Joy and the purchasing committee also except to the finding of the said master that it is too late for the said Wabash Railroad Company to question the good faith of Compton's acquisition and ownership of the bonds in question or to raise the question that the bringing of the original Compton suit in the state courts was a mere device to evade the jurisdiction of the federal courts as such; whereas the master should have found that the pretended sale of said bonds by Arents & Young to said James Compton was a mere colorable device to evade the jurisdiction of the federal courts, and that it was not a *bona fide* transaction between the parties and did not pass the title to the said bonds to the said James Compton but left the title therein with the said Arents & Young, and that said James Compton is not entitled to enforce the said judgment, and that Arents & Young are the real parties in interest.

11. The said Wabash Railroad Company, James F. Joy and
1101 the purchasing committee also except to the said report in that the said master finds, as a conclusion of law that, unless the said purchasing committee, Joy, Ashley, Welles and Hubbard, or

their successor, the Wabash Railroad Company, should pay the whole amount of the Compton judgment and lien, viz., $339,920.40, with interest thereon at six per cent. from May 1, 1888; in default thereof the court should sell the railroad property in Ohio, without requiring him to redeem from the prior mortgages; whereas the said master should have found that, the said Wabash Railroad Company being the owner thereof under foreclosure and sale under the two prior mortgages, the said Compton has only the right to come in and redeem by paying the amount of said prior mortgages, principal and interest.

DILLON & SWAYNE,
Attorneys for the Wabash Railroad Company, James F. Joy and the Purchasing Committee.

1102 *Exceptions of James Compton to Report of Bluford Wilson.*

On July 8, 1891, exceptions of James Compton to report of Bluford Wilson, special master herein, was filed in the clerk's office of said court, and reads and is as follows, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Exceptions taken by the defendant James Compton, to the report of Hon. Bluford Wilson, special master, appointed herein by an order made on the seventeenth day of August, 1889.

First exception. For that the said master has in and by his said report found and reported that "if asked to fix the priority of liens as between the Compton judgment, and the several mortgages in controversy as to real estate embraced in terminal property at Toledo, the rule should be to regard such real estate as accessions to that division and, as such, subject to the Compton lien and the underlying and successive general mortgages in the order of the
1103 respective priorities adjudged by the Supreme Court of Ohio;" whereas the said master ought to have found and reported that neither of the underlying mortgages in the Ohio property, to wit, the mortgage executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company and the mortgage executed by the Toledo & Wabash Railroad Company to Edwin D. Morgan, covered property acquired subsequent to the dates of their respective execution and delivery, and that the lien of said equipment bonds comprised in the Compton judgment is the first and best lien on all of the real estate acquired by the Toledo & Wabash Railway Company, subsequent to the date and delivery of the said mortgage executed to Edwin D. Morgan, and is the first and best lien on all the real estate acquired by the Toledo & Wabash Railway Company, in-

cluding as part of the latter the terminal property referred to, all of which real estate was specifically identified in the hearing before said master as appears by his said report.

Wherefore, the said James Compton excepts to the said master's report and prays that his exception be sustained.

JOHN H. DOYLE,
JOHN G. MILBURN,
Solicitors for Defendant, James Compton.

1104 *Stipulation as to Matters Pertaining to Decree on Issues of James Compton.*

On October 12, 1892, a stipulation was filed herein as of July 20, 1892, by order entered October 12, 1892, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

Consolidated Cause in Equity. Stipulation.

JAMES R. JESUP and EDWARD H. DIXON
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

It is stipulated herein by all the parties in interest First, That the affidavits of John G. Milburn and John H. Doyle, hereto attached, may be filed as of July 20, 1892, and be treated as if sworn to and filed prior to the entry of the decree herein. Second. That the record may show as of the date of July 20, 1892, that the defendant James Compton appeared in court and, upon the settlement of the decree, prayed the court to so frame its decree as to permit the said defendant to redeem the property in Ohio, embraced in the decree of the Supreme Court of Ohio, referred to in the answer of the said James Compton, from the two mortgages on the said Ohio property found by said decree to be prior to the lien of said Compton, known as the Farmers' Loan & Trust Company mortgage, and the Edwin D. Morgan mortgage, with the interest thereon, and from the amount due thereon, as found by the court in this cause, and upon such redemption to order a resale of said property.

And that said defendant James Compton offered to give a
1105 good and sufficient bond in the penal sum of one hundred thousand dollars, conditioned that if such resale was thus ordered and took place, that said property would sell, at such sale, for such sum as would pay all of the amount due on said prior mortgages as thus found by the court, including all costs and expenses attending such resale and the claim of said James Compton.

And that said James Compton also prayed to the court to decree that the net income of the property, since the purchase of the same and the delivery of possession thereof to the purchasers under the sale

made in pursuance of the decree of sale herein rendered shall be ascertained and the same be offset, so far as necessary, against the interests accruing on said mortgages since such delivery of possession of said property, in determining the amount to be finally found due under the mortgages held to be prior to the lien of said James Compton, and this stipulation may be entered as July 20, 1892. And that the court refused each and every one of the prayers aforesaid and thereupon entered the decree herein.

RUSH TAGGART,
Attorney for the Wabash R. R. Co.,
James F. Joy and Humphreys and Lindley.
JOHN H. DOYLE,
Solicitor for James Compton.

Dated October 10, 1892.

1106 *Order Made on Such Stipulation.*

On Wednesday, October 13, 1892, an order was made at chambers, in this cause, and reads and is in words and figures following, to wit:

Consolidated Cause.

JAMES R. JESUP and EDWARD H. DIXON
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

This day came the parties and submitted to the court their stipulation dated October 10, 1892, and filed herein. And it is therefore ordered and adjudged:

First. That the affidavits of John G. Milburn and John H. Doyle be filed as of July 20, 1892, and be treated as sworn to and filed as of said date prior to the entry of the decree herein on the twenty-first of July, 1892.

Second. It is further ordered and decreed that the record herein may show, as of date July 20, 1892, that the defendant appeared in court and upon the settlement of the decree prayed the court to so frame its decree as to permit the defendant to redeem the property in Ohio embraced in the decree of the Supreme Court of Ohio, referred to in the answer of said James Compton, from the two mortgages on the said Ohio property found by said decree to be prior to the lien of said Compton, known as the Farmers' Loan & Trust Company mortgage and the Edwin D. Morgan mortgage, with the interest thereon, and from the amount due thereon as found by this court in this suit. And upon such redemption to order the sale of
1107 the property. And also offered to give a good and sufficient bond to the satisfaction of the court in the penal sum of one hundred thousand dollars, which sum the stipulating parties admit to be sufficient, conditioned that if such re-sale was thus ordered and took place, that said property would sell at such re-sale for such sum as would pay all of the amount due on said prior mort-

gages as thus found by the court, including all costs and expenses attending such re-sale, and the claim of said James Compton.

And at the same time the said Compton prayed the court to decree that the net income of the said property, since the delivery of possession of the same to the purchasers under the sale made in pursuance of the decree heretofore rendered herein, be ascertained and the same set off so far as necessary against the interest accruing on said mortgages since the delivery of such possession in determining the amount to be paid in making said redemption by said Compton. And the court refused to grant said prayer or any part thereof.

And it is hereby ordered that this entry be recorded and made part of the record in this cause as of July 20, 1892, and preceding the entry of the decree herein on the claim of James Compton.

Approved October 12, 1892.

HOWELL E. JACKSON,
Circuit Judge.

1108 *Affidavit of John G. Milburn.*

On October 12, 1892, an affidavit of John G. Milburn was filed herein as of July 20, 1892, by order entered October 12, 1892, and reads and is in words and figures following, to wit:

In the United States Circuit Court for the Northern District of Ohio, Western Division.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
against
THE WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY ET AL., Defendants.

NORTHERN DISTRICT OF NEW YORK,
State of New York, County of Erie, ss:

I, John G. Milburn, being duly sworn, do depose and say: I am one of the attorneys and counsel for James Compton, who has been made a defendant in this suit. I have been one of his attorneys and counsel ever since the institution of the suit in the State Court of Ohio, which resulted in the decree in his favor rendered by the Supreme Court of Ohio referred to in the pleadings herein, and I have had continuous charge of all the various litigations involving the equipment bonds upon which such decree was obtained ever since that time.

The bonds were originally placed in my possession with instructions to institute whatever litigation was necessary, to enforce
1109 whatever lien there was in favor, and to direct all of such litigation. The most ample power and authority was conferred upon me to take whatever steps were necessary to enforce such bonds. Further, I was to keep watch over any litigations or proceedings that in any way affected such bonds, and it was left to me,

and has been so during all the years such litigations have been pending to decide whatever steps it was necessary to take for their protection. This, perhaps, unusual power was conferred upon me because my client desired to be relieved from giving his own time or attention to the matter, excepting such matters as I should bring to his attention. I occupied this position in relation to these equipment bonds at the time the final decree of foreclosure was entered in this case at Chicago, in which decree is the reservation as to the rights of said Compton. At that time the Hon. John H. Doyle, of Toledo, was associated with me as counsel, and is so now. The reservation was prepared with great care by us, was submitted to the opposing counsel and was approved by the court, and inserted in the decree as it is there found. At that time, and subsequently, it was fully considered by Judge Doyle and myself, as to what were the precise rights of Mr. Compton under that reservation, particularly with reference to the question whether it was necessary for him to bid at the foreclosure sale to protect his rights. I was decidedly of the opinion that it was not necessary for him to do so, and so was Judge Doyle. The basis of our opinion was the particular language of the reservation, which, to my mind, was absolutely inconsistent with the idea that Compton's rights would be transferred by the sale from the property to any surplus fund. I particularly relied upon the clear and explicit language of the reservation, that if such a decree of the Ohio Supreme Court in Compton's favor should be found to be in full force, the purchasers at the sale should pay the amount due thereon within ten days after the entry of the decree herein in favor of James Compton, and that in default of such payment this Court
1110 would resume possession of the property covered and affected by the lien of the defendant Compton and enforce such decree as it might render herein in his favor by resale of the property, or otherwise, as the court should direct. That clearly seemed to me to mean that if Compton's judgment was in force, there would be a decree for the whole amount due him in his favor, which the court would enforce by the sale of the property or in some equally effective way. There is not a word in the reservation to the effect that the rights of Compton should be transferred from the property to any surplus fund arising on the sale. If there had been any such language, I should certainly have made arrangements with my client to attend the sale and bid on the Ohio property up to such amount as would protect his interest.

It was by my advice and upon my construction of the reservation contained in the decree of the court, concurred in by Judge Doyle, that the defendant, Compton, did not attend the sale and had no bid made thereon in his favor and for his protection. Had I deemed such a step necessary for the protection of his rights, I was in a position to have made the necessary arrangements which would have secured a bid on the Ohio property that would have furnished a surplus fund sufficient for the payment of the amount due as found by the Ohio decree in favor of Mr. Compton. If the court or counsel had intended that, upon the sale occurring, any rights that Mr. Compton had in the property should be transferred to a surplus fund,

or that in the event of a decree in his favor the remedy afforded him was to be confined to the redemption of the prior liens, it would have been easy to state so explicitly in the reservation, and then I would not have been misled, but should have attended the sale in behalf of my client and produced a sufficient surplus fund.

In connection with Mr. Compton's claim, in another phase of it unconnected with this foreclosure suit, I had occasion to look into the value of, and what could be realized from the Ohio prop-
1111 erty, with the result that I had authoritative information that the value of the Ohio property was largely in excess of the liens prior to the equipment bonds and the amount found due Mr. Compton by the Ohio decree.

JOHN G. MILBURN.

Subscribed and sworn to before me this ninth day of September, A. D. 1892.

WM. JOHNSON,
Notary Public in and for Erie County, N. Y.

Affidavit of John H. Doyle.

On October 12, 1892, an affidavit of John H. Doyle was filed herein as of July 20, 1892, by order entered October 12, 1892, and reads and is in words and figures following, to wit:

In the United States Circuit Court, Northern District of Ohio, Western Division.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Affidavit.

STATE OF OHIO, *County of Lucas, ss:*

I, John H. Doyle, being duly sworn, do depose and say: I am one of the attorneys and counsel for James Compton, who has
1112 been made a defendant in this suit. I have been one of his attorneys and counsel since a short time after the rendition of the decree in the Supreme Court of the State of Ohio, and before the institution in this court of any proceedings to make him a party thereto, and from that time have continued to be associated with Mr. John G. Milburn, of Buffalo, New York, as such attorney and counsel, and kept in this position in relation to these equipment bonds at the time the final decree of foreclosure was entered in this cause at Chicago, in which decree is the reservation as to the rights of said Compton. I have read the affidavit of John G. Milburn, prepared to be filed herein, and all there is therein stated, after the

statement of my association with said Milburn, as counsel, is true, and I hereby reiterate, reassert and reaffirm all of the statements in that said affidavit, in relation to the position and reliance of counsel upon said decree and the reservation therein, and the rights of said Compton thereunder, as stated in said affidavit the same as if it was herein fully restated in the language in the said affidavit contained.

JOHN H. DOYLE.

Subscribed in my presence and sworn to before me this twelfth day of September, A. D. 1892.

FREDERICK B. WILLARD,
[SEAL.] *Notary Public, Lucas County, O.*

Decree Entered in Respect to Claim of James Compton.

(Printed *ante* p. 827.)

1113 *Opinion on Final Hearing of Issues of James Compton.*

Afterwards, to wit, on January 12, 1892, the opinion of Judges Jackson and Gresham on claim of James Compton was filed herein, and reads and is in words and figures following, to wit:

The United States Circuit Court for the Northern District of Ohio, Western Division. In Equity.

Consolidated and Ancillary Causes Pending on the Claim of James Compton.

JAMES R. JESUP and ISAAC H. KNOX ET AL.,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

Without setting out in detail the facts and questions presented on the claim of James Compton, we deem it sufficient to state our conclusions thereon, which are as follows, viz.:

1. That said Compton was in no way prevented or precluded from instituting or prosecuting his suit in the Ohio state courts against the Toledo, Wabash & Western Railway Company and others, made defendants therein, by either the pendency of the Ham (or Tysen) suit in the United States Circuit Court of Indiana, or by the judgment of the Supreme Court of the United States in said suit, denying the existence of any lien, legal or equitable, in favor of the equipment bonds issued by the Toledo & Wabash Railway Company (Railway Company *vs.* Ham, 114 U. S., p. 587, 588); Pomeroy's Remedies and Remedial Rights, secs. 396 and 399, and
1114 cases cited): First. Because he was not a party to that proceeding and did not appear therein; Second. Because that Ham suit was not, in its inception nor at the time Compton commenced his action in the state court, such a class suit, or so represen-

tative in its character as to bind him, without his being or becoming an actual party thereto; and, third, because if said Ham suit had been so representative in its character as that the decree of the Supreme Court therein could or would have concluded said Compton on the question of the lien of the "equipment bonds," neither the pendency of said suit nor the decree of the Supreme Court were ever interposed by the defendants to his suit in the state courts, either by way of abatement or in bar thereof, although ample time and opportunity so to do was afforded them (Grant *vs.* Ludlow, 8 Ohio St., 1; Davis *vs.* Mathews, 39 Ohio St., 45; Dimick *vs.* Revere Co., 117 U. S., 570).

Under such circumstances, the state courts having jurisdiction of both the parties and subject matter were entitled to proceed and determine the questions involved.

2. That the decree of the Supreme Court of Ohio in said Compton suit (Compton *vs.* Railway Co. *et al.*, 45 Ohio St., 592) affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, and declaring that said Compton's "equipment bonds," amounting with interest on May 1, 1888, to the sum of $339,820.40, constituted a valid and subsisting lien on the property, etc., of the Toledo & Wabash Railway Company, which by mesne conveyances, consolidation and foreclosure had passed into the hands, possession and control of defendants therein subsequent to 1862, and that said lien had priority over all mortgages executed by successor companies and interest acquired and held thereunder by defendants is a *conclusive adjudication* against all the defendants to said suit and their privies in estate or interest, of the amount, validity and priority of said Compton's claim upon the railroad and all property and the
1115 appurtenances thereto, originally owned by the Toledo & Wabash Railway Company (Cromwell *vs.* Sac. Co., 94 U. S., 352; Graham *vs.* Boston N. N. Co., 118 U. S., 101; Dimick *vs.* Revere Co., 117 U. S., 570; McElmoyle *vs.* Cohen, 13 Peters, 312).

3. That Compton's said lien was and is inferior and subordinate to four certain mortgages made and executed by the four separate constituent divisions which consolidated prior to 1862, and formed the Toledo & Wabash Railway Company, viz., a mortgage executed by the Toledo & Illinois Railway Company, September 8, 1853, to the Farmers' Loan & Trust Company, as trustee, to secure the payment of its bonds to the amount of $900,000; a mortgage executed by the old Toledo & Wabash Railway Company, October 15, 1858, to Edwin D. Morgan, trustee, to secure its issue of $1,000,000 bonds, a mortgage executed by the Lake Erie, Wabash & St. Louis Railroad Company, August 1, 1853, to the Farmers' Loan & Trust Company, as trustee, to secure its issue of $2,500,000 bonds, and a mortgage executed by the Wabash & Western Railroad Company, October 15, 1858, to Edwin D. Morgan, trustee, to secure its issue of $1,500,000 bonds. The priority of these several mortgages over the lien of his "equipment bonds" was conceded by Compton in the state suit; but, if the priority of lien created by said four mortgages had not been admitted by him, such priority is clearly established. Neither the trustee in said four mortgages, nor the beneficiaries therein, were

parties to Compton's suit in the state court; nor does the decree declaring the lien of his "equipment bonds" upon the railroad and its appurtenances of the Toledo & Wabash Railway Company and its priority over all liens and rights held by the several defendants to his suit, in any way affect said above-mentioned four mortgages, which were in full force pending his suit, and which have been foreclosed in the above-entitled consolidated cause.

4. That, by his petition in the state suit Compton prayed
1116 that his equipment bonds, and the moneys due and to become due thereon, might be adjudged and declared to be a charge and lien "upon all of the property of said defendant, the Wabash, St. Louis & Pacific Railway Company, that is situated in the states of Ohio and Indiana, so far as the same was owned by the Toledo & Wabash Railway Company at the time the property and franchises of the company last named were transferred to the Toledo, Wabash & Western Railway Company, and that the lien of said bonds on the property last mentioned has priority over all liens of all kinds now existing upon the same," except the four prior mortgages above referred to.

The Court of Common Pleas of Lucas County and the Supreme Court of Ohio adjudged that said "equipment bonds" were a lien upon the *entire line* of road indicated, both in Ohio and Indiana; and that such lien was prior and superior to the rights, interest, estates, claims and liens of each and all the defendants to the suit in and upon the railroad and property upon which said lien was declared. The decrees did not attempt to enforce said lien upon that portion of the line of road lying in Indiana, but directed a sale, in default of defendants paying the sum adjudged to be due Compton, of that portion of the railroad on which the lien was declared, situated in the state of Ohio and over which its courts had jurisdiction; such sale of the Ohio portion of the railroad to be made subject to said mortgages of September 8, 1853, and October 15, 1858, by the Toledo & Illinois Railroad Company and Toledo & Wabash Railway Company to the Farmers' Loan & Trust Company and to Edwin D. Morgan, respectively.

While the decree of the state court did not attempt to subject the property in Indiana, on which the lien of Compton's equipment bonds was declared, for the manifest reason that such property was not within the jurisdiction of the court, or within the reach of its process, still that adjudication, as against each and all the defendants to said suit, conclusively establishes, in this and all other courts, where said decree is sought to be enforced, Compton's priority of lien on that portion of the railroad, situated in Indiana. In other
1117 words, the courts of Indiana and of the United States, sitting in and for that state, will, upon Compton's application, enforce the Ohio decree in his favor in respect to the Indiana property, as against the defendants to his suit. The Ohio courts could have compelled the said defendants to give effect to said lien in Indiana (Lewis *vs.* Clark, 16 Howard, 13; Northern Indiana R. R. Co. *vs.* Michigan Central R. R. Co., 15 Howard, 243; Booth *vs.* Clark, 17

Howard, 332, 333, 334 and cases cited; Phelps *vs.* McDonald, 99 U. S., 308 and cases cited).

5. That Compton's suit in the state courts did not so impound the property on which he sought to have his equipment bonds declared a lien as to prevent this court from taking the actual possession and custody of the same during the pendency thereof. In the decree entered by this court on March 23, 1889, it is declared "that, at the time of the filing in this court of the original and amended and supplemental bills and the various cross-bills herein, said mortgaged railways, property and premises were in the possession of this court through its receiver, appointed by its order;" and such possession continued until the same was turned over to the purchaser under the sale directed by said decree (Cooper *vs.* Reynolds, 10 Wallace, 308).

It is also clear that Compton's suit and decrees therein did not in any way prevent or interfere with the foreclosure proceeding in this court under mortgages prior, as well as subsequent in dates and right to his equipment bonds. Notwithstanding these foreclosure proceedings, Compton after obtaining his decree in the Supreme Court of Ohio, could have proceeded with the execution thereof, by a sale of the Ohio property covered by his lien. This court declined to restrain him from so doing. He could have executed his decree as against the road in Ohio, without interfering with or disturbing this court's custody and possession of the same. If he had proceeded with the execution of his decree, he would have sold and purchased
1118 subject to the two mortgages made by the Toledo & Illinois Railroad Company and the Toledo & Wabash Railroad Company in 1853 and 1858, which were being foreclosed in this court, and in respect to which his lien and decree were subordinate. What would he have acquired by such execution of his decree? Nothing more than the rights or equity of redemption which the defendants to his suit held in the property.

6. That this court, having the rightful custody and possession of said railroad properties in Ohio and Indiana, under the proceedings to foreclose mortgages thereon, both prior and subsequent to the equipment bonds and the lien thereof declared in Compton's favor, was invested with proper authority, not only to sell the mortgaged premises, but to adjust all questions of priority of lien thereon, so far as the same were not settled by prior decisions of courts having jurisdiction and to distribute the proceeds of sale according to the rights and priorities of the respective lien claimants. Compton having failed to proceed, as he was at liberty to do, with the execution of his state decree, and being a lien claimant upon a portion of the mortgaged premises, situate in Ohio and Indiana, sought to be foreclosed, was properly brought before the court and made a party to the proceedings. Upon his coming into the court, the defendants to his suit in the state courts, and others who had succeeded to their rights, or were privies in estate to them, raised issues and questions with him as to the validity of his decree and the lien of his equipment bonds as against them, or the mortgage under which they claimed.

The Farmers' Loan & Trust Company, as trustees, under the mortgages executed in 1853 by the Toledo & Illinois Railroad Company

and Lake Erie, Wabash & St. Louis Company and James F. Joy, as successor trustee to Edwin D. Morgan, deceased, in the mortgages executed in October, 1858, by the old Toledo & Wabash Railroad Company and the Wabash & Western Railway Company were not parties to said issues with Compton and had no concern
1119 therein, the priority of lien of said four mortgages, executed by the four constituent companies, which consolidated to form the Toledo & Wabash Railway Company, being unquestioned by said Compton and all other parties to the foreclosure proceedings. When the decree of sale was passed on March 23, 1889, by the Circuit Courts of the Sixth and Seventh Circuits in the consolidated causes and foreclosure proceedings, the issues between Compton and those contesting the validity of his Ohio decree and the lien of his equipment bonds had not been determined, and said decree was, accordingly, made without prejudice to his rights, which were fully preserved, and were to be enforced by said courts, as might subsequently be determined. The reservations in the decree were not intended to adjudicate anything in Compton's favor, but merely to preserve his rights *"in the relation in which he now stands toward the mortgagees, parties hereto."* It was further provided that the court reserved the power and authority to resume possession of the property covered and affected by the said lien of Compton and enforce such decree as it might thereafter render in his favor *"by a re-sale of such property or otherwise as this court may direct."*

7. That the Ohio decree, having established the validity and priority of Compton's lien, as against all the parties defendant to his suit, the courts of the United States, having possession of the property covered and affected by his lien, under said foreclosure proceedings, pending herein, should recognize and enforce said lien, as against all those bound by the decree in his favor, viz.: the defendants to his suit in the state court, and those succeeding to their rights and title to the property of the Toledo & Wabash Railway Company. Compton's claim and priority of lien being thus established against all the parties to the foreclosure proceedings in this court, except the trustees and *"cestuis que trust,"* under the four above described mortgages of 1853 and 1858, and his rights having been reserved by the decree of sale, he is now entitled to the same measure of relief
1120 at the hands of the Court as would have been properly rendered him if his claim had been acted upon and determined when said decree of March 24, 1889, was passed. He was now entitled to nothing more and nothing less. What decree or relief was he then entitled to, and how may the same now be sub-tantially awarded him?

Under and in pursuance of said decree of March 25, 1889, foreclosing mortgages which were anterior to and superior to Compton's claim and lien, as well as mortgages subsequent and subordinate thereto, the property covered by said mortgages was sold on May 15, 1889. The sale was subsequently confirmed and possession given to the purchaser, or their assignee, the Wabash Railroad Company, the present owner, who has thereby succeeded to all the right, title and interest and estate of each and all the trustees and their respective

"cestuis que trust," in, to and under the several mortgages foreclosed. In so far as the purchasers, or present owner, acquired their title and estate in and to the property covered by Compton's claim and lien, under the four mortgages anterior in date and superior in lien, there is no pretense that he has any right to disturb such title or estate; nor has he any valid claim to have that sale set aside so as to afford him the opportunity or chance of a resale of the same. If his rights had been settled when the decree of sale was passed, effect would have been given to his lien by either providing that the surplus proceeds arising from the sale of the property covered by his lien, after paying or discharging prior liens thereon, should be paid over to him, or that he might redeem said prior mortgages, and then sell the property for the satisfaction of both the amount paid to redeem and of his own claim. As an equitable lien claimant has his right, as against the mortgages ahead of him, was either to redeem or take the chances of obtaining a surplus arising from the sale of the premises. It appears that no surplus over and above the mortgage debts having priority to his lien was realized from the sale of the property; so that there is no fund in the hands of the court or purchaser at the sale applicable to the payment of his lien.

1121 8. There being no fund arising from the sale with which to pay or apply on Compton's claim, the question is presented whether this court, under the reservations made in the foreclosure decree for the protection of his rights, should now resume possession of the property and order a resale thereof, or of that portion situated in Ohio, in order to give Compton an opportunity to bid thereon, or should he be allowed to redeem the same within a reasonable time, to be fixed by the court? It is earnestly insisted that this court should enforce the Ohio decree by ordering a resale of the property covered by the lien, situated in the state of Ohio. This mode of relief is not proper at the hands of this court, which had the undoubted right, in connection with the Circuit Court of the Seventh Circuit, to foreclose the four division mortgages which were ahead of Compton's lien, notwithstanding his decree and proceedings in the state court. Said Circuit Courts had also the right and jurisdiction to foreclose the mortgages subsequent in point of lien to his claim. The purchasers have succeeded to the title and estate under both classes of mortgages. Compton's equity or lien was superior to one set of said mortgages and inferior to the other. In respect to a sale of the property covered by the mortgages of the latter class he has no right to question the purchaser's title or demand a resale of all, or any portion of the mortgaged premises. All that he can rightfully or equitably claim now at the hands of this court is that, having a lien subordinate to some and superior to others of the mortgagees which have been properly foreclosed, he should be allowed to redeem from the purchaser, who has succeeded to the rights of the former, and, upon effecting such redemption, add or attach his claim thereto, and then sell for the whole, unless the mortgages subsequent to his lien, or those who have succeeded to their rights, should redeem from him.

This court, in connection with the Circuit Court for the Seventh Circuit, had jurisdiction over the property, both in Ohio and In-

diana, covered by Compton's lien and the four mortgages
1122 which antedated and were superior to his lien. The foreclosure sale covered and embraced the entire line which originally belonged to the Toledo & Wabash Railway Company, which issued the equipment bonds on which Compton's claim and lien was founded. That entire line of road was subject to the prior lien of the four above-mentioned underlying mortgages, which were also foreclosed. As against the purchaser of the property (the entire line of said road in both Ohio and Indiana) Compton can not be allowed to select and redeem detached portions thereof. He must redeem the whole or none. The Supreme Court of Ohio adjudged that, as against the defendants to his suit, Compton's lien was upon the entire line of said road, lying in both Ohio and Indiana. That court directed only a sale of that portion of the road situate in Ohio, because its execution process could extend no further. But this court and the Circuit Court of the Seventh Circuit, having full jurisdiction over the entire property, and having jointly and concurrently carried on said foreclosure proceedings and passed the decree of March 23, 1889, and having together heard and determined Compton's case, can award him such relief in respect to the entire road on which his lien rests, as he is deemed entitled to. The mortgage lien under the four above-mentioned mortgages of 1853 and 1858, having priority over Compton's lien, amounted, as shown by the decree of March 23, 1889, and by the report of the special master, Bluford Wilson, to the sum of $8,540,058.09, on February 1, 1889, and our conclusion is that he should be allowed to redeem the entire line of railroad formerly belonging to the Toledo & Wabash Railway Company, together with the equipment and terminals assigned thereto by the decree of March 23, 1889, upon paying or tendering payment to the Wabash Railroad Company, the present owner of said line and property, of said sum of eight millions five hundred and forty thousand and fifty-eight and 09-100ths dollars ($8,540,058.09), with interest thereon from February 1, 1889, together with the taxes and interest thereon, which said Wabash Railroad Company has paid upon
1123 the property since confirmation of the sale. Such redemption will be confined to the property of said Toledo & Wabash Railway Company "line," as passed to the purchaser under the foreclosure sale, but it will not cover or include additions thereto made by the purchasers or their assignees, the Wabash Railroad Company, since the sale (Collins *vs.* Riggs, 14 Wallace, 493; Allis *vs.* Insurance Company, 97 U. S., 144-146; Bradley *vs.* Snyder, 14 Ill., 263, and cases cited; Wood *vs.* Holland, 3 S. W., 739; Story's Equity Jur., Sec. 1023 and notes; Cholmy *vs.* Oxford, 2 Atkins, 267; Fell *vs.* Braum, 2 Bro. C. C., 278).

Compton will be allowed ninety days from the entry of the decree in conformity herewith on his claim or lien, within which to make and perfect said redemption, and, if not made within that time, his claim upon the property and every portion thereof will be forever barred. Should the redemption hereby allowed be made, then the purchasers at foreclosure sale, or the Wabash Railroad Company, as the successor to their title, will be allowed sixty days within which

to pay said Compton's entire debt upon the premises, including both the amount of his Ohio decree, with interest thereon, and the sum required to redeem, with interest thereon; and, in default of such payment to him, the premises will be resold at public auction, after being duly advertised for ninety days, to satisfy and discharge Compton's entire debt against the same (Smithetts *vs.* Harketh, L. N., 44 C. S., 161; Parker *vs.* Fuller, 1 Rup. & M., 656; Cloud *vs.* Hamilton, 3 Yerger, 81; Fulgham *vs.* Colton, 3 Tennessee Ct., 299; Edmiston *vs.* Lytle, 1 Paige, 641; Simmons *vs.* Taylor, 38 Fed. Rep. 682).

9. That the claim of Compton to priority of lien on certain terminal property at Toledo, Ohio, is not well founded. In the decree of March 23, 1889, the court found "that the parcels of real estate embraced in terminal properties and attached to the various divisions of said railway (Wabash, St. Louis & Pacific Railway Company) are to be regarded as *accessions* to said divisions, respectively,
1124 and are subject to the lien of the divisional and of the respective general mortgages, in the order of their respective priorities." We are not disposed to disturb this finding and adjustment, although Compton was not heard thereon when it was made, for the reason that, under the language employed in describing the property intended to be covered by and embraced in the mortgages of the Toledo & Illinois Railroad Company of 1853, and of the Toledo & Wabash Railroad Company of 1858, the terminals at Toledo, which Compton seeks to reach and subject to payment of his claim may fairly be treated and considered as *accessions* or *accretions* to the mortgage property, or as included in said mortgages, under the authority of Thompson *vs.* Whitewater Valley Co., 132 U. S., pp. 69-75; Harvis *vs.* Gunnell, 9 S. W., 376; Miller *vs.* Kendrich (N. J.), 13 Cent., 352; Farmers' Loan & Trust Co., *vs.* Bankers' & M. Teleg. Co., 119 N. Y., 15.

There is nothing in the reservations of the decree of March 23, 1889, which requires the court to order a resale of the property covered by Compton's equitable lien. That lien was in fact discharged by the foreclosure of the four mortgages ahead of it, and which foreclosure Compton had no right to interfere with or delay. The reservations in the decree of sale were not intended and cannot affect the purchaser's title acquired under those mortgages. We cannot properly, therefore, direct a resale without disregarding the prior right of said mortgagees and of the purchasers who have succeeded thereto. If we had the discretion so to do, it should not be exercised in his favor, for it does not appear that any larger sum could be obtained on a resale; it is not shown that it sold for an inadequate price, and Compton offers no guaranty or security that a resale will bring a larger amount and realize a surplus to which he would be entitled. It is not proper for the court to order resales as a matter of experiment, and thereby cast clouds upon the title of the purchasers or present owner. As stated by the Supreme Court in Robinson *vs.*
1125 Iron Railway Co., 135 U. S., 530, his failure "to offer to redeem is evidence that he does not think the property was

worth more than it brought at the sale." Besides, he was as free to bid at the sale already made as he would be upon a resale. Under such circumstances we give full effect to his equitable lien by allowing him to redeem the property upon the terms indicated.

If it is desired that the taxes paid by the Wabash Railroad Company since the sale, which Compton is required to refund with interest in redeeming, should be ascertained in advance; then a reference may be had to ascertain the same; and the time occupied in the execution of such reference will not be counted or included in the ninety days allowed for effecting redemption, as above provided. Should Compton fail, neglect or decline to redeem within the time and upon the terms above indicated and permitted, he will be taxed with the costs of the proceedings in this court upon his claim.

HOWELL E. JACKSON,
Circuit Judge, Sixth Circuit.
WALTER Q. GRESHAM,
Circuit Judge, Seventh Circuit.

1126 *Prayer for Appeal and Assignment of Errors.*

On October 13, 1892, an application for appeal and assignment of errors was filed herein, and reads and is in words and figures following, to wit:

In the United States Circuit Court, Northern District of Ohio, Western Division.

Consolidated Cause. Application for Appeal and Assignment of Errors.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

The defendant James Compton now prays the court to allow an appeal herein from the judgments, order and decree herein rendered upon the claim of said James Compton and the issues thereon, and to fix the amount of the bond for such appeal.

And the said defendant assigns the following errors in the record and proceedings herein, to wit:

First. The court erred in making and granting an order in this suit for service upon the said James Compton out of the district.

Second. The court erred in overruling the motion of the said James Compton, to set aside the service made upon him herein, in the District of Columbia, where the said James Compton resided, and whereof the said James Compton was a citizen at all times
1127 since the commencement in this court of any proceedings effecting the property involved herein.

Third. The court erred in granting an order for service on said

James Compton before any pleading was filed herein, affecting him or showing him to be a proper or necessary party hereto.

Fourth. The court erred in entertaining jurisdiction of the said James Compton upon the pleadings herein filed against him, when they were filed, the same showing that the court was without jurisdiction of the person of said James Compton, and without jurisdiction to grant the relief prayed for in said pleadings.

Fifth. The court erred in overruling the demurrer of James Compton to the amendment of the amended and supplementary ancillary bill of complaints herein, being the pleading of the complainant, making or seeking to make James Compton a party.

Sixth. The court erred in overruling the demurrer of the said James Compton to the amendment to the cross-bill of Humphrey and Lindley filed herein, being the pleading of said Humphrey and Lindley, making said James Compton a party and praying for relief against him.

Seventh. The court erred in its final decree as rendered herein, on said claim of the defendant, in not sustaining the report of Bluford Wilson, special master, and entering a decree accordingly.

Eighth. The court erred in its final decree herein on the claim of said James Compton in refusing to carry into effect the provisions of the decree of sale rendered herein, in reference to the claim of said James Compton, and under which the property was sold and the present owners obtained their title.

1128 Ninth. The court erred in its decree in requiring this defendant to redeem the said property from the prior liens before enforcing his decree obtained in the Supreme Court of Ohio.

Tenth. The Court erred in its decree on the claim of said defendant James Compton in refusing to allow this defendant to redeem from the liens on the Ohio property prior to his lien, and upon such redemption to order a resale of the property embraced in the decree of this defendant rendered by the Supreme Court of Ohio.

Eleventh. The court erred, after finding the lien of said James Compton, this defendant, to be in full force and valid, in not requiring the payment thereof within a reasonable time, or decreeing a sale of property, upon which his lien existed, to pay the same.

Twelfth. The court erred in interfering in any manner with the enforcement by this defendant of his decree obtained in the State Courts of Ohio.

Thirteenth. The Court erred in refusing to find that the defendant had the first liens upon all of the property in Ohio, obtained and acquired after the issue of this defendant's bond and the consolidation of 1865, set up in the pleadings herein, and set forth in the answers of this defendant, to which reference is made.

Fourteenth. The court erred upon the offering by this defendant to give a good and sufficient bond; that upon resale the property would bring enough to pay the prior mortgages and all costs of resale and the claims of this defendant, in not accepting said bond and ordering said resale.

Fifteenth. The court erred in refusing to ascertain the net earn-

ings of the property, since the delivery of possession of the purchasers under the sale made herein, and offsetting the same,
1129 so far as may be necessary, against the interest accruing on the liens prior to the lien of this defendant.

Sixteenth. The court erred in requiring this defendant to pay interest on said prior liens up to the date of redemption, irrespective of said net earnings or income from the property during the same period.

Seventeenth. The court erred in its decree on the claim of said James Compton, and the issues thereon, in imposing any conditions whatever upon his right to make a resale of the property after his lien was adjudicated to be valid and in full force.

Eighteenth. The court erred, after bringing this defendant into court against his protest, and compelling him to set up his claim, which the court found to be in full force and valid, in awarding all costs made on said claim and the issues thereon, including the master's fees, against this defendant in the said decree herein rendered.

Nineteenth. The defendant says there are other errors apparent in said record which, if not included in the above assignment, he prays may be inquired into and examined, and, if necessary, that he may hereafter be permitted to assign and specify the same.

JOHN G. MILBURN,
JOHN H. DOYLE,
Solicitors for James Compton.

1130 *Additional Assignment of Errors.*

Afterwards, on November 30, 1892, an additional assignment of errors was filed herein, and reads and is in words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Western Division.

Consolidated Cause.

JAMES R. JESUP and EDWARD H. DIXON
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY ET AL.

Additional assignment of error, by James Compton, to be added to and to be in addition to those already assigned.

1. The court erred in entertaining jurisdiction of this suit, the court being without jurisdiction for the following among other reasons:

That necessary parties to the suit, plaintiff and defendant, were citizens and residents of the same states, and that the same is disclosed by the bill and various answers and cross-bills filed herein, and no other ground of jurisdiction existed than the citizenship of the parties.

2. That, if James Compton was a necessary party to the suit, then his citizenship in the District of Columbia defeated the jurisdiction of the court; and, if not a necessary party, the court erred in bringing him in *in invitum*.

3. The court erred in overruling the demurrers filed by James Compton herein.

JOHN G. MILBURN,
JOHN H. DOYLE,
Solicitors for Complainant.

1131 *Allowance of Appeal.*

Afterwards, on December 1, 1892, an appeal was allowed in this cause, and reads and is as follows, to wit:

United States Circuit Court, Northern District of Ohio, Western Division.

In Equity. Consolidated Cause.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

The defendant James Compton having prayed an appeal herein from the orders, judgments and decrees entered herein on his claim; and from the final decree entered on the twenty-first of July, 1892, and having filed his assignment of errors, and having filed his bond for appeal, which has been approved by the Circuit Judge, it is ordered that said appeal be allowed, which is accordingly done.

AUGUSTUS J. RICKS,
United States District Judge, &c.

1132 On December 1, 1892, an order allowing an appeal in this cause was entered in the chancery order book of said court, and reads and is in words and figures following, to wit:

In Equity. No. 552.

JAMES R. JESUP and EDWARD H. DIXON, Trustees,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

James Compton, by his solicitors, now appeared in open court and prayed the court to allow an appeal from the judgment, order and decree made and entered herein upon the claim of said James Compton, and the issues presented upon such claim. And the court, being of the opinion and finding that such appeal is proper, and that said James Compton is entitled thereto, it is ordered that said appeal be,

and the same hereby is, allowed, and the court fixes the amount of bond for appeal at five thousand dollars.

Approved December 1, 1892.

HOWELL E. JACKSON,
Circuit Judge.

Appeal Bond and Approval.

Afterwards, on December 1, 1892, an appeal bond was filed herein, and reads and is in words and figures following, to wit:

1133 Know all men by these presents:

That we, James Compton, principal, and T. Henry Walter and Lewis Ginter, sureties, are held and firmly bound unto James R. Jesup and Edward H. Dixon, trustees, and the successor or successors of either of them in the trust; Solon Humphreys and Daniel A. Lindley, trustees, and the successor or successors of either of them; the Wabash Railroad Company and any other party to the suit hereinafter mentioned interested herein, in the full and just sum of five thousand dollars, to be paid to the said obligees above named, or either or any of them, or their certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fifteenth (15th) day of November, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately at a term of the Circuit Court of the United States for the Northern District of Ohio, Western Division, being the June term, 1892, in a suit depending in said court between the said James R. Jesup and Edward H. Dixon, trustees, complainants, and the Wabash, St. Louis & Pacific Railway Company and other defendants, and in which James Compton was made defendant, a decree was rendered on the issues presented as to the claim of said James Compton, and the said James Compton having obtained an appeal from said decree allowed by the court at the term aforesaid upon giving bond in the sum of "five thousand dollars," as provided by law, to the United States Circuit Court of Appeals for the Sixth Circuit of the United States.

Now, the condition of the above obligation is such that, if the said James Compton shall prosecute said appeal to effect and an-
1134 swer all costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] JAMES COMPTON.
[SEAL.] T. HENRY WALKER.
[SEAL.] LEWIS GINTER.

Sealed and delivered in the presence of
CHAS. W. DOWNING.
L. D. ALEXANDER.
J. M. V. HICKS.

The above bond is approved.

HOWELL E. JACKSON,
Circuit Judge,
AUGUSTUS J. RICKS,
District Judge, &c.

Toledo & Illinois R. R. First Mortgage.

(No. 18.)

EXHIBIT 70.

UNITED STATES OF AMERICA, STATE OF OHIO.

Mortgage and Convertible Bond.

The Toledo and Illinois Railroad Company.

No. —. $1,000.

Know all men by these presents:

That the Toledo & Illinois Railroad Company acknowledge themselves indebted to the Farmers' Loan & Trust Company of the city of New York, or bearer, in the sum of one thousand dollars, which sum said railroad company promise to pay on presentation of this bond to the holder thereof, at the office of the said Farmers' Loan & Trust Company in the city of New York, on the first day of
1135 August, in the year one thousand eight hundred and sixty-five, with interest thereon at the rate of seven per cent. per annum, semi-annually, on the first day of August and February in each year, until the said principal sum shall be paid, on presentation of the annexed interest warrants at the office of the said Farmers' Loan & Trust Company, and they hereby waive all benefit of valuation or assessment laws. The holder of this bond shall be entitled at any time within six years from the date hereof to convert the principal sum into the capital stock of the said railroad company at par ($50 per share), on the surrender of this bond, with the unpaid interest warrants annexed.

This bond is one of a series of nine hundred of like tenor, date and amount, the full and final payment of which, and the interest thereon, is secured by an indenture of mortgage dated September 8, 1853, on the said railroad, its furniture and franchises, executed and delivered to the said Farmers' Loan & Trust Company in trust, and duly recorded.

In witness whereof, the Toledo & Illinois Railroad Company have caused this bond to be attested in their behalf, and their corporate seal to be hereunto affixed, at their office in the city of Toledo, in the state of Ohio, this first day of August, one thousand eight hundred and fifty-three.

JOHN ROSS,
President.

[SEAL.]

Countersigned:
M. JOHNSON, *Treasurer.*

This is to certify that the above bond is included in a mortgage dated September 8, 1853, on the Toledo & Illinois Railroad, together with its furniture and the franchises of the company, executed to the Farmers' Loan & Trust Company, of the city of New York, in trust, and for the use and benefit of the holders of the obligations of the said railroad company of same tenor, date and amount, not exceeding in all nine hundred thousand dollars, with power
1136 therein contained to take possession of, use and sell the same or any part thereof, in case of sixty days' default in paying the interest or principal of said bonds or any of them, which mortgage has been recorded in the several counties in and through which said railroad is located.

D. D. WILLIAMSON,
President of the Farmers' Loan & Trust Company.

$35.

TOLEDO & ILLINOIS RAILROAD CO.

Interest warrant issued by the Toledo & Wabash Railway Company for thirty-five dollars, payable February 1, 1887, in the city of New York, to bearer, for six months' interest on Toledo & Illinois Railroad Company's bond for $1,000.
No.

J. N. DRUMMOND,
Secretary Toledo & Wabash Railway Company.

The following is stamped on the face of the bond:
For value received, it is hereby agreed between the Toledo & Wabash Railway Company and the holder of this bond that the time for the payment of the principal thereof shall be extended until August 1, 1890, provided the annexed coupons for interest issued by said company shall be paid when due.

1137 *Lake Erie, Wabash & St. Louis Railroad Company First Mortgage (Indiana).*

(No. 19.)

No. EXHIBIT 71. $1,000.

UNITED STATES OF AMERICA, *State of Indiana.*

Mortgage and Convertible Bond.

The Lake Erie, Wabash & St. Louis Railroad Company.

Know All Men by These Presents:
That the Lake Erie, Wabash & St. Louis Railroad Company acknowledge themselves indebted to the Farmers' Loan & Trust Com-

pany of the city of New York, or bearer, in the sum of one thousand dollars, which sum said railroad company promise to pay on presentation of this bond, to the holder hereof, at the office of the said Farmers' Loan & Trust Company, in the city of New York, on the first day of August, in the year one thousand eight hundred and sixty-five, with interest thereon at the rate of seven per centum per annum, semi-annually, on the first day- of August and February, in each year, until the said principal sum shall be paid, on presentation of the annexed interest warrants, at the office of the said Farmers' Loan & Trust Company, and they hereby waive all benefit of valuation or appraisement laws.

The holder of this bond shall be entitled, at any time within six years from the date hereof, to convert the principal sum into the capital stock of the said railroad company at par ($50 per share) on the surrender of this bond with the unpaid interest warrants annexed.

This bond is one of a series of twenty-five hundred of like tenor, date and amount, the full and final payment of which, and interest thereon, is secured by an indenture of mortgage, bearing even
1138 date herewith on the said railroad, its furniture and franchises executed and delivered to the said Farmers' Loan & Trust Company, in trust and duly recorded.

In witness whereof, the Lake Erie, Wabash & St. Louis Railroad Company have caused this bond to be attested on their behalf, and their corporate seal to be hereunto affixed at their office in the city of Lafayette, in the state of Indiana, this first day of August, one thousand eight hundred and fifty-three.

[SEAL.] A. W. S. WHITE, *President.*

Countersigned:

EDW. WHITEHOUSE, *Treasurer.*

This is to certify that the above bond is included in a mortgage bearing even date therewith on the Lake Erie, Wabash & St. Louis Railroad, together with its furniture, and the franchises of the company, executed to the Farmers' Loan & Trust Company of the city of New York, in trust and for the use and benefit of the holders of the obligations of the said railroad company, of same tenor, date and amount, not exceeding in all two million five hundred thousand dollars, with power therein contained to take possession of, use and sell the same, or any part thereof, in case of sixty days' default in paying the interest or principal of said bonds, or any of them; which mortgage has been recorded in the several counties in and through which said railroad is located.

D. D. WILLIAMSON,
President of the Farmers' Loan & Trust Company.

$35.

Lake Erie, Wabash & St. Louis Railroad Company.

Interest warrant issued by the Toledo & Wabash Railway Co. for thirty-five dollars, payable February 1, 1887, in the city of New

York, to bearer, for six months' interest on Lake Erie, Wa-
1139 bash & St. Louis R. R. Co.'s bond for $1,000.
No. —. J. N. DRUMMOND,
Secretary T. & W. R. W. Co.

The following is stamped on the face of the bond:

For value received, it is hereby agreed between the Toledo & Wabash Railway Company and the holder of this bond that the time for the payment of the principal thereof shall be extended until August 1, 1890, provided the annexed coupons for interest issued by said company shall be paid when due.

Agreement of Consolidation on the — Day of June, 1856.

(No. 5.)

EXHIBIT 5, COMPTON APPEAL RECORD.

Agreement of the Lake Erie, Wabash and St. Louis, and the Toledo and Illinois Railroad Companies for Consolidation.

Whereas, By virtue of an act of the legislature of the state of Indiana, approved February 23, 1853, and by virtue of an act of the legislature of the state of Ohio, passed April 10, 1856, providing for the consolidation of railroad companies of adjoining states in certain cases, and of the authority given by said acts, the Lake Erie, Wabash & St. Louis Railroad Company, a corporation existing in the state of Indiana, and the Toledo & Illinois Railroad Company, a corporation existing in the state of Ohio, whose lines of road meet and unite at the same point of the state line, between the states of Ohio and Indiana, have become empowered to consolidate their respective roads, property and capital stock so as to become but one corporation in fact; and

1140 Whereas, Said corporations have each, by their boards of directors resolved to consolidate their roads, property and capital stock, and for that purpose to enter into an agreement specifying the terms and conditions of such consolidation;

It is therefore mutually agreed, and this article of agreement witnesseth,

That the Lake Erie, Wabash & St. Louis Railroad Company, party of the first part, and the Toledo & Illinois Railroad Company, party of the second part, in consideration of the benefits and advantages which will enure to the stockholders of each of the respective parties to this agreement, will become consolidated, and upon the ratification of this agreement by the stockholders of each of the parties, and the election of directors as hereinafter provided, shall be deemed to be one corporation, and all the property of each of the parties as hereinafter provided shall be the property of such consolidated corporation.

It is hereby stipulated and agreed that the amount of capital stock

subscribed for and issued, and the value of the railroad appurtenances thereto, and other assets and property, as well as the amounts of indebtedness by mortgage, bonds or otherwise of each of the parties to this agreement, are in proper and equal rates to the value of the roads respectively made by said parties, or in the process of construction, and that in merging the parties into one consolidated corporation they are on an equal basis, and the capital stock of each of the parties hereto is declared to be of equal value, and in said consolidation shall be estimated at its par value; that is to say, at the rate of fifty dollars for each share thereof.

It is further agreed that the consolidation hereby made shall be perpetual during the corporate existence of the parties to this agreement, and the railroads and side tracks, and all rights of way and unfinished parts of either of said roads, all real estate and structures of every kind and description, all machinery and rolling stock, all tools and utensils, all balances of unpaid stock, all notes, ac-
1141 counts, claims and demands against any person or corporation, all the franchises, rights, privileges and immunities, and every other interest of whatever name or nature, now belonging to or which may have become vested in either or both of the parties to this agreement are all hereby assigned to, transferred and vested in such consolidated corporations without any other or further particular description of either or any part thereof as fully and to the same extent, and for the same purpose as either or both of the parties hereto do now or may hold, use and occupy the same, and said consolidated corporation shall have all the powers of said parties to sue for and defend and protect the roads, property, demands, franchises and rights so conveyed and transferred as above enumerated, which now belong to the parties hereto.

It is further stipulated and agreed, that the said consolidated company shall assume and be liable for all the outstanding bonds, indebtedness and other liabilities of each of the parties to this agreement, and all mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures and personal property, which may be described in such mortgage, as though the same had been originally executed by such consolidated corporation.

It is further agreed that the consolidated corporation hereby created shall be known and designated as the Toledo, Wabash & Western Railroad Company.

The officers of said corporation shall consist of a board of fifteen directors and such other officers as may be required by law, or as the directors may deem proper to appoint, all of whom shall hold their offices at the pleasure of the directors.

The directors shall be elected annually at such time as shall be provided after the first election, and hold their offices until their sucessors shall be elected and qualified.

Not less than two of the said directors shall be chosen from resi-
dents of the State of Ohio and not less than four from
1142 residents of the State of Indiana, and the residue from any state of the United States, inclusive of Ohio and Indiana.

The directors shall immediately, within a reasonable time after their election, enter upon the discharge of their duties, elect one of their number to be president of said corporation, appoint the other officers of the company, and do and perform all other acts which they shall deem necessary and proper for the management of the affairs of said corporation, not inconsistent with the laws of the states where the road of such corporation may be.

The capital stock of such consolidated corporation shall consist of nine millions of dollars, and shall be divided into shares of the amount of fifty dollars for each share. The shares how held by the stockholders in either of the corporations, parties to this agreement, shall be deemed and held to be shares of the capital stock of the consolidated corporation until the certificates therefor shall be exchanged for certificates of such corporation, and it shall be the duty of the secretary of said corporation to issue certificates of capital stock therein in lieu of certificates of the stock of the respective parties hereto, as fast as the same shall be returned to his office by the holders thereof.

The stockholders of the corporation shall meet either in person or by proxey once in each year at such time and place as shall be designated by the directors, and elect the directors as before provided; each share shall entitle the holder to one vote, and the persons having the highest number of votes shall be declared to be elected. The directors shall have power to issue any other and further bonds of said corporation to such an amount that the indebtedness of the company at any time shall not exceed the amount of the capital stock authorized by this agreement, and secure the same by way of mortgage or other lien upon the property and income of the corporation.

They may authorize any of the capital stock not subscribed, issued and taken to be subscribed for, issued and taken as preferred stock that may be entitled to dividends not exceeding ten per cent. per annum, if such dividends shall be earned over and above
1143 the interest of the debts — the company, sinking fund and operating expenses, and they may cause such stock to be sold to the subscribers therefor at such prices as the interest of the company may seem to require.

This article of agreement shall be signed by the presidents, attested by the secretaries and sealed with the official seals of each of the parties hereto. But the same shall not be deemed to be binding until it shall have been submitted to the stockholders of each of the parties hereto at a meeting to be called separately for the purpose of taking the same into consideration. If the holders of two-thirds of the stock, in person or by proxy, shall vote for the adoption of the same, then the secretary of each of the parties respectively shall certify the same on this article, and it shall be then deemed of binding force and obligation. After such ratification shall have been made by the stockholders, it shall be their duty at the same time to appoint a time and place so as to allow three weeks' notice to be given at each of the principal offices of the

parties hereto for the election of the directors as provided in this article of agreement.

In witness whereof, the Lake Erie, Wabash & St. Louis Railroad Company, party of the first part, and the Toledo & Illinois Railroad Company, party of the second part, have caused this article of agreement to be signed by the presidents and attested by the secretaries and sealed with the official seals of each of the parties hereto on this — day of June, A. D. 1856.

[L. S.] A. BOODY,
President Lake Erie, Wabash & St. Louis R. R. Co.

Attest:
JOHN N. DRUMMOND,
Secretary Lake Erie, Wabash & St. Louis R. R. Co.

[L. S.] W. BAKER,
President Toledo & Illinois R. R. Co.

Attest:
JOHN R. OSBORN,
Secretary Toledo & Illinois R. R. Co.

1144 *Indenture of Toledo & Wabash Railroad Company to Edwin D. Morgan of October* 12 *and* 15, 1858.

(No. 12.)

EXHIBIT 10, COMPTON APPEAL RECORD.

This indenture, made this fifteenth day of October, A. D. one thousand eight hundred and fifty-eight, between the Toledo & Wabash Railroad Company, a corporation duly constituted under the laws of the state of Ohio, of the first part, and Edwin D. Morgan, of the city and state of New York, — the second part, witnesseth:

Whereas, the said party of the first part hath ordered to be issued, for the purposes of said road, its bonds of the denomination of two hundred and fifty and five hundred and one thousand dollars each, to the amount of one million ($1,000,000) dollars, bearing interest at the rate of seven per centum per annum, payable semi-annually on the first day- of May and November in each year hereafter, at the office of Edwin D. Morgan, or such other place in the city of New York as may be designated, each of the said bonds made payable to the said Morgan or bearer on the first day of November, A. D. one thousand eight hundred and seventy-eight, at the same place, and each bond being authorized by a certificate signed by said Morgan.

Now, therefore, the said party of the first part, in order to secure the payment of the said bonds and interest, and in consideration of one dollar in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and for other sufficient considerations, have granted, sold and conveyed, and doth by these presents grant, sell and convey, to the said Morgan and his successor or suc-

cessors in the trust hereby created, all the following property
1145 of the party of the first part, viz., its railroad, made and to be made, the right of way and all lands occupied thereby, together with superstructures, depots, depot grounds and all buildings erected or to be erected thereon, and the rails, tracks, side-tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises and accessories of the said party of the first part, in the state of Ohio, and all the rolling stock, material, machinery, furniture and equipments of said road, being the same property described in the deed of Mathew Johnson, marshal and special master commissioner, to A. Boody, dated October 8, A. D. one thousand eight hundred and fifty-eight, and which was conveyed by said Boody to the party of the first part. But nothing herein contained is intended to prevent the said company from disposing of any property whatever which may not be immediately necessary to the operation of its said railroad.

To have and to hold the said premises and every part thereof, and all its increase, accessions and incidents, unto the said Morgan and to his successors severally in the said trust, upon the following trusts, viz., on failure to pay the interest or principal, or any part of either, according to the tenor of said bonds then, after sixty days from such default, upon request of the holder of such bond, the said trustee or his successors in the trust may enter and take possession of all or any part of said mortgaged property, and as the attorney in fact, or agent of the said party of the first part, by himself or his agents or otherwise, have, use and operate the said railroad, and make all the needful repairs, alterations and additions thereto, and after paying the expenses of such use, repairs, etc., apply the surplus to the payment of the interest and principal due and unpaid; or, on such default aforesaid, said trustee or his successors in the trust may, at his discretion, or on the written request of the holders of at least one-half of the outstanding bonds, shall proceed by judicial decree to foreclose and sell the road and property hereby mortgaged, and apply the proceeds to the payment of costs and to the
1146 interest and to principal remaining unpaid; on such sale all benefit of valuation or appraisement laws is hereby waived.

The sale to be made subject to the first mortgage made by the Toledo & Illinois Railroad Company, bearing date the eighth day of September, A. D. one thousand eight hundred and fifty-three, for nine hundred thousand dollars ($900,000), and subject to the following conditions in relation to said bonds, that is to say: Whereas, the payment of the said bonds and the interest thereon was and is part of the consideration of the said purchase, holding and controlling said road by the party of the first part; and whereas, the party of the first part has executed its bond for nine hundred thousand dollars to the said Edwin D. Morgan, as trustee, in behalf of the holders of said bonds of the Toledo & Illinois Railroad Company, and has executed a prior mortgage upon the property hereinbefore described, to secure said bonds, it is therefore declared to be the true intent and meaning of this instrument, as follows, viz.:

First. That this mortgage attaches to the property above described as subject to and subordinate to said bonds of the Toledo & Illinois Railroad Company, or said issue of nine hundred thousand dollars whether evidenced by said bond of the party of the first part, made to Edwin D. Morgan, trustee, etc.

Second. That the party of the first part, or any railroad company into which it may become a component part by consolidation, shall be chargeable with said sum of nine hundred thousand dollars, as a prior lien and encumbrance to any other debt thereon.

Third. That it shall be lawful for this company, or such consolidated company of which it may be a part hereafter, to substitute for the aforesaid bond for nine hundred thousand dollars, made to Edwin D. Morgan, trustee, other bonds of such denomination as may be deemed for the interest of such company to make, but not exceeding in amount or time of payment the terms and conditions of said bond; the object and intent of said bonds being to
1147 pay the aforesaid bonds of the Toledo & Illinois Railroad Company, and the same, when so made and substituted, shall have the same priority of lien to the bonds which are described in this mortgage as if they were now, in fact, made and particularly described and set forth in the mortgage made and executed prior to this indenture, and holders of all such bonds shall be subrogated to the rights and securities of the holders of such bonds issued by the Toledo & Illinois Railroad Company.

And it is hereby agreed, and these presents are upon this express condition, that, on payment of principal and interest upon said bonds, the estate hereby granted to said party of the second part shall cease, determine and become void, and the right of the premises and property hereby conveyed shall revert and revest in the said party of the first part, without any acknowledgment of satisfaction, conveyance, re-entry or other act.

And it is further mutually agreed that the said party of the second part, and their successors in said trust, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the wrongful acts of any agent employed by them when such agent is selected with reasonable discretion, and said party of the second part, and their successors in the trust, shall be entitled to receive proper compensation for any labor or service performed by them in the discharge of their trust in case they shall be compelled to take possession of said premises, or any part thereof, or manage the same.

In case of the death or disability of the said party of the second part the estate hereby granted shall not vest in his legal representatives, but shall, as to said party, cease and determine, and said party of the first part shall proceed at once to appoint a successor to said trust, and in the event of a failure to appoint for a term of sixty days, then, upon the application of the holders of said bonds to the amount of three hundred thousand dollars, it shall be lawful for the person being at the time judge of the Common Pleas of the county of Lucas, and state of Ohio, to appoint a successor

to said trust, who shall have the same privileges and duties
1148 in regard to said trust named herein at the execution of this indenture.

In witness whereof, the party of the first part hath caused the presents to be signed by its president, countersigned by its secretary, and the corporate seal of said company to be affixed hereto, at Toledo, in the state of Ohio, this day and year above written.

[SEAL.] JOHN OSBORN, *President.*

Countersigned:
JOHN DRUMMOND, *Secretary.*

In presence of:
CALVIN BULLOCK.
EDWARD BISSELL, JR.

STATE OF OHIO, *Lucas County, ss:*

Be it remembered that on this eighteenth day of October, A. D. 1858, before me, the undersigned, a notary public, within and for the county of Lucas aforesaid, personally came the above-named John R. Osborne, president and John N. Drummond, secretary of the Toledo & Wabash Railway Company, and severally acknowledged that, as such, they signed the foregoing instrument, and affixed thereto the corporate seal of said company, in pursuance of a resolution of the board of directors of said company, and that the foregoing is the act and deed of said company for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[SEAL.] EDWARD BISSELL, JR.,
Notary Public.

Recorded October 20, 1858, in volume 12, page 263, Lucas county, Ohio; also in other counties along the line.

1149 *Indenture of Wabash & Western Railroad Company to Edwid D. Morgan, on October 12 and 15, 1858.*

(No. 14.)

EXHIBIT 11, COMPTON APPEAL RECORD.

This indenture, made this fifteenth day of October, A. D. eighteen hundred and fifty-eight, between the Wabash & Western Railway Company, a corporation duly constituted under the laws of the state of Indiana, of the first part, and Edwin D. Morgan, of the city and state of New York, of the second part, witnesseth:

Whereas, the said party of the first part hath ordered to be issued for the purposes of said railway its bonds of the denomination of one hundred, five hundred and one thousand dollars each, to the

amount of fifteen hundred thousand dollars, bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year hereafter, at the office of Edwin D. Morgan, or such other place in the city of New York as may be designated; each of said bonds bearing even date herewith, and made payable to the said Morgan or bearer on the first day of November, A. D. eighteen hundred and seventy-eight, at the same place, and each bond being authenticated by a certificate signed by said Morgan: Now, therefore, the said party of the first part, in order to secure the payment of said bonds and interest, and in consideration of one dollar in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for other sufficient consideration, hath granted, sold and conveyed, and doth by these presents sell and convey to said Morgan, his successor or successors in the said trust hereby created, all the following property of the party of the first part, viz.: Its railroad, made and to be made, the right of way and all the land occupied thereby, together with all the superstructure, depots, depot grounds and buildings erected or to be erected thereon, and the rail, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges and franchises of the said party of the first part in the state of Indiana, and all the rolling stock, materials, machinery, furniture and equipments of the said road, being the same property described in the deed of John L. Robinson, marshal and commissioner, to A. Boody, dated October 5, eighteen hundred and fifty-eight, and conveyed by A. Boody to the party of the first part. But nothing herein contained is intended to prevent said company from disposing of any property whatsoever, which may not be immediately necessary with the operation of its said railroad. To have and to hold the said premises, and every part thereof, and all the increase, accessions and incidents, unto said Morgan, and his successors, severally in the said trust, upon the following trust, viz.:

On failure to pay the interest or principal, or any part of either, according to the tenor of said bond, then, after sixty days from said default, upon request of the holder of such bonds, the said trustee, or his successors in the trust, may enter and take possession of all or any part of the said mortgaged property, and as the attorney in fact or agent of the party of the first part, by himself or his agents or otherwise, have, use and operate the railroad, and make all the needful repairs, alterations and additions thereto, and after paying the expenses of such use, repairs, etc., apply the overplus to the payment of the interest due and unpaid, and, after that, the principal; or on such default aforesaid, the trustee, or his successors in the trust, may, at his discretion, or on the written request of the holders of at least one-half of the outstanding bonds, shall proceed, by judicial decree, to foreclose and sell the road and property hereby mortgaged, and apply the proceeds to the payment of the costs, and to the interest and principal remaining unpaid; on such sale all benefit of valuation and appraisement laws is waived, the sale to be made subject to the first mortgage made by the Lake Erie, Wabash

& St. Louis Railroad Company, bearing date the first day of
1151 August, eighteen hundred and fifty-three, for two million five hundred thousand dollars, and subject to the following conditions in relation to the said bonds; that is to say:

Whereas, the payment of said bonds and the interest thereon was and is a part of the condition of the purchasing, holding and controlling said road by said party of the second part; and

Whereas, the said party of the first part has executed its bond for two million five hundred thousand dollars to the said Edwin D. Morgan, as trustee, in behalf of the holders of said bonds of the Lake Erie, Wabash & St. Louis Railroad Company, and has executed a prior mortgage upon the property hereinbefore described, to secure said bonds, it is therefore declared to be the true intent and meaning of this instrument as follows, viz.:

First. That the mortgage attaches to the property above described and subject and subordinate to said issue of two million five hundred thousand dollars, whether evidenced by said bonds of the Lake Erie, Wabash and St. Louis Railroad Company, or said bonds of the party of the first part made to Edwin D. Morgan, as trustee.

Second. That the party of the first part, or any railroad company of which it may become a component part by consolidation, shall be chargeable with said sum—two million five hundred thousand dollars—as a prior lien and encumbrance to any other debt thereon.

Third. That it shall be lawful for this company, or such consolidated company of which it may be a part hereafter, to substitute for the aforesaid bond of two million five hundred thousand dollars, made to Edwin D. Morgan, trustee, etc., other bonds of such denomination as may be deemed for the interest of said company to make out, not exceeding in amount and time of payment the terms and conditions of said bonds, the object and intent of such bonds being to pay the aforesaid bonds of the Lake Erie, Wabash & St. Louis Railroad Company, and the same, when so made and sub-
1152 stituted, shall have the same priority of lien to the said bonds which are described in this mortgage as in fact made and particularly set forth in the mortgage made and executed prior to this indenture, and the holders of all such bonds shall be subrogated to the rights and security of the holders of said bonds issued by the Lake Erie, Wabash & St. Louis Railroad Company; and it is hereby agreed, and these presents are upon the express condition, that, on payment of the principal and interest of said bonds, the estate hereby granted to the party of the second part shall cease, determine and become void, and the right of the premises and property hereby conveyed shall revert to and revest in the party of the first part without any acknowledgment of satisfaction, reconveyance, reentry or other act, and it is also further mutually agreed that the said party of the second part, and successors in said trust, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the wrongful acts of any agents employed by him, when such agent is selected with reasonable discretion, and that said party of the second part and his successors in said trust shall be entitled to receive proper compensation for any

labor or service performed by them in discharge of said trust, in case they shall be compelled to take possession of said premises, or any part thereof, or manage the same. In case of the death or disability of said party of the second part, the estate hereby granted shall not rest in his heirs or legal representatives, but shall, as to said party, cease and determine, and the party of the first part shall proceed at once to appoint a successor to said trust, and in the event of a failure to appoint him for the term of sixty days, then, upon application of holders of said bonds to the amount of five hundred thousand dollars ($500,000), it shall be lawful for the person being at the time Judge of the Circuit Court of Tippecanoe County, Indiana, to appoint a successor to said trust, who shall have same rights, privileges and duties in regard to said trust named herein at the execution of this indenture.

1153 In witness whereof, the party of the first part hath caused these presents to be signed by its president, countersigned by its secretary, and the corporate seal of the company to be affixed hereto, in La Fayette, in the State of Indiana, this fifteenth day of October, eighteen hundred and fifty-eight.

[SEAL.] A. BOODY, *President.*

JOHN N. DRUMMOND, *Secretary.*

In presence of
L. TILTON,
JOSEPH S. GRAMINS.

STATE OF OHIO, *Cuyahoga County, ss:*

Be it remembered that on this 14th day of October, A. D. eighteen hundred and fifty-eight, before me, the subscriber, a notary public within and for the county aforesaid, personally came the above-named A. Boody, president of the Wabash & Western Railway Company, and acknowledged the foregoing instrument to be the act and deed of said company, and that the same was executed by him in that behalf.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[SEAL.] JOSEPH S. GRAMINS,
Notary Public.

STATE OF OHIO, *Lucas County, ss:*

On the eighteenth day of October, A. D. eighteen hundred and fifty-eight, before me, the subscriber, a notary public in and for said county, personally appeared John N. Drummond, secre-

1154 tary of the Wabash & Western Railway Company, who acknowledged that he countersigned the foregoing instrument as such secretary, by order of the board of directors of said company, and that he affixed the corporate seal thereto by like order of said board for the uses and purposes therein expressed, and that the same is the act and deed of said company.

[SEAL.] EDWARD BISSELL, JR.,
Notary Public.

Consolidated Agreement of Wabash & Western Railroad Company with Toledo & Wabash Railroad Company.

(No. 16.)

EXHIBIT 14, COMPTON APPEAL RECORD.

Consolidation Agreement.

Wabash & Western Railway Co. with Toledo & Wabash Railroad Co.

Whereas, by virtue of an act of the legislature of the state of Indiana, approved February 23, 1853, and by virtue of an act of the legislature of the state of Ohio, passed April 10th, 1856, providing for the consolidation of railroad companies of adjoining states in certain cases, and by the authority given by said acts the Wabash & Western Railway Company, a corporation existing in the state of Indiana, and the Toledo & Wabash Railroad Company, a corporation existing in the state of Ohio, whose lines of road meet and unite at the same point of the state line between the states of Ohio
1155 and Indiana, have become empowered to consolidate with their respective roads, property and capital stock, so as to become but one corporation in fact; and

Whereas, said corporations have, by their boards of directors, resolved to consolidate their roads, property and capital stock, and for that purpose to enter into an agreement specifying the terms and conditions of such consolidation;

It is, therefore, mutually agreed, and this article of agreement witnesseth:

That the Wabash & Western Railway Company, party of the first part, and the Toledo & Wabash Railroad Company, party of the second part, in consideration of the benefits and advantages which will ensue to the stockholders of each of the respective parties to this agreement, will become consolidated, and upon the ratification of this agreement by the stockholders of each of the parties as hereinafter provided shall be the property of such consolidated corporation. It is hereby stipulated and agreed that the amount of the capital stock subscribed for and issued, and the value of the railroad's appurtenances thereto, and other assets and property, as well as the amounts of indebtedness by mortgage bonds or otherwise, by each of the parties to this agreement, are in proper and equal rates to the value of the roads respectively made by said parties, or in the process of construction, and that in merging the parties into one consolidated corporation they are on equal basis, and the capital stock of each of the parties hereto is declared to be of equal value, and in said consolidation shall be estimated at its par value; that is to say, at the rate of fifty dollars for each share thereof.

It is further agreed that the consolidation hereby made shall be perpetual during the corporate existence of the parties to this agreement, and the railroads and sidetracks, and all rights of way and unfinished parts of either of said roads, all real estate and structures

of every kind and description all machinery and rolling stock, all tools and utensils, all balances of unpaid stock, all notes, accounts, claims and demands against any person or corporation, all
1156 the franchises, rights, privileges and immunities, and every other interest of whatever kind or nature now belonging to or which may have become vested in either or both of the parties to this agreement, are all hereby to be transferred and vested in such consolidated corporation without any other or particular description of either or any part thereof, as fully and to the same extent and for the same purpose as either or both the parties hereto do now, or may hold, use and occupy the same, and said consolidated corporation shall have all the powers of said parties, to sue for, and defend and protect the roads, property, demands, franchises and rights so conveyed and transferred as above enumerated which now belong to the parties hereto.

It is further stipulated and agreed that the said consolidated company shall assume, and be liable for, all outstanding bonds, indebtedness and other liabilities of each of the parties to this agreement, and all mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation.

It is further agreed that the consolidated corporation hereby created shall be known and designated as the Toledo & Wabash Railway Company.

The officers of said corporation shall consist of a board of fifteen directors and such other officers as may be required by law, or as the directors may deem proper to appoint, all of whom shall hold their offices at the pleasure of the directors.

The directors shall be elected annually at such times as shall be provided after the first election, and hold their offices until their successors shall be elected and qualified. Not less than two of the said directors shall be chosen from residents of the state of Ohio, and not less than four from residents of the state of Indiana, and the residue from any state of the United States, inclusive of Ohio and Indiana. The directors shall immediately, or within a reasonable time after their election, enter upon the discharge of their
1157 duties, elect one of their number to be president of said corporation, appoint the other officers of the company and do and perform all other acts which they shall deem necessary and proper for the management of the affairs of said corporation not inconsistent with the laws of the states where the roads of the corporation may be.

The stockholders of the corporation shall meet either in person or by proxy once in each year at such time and place as shall be designated by the directors, and elect the directors as before provided; each share shall entitle the holder to one vote, and the person having the highest number of votes shall be declared to be elected.

The directors shall have the power to issue any other and further bonds of said corporation to such an amount that the indebtedness of the company at any time shall not exceed at any time the amount of the capital stock authorized by this agreement, and secure the

same by way of mortgage or lien upon the property and income of the corporation.

They may authorize any of the capital stock not subscribed, issued and taken to be subscribed for, issued and taken as preferred stock that may be entitled to dividends not exceeding ten per centum per annum, if such dividends shall be earned over and above the interest of the debts of the company, sinking fund and operating expenses, and they may cause such stock to be sold to the subscriber therefor at such price as the interests of the company may seem to require.

The capital stock of such consolidated corporation shall consist of eight millions of dollars and shall be divided into shares of the amount of fifty dollars for each share.

The stock now held by stockholders in either of the corporations, parties to this agreement, shall be deemed and held to be shares of the capital stock of the consolidated corporation, until the certificates thereof shall be exchanged for certificates of such corporation, and it shall be the duty of the secretary of such corporation to issue certificates of the stock of the respective parties hereto as fast
1158 as the same shall be returned to his office by the holders thereof.

This article of agreement shall be signed by the president, attested by the secretary, and sealed with the official seals of each of the parties hereto.

But the same shall not be deemed to be binding until it shall have been submitted to the stockholders of each of the parties hereto at a meeting to be called separately for the purpose of taking the same into consideration. If the holders of two-thirds of the stock, in person or by proxy, shall vote for the adoption of the same, then the secretaries respectively shall certify the same on this article, and it shall then be deemed of binding force and obligation.

After such ratification shall have been made by the stockholders it shall be their duty at the same time to appoint a time and place so as to allow three weeks' notice to be given at each of the principal offices of the parties hereto for the election of the directors as provided for in this article of agreement.

In witness whereof, the Wabash & Western Railway Company, party of the first part, and the Toledo & Wabash Railroad Company, party of the second part, have caused this article of agreement to be signed by the presidents and attested by the secretaries, and sealed with the official seals of each of the parties hereto, on the seventh day of October, A. D. 1858.

[SEAL.] A. BOODY,
President Wabash & Western Railway Company.

Attest:
JNO. N. DRUMMOND,
Secretary Wabash & Western Railway Company.

[SEAL.] JNO. R. OSBORN,
President Toledo & Wabash Railroad Company.

Attest:
JNO. N. DRUMMOND,
Secretary Toledo & Wabash Railroad Company.

1159 Approved by the stockholders of the Toledo & Wabash Railroad Company, November 1, 1858.

Approved by the stockholders of the Wabash & Western Railway Company, November 3, 1858.

Articles of Consolidation, Toledo & Wabash Railway, Great Western Railway Company of '59, Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company.

(No. 17.)

EXHIBIT 23.

Articles of Consolidation.

(Printed *ante*, p. 387.)

Stipulation.

In the Circuit Court of Appeals of the United States, Sixth Circuit, Western Division.

JAMES R. JESUP and EDWARD H. DIXON, Complainants,
against.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.

It is hereby stipulated that the following papers only, contained in the transcript of the record in this suit filed in the clerk's
1160 office *on* the Circuit Court of Appeals for the — Circuit on the appeal taken herein by James Compton need be printed:

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Amendment to amended and supplemental bill relating to James Compton	253
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It is further stipulated that either party may refer on the appeal to any other paper contained in the transcript of record; and that there shall also be inserted in the printed volume a copy of the index to the transcript of record.

Dated February 4, 1893.

JOHN G. MILBURN,
Solicitor for James Compton.
RUSH TAGGART,
Solicitor for Wabash Rd. Co., James F. Joy et al.
HENRY CRAWFORD,
Solicitor for Humphreys and Lindley.
JUDSON HARMON,
Solicitor for James Compton.

1163 ADELBERT COLLEGE OF WESTERN RESERVE UNIVERSITY
vs.
THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY ET AL.

EXHIBITS TO AGREED STATEMENT OF FACTS.

EXHIBIT NO. 1 TO AGREED STATEMENT OF FACTS, PARAGRAPH NO. 1.

EXHIBIT 1.

Know all men by these presents that we, the undersigned, being desirous of forming a corporation for the purpose of constructing and owning a railroad from the city of Toledo, in the county of Lucas and state of Ohio, to the west line of the state of Ohio in a general direction towards the town of Fort Wayne, in the state of Indiana, do hereby adopt articles of association and incorporation as follows, viz.:

1. We, the undersigned, whose names are hereunto subscribed, hereby organize, form and become a corporation and body corporate under and in pursuance of an act of the general assembly of the state of Ohio, entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, for the purpose of constructing, owning and maintaining a

railroad from the city of Toledo, in the state of Ohio, in a direction towards the town of Fort Wayne, in the state of Indiana, to a point in the west boundary line of said state of Ohio, in the township of Harrison, in the county of Paulding, in said state of Ohio.

2. Said corporation shall be called and known by the name and style of the Toledo and Illinois Railroad Company and shall
1164 continue one hundred years from the day of date hereof.

3. The capital stock of said corporation deemed by the undersigned necessary to construct said railroad shall be, and is hereby fixed at five hundred thousand dollars and shall consist of and be divided into ten thousand shares of fifty dollars each.

4. The said railroad shall be constructed from the city of Toledo through the counties of Lucas, Henry, Fulton, Defiance and Paulding or parts of said counties, to the west boundary line of said state of Ohio, in the township of Harrison, in the county of Paulding aforesaid, in a general direction towards the town of Fort Wayne, in the state of Indiana.

5. The number of directors to manage the business and affairs of said corporation shall be, and is hereby fixed at, seven.

In witness whereof, we have hereunto affixed our hands and seals at Toledo, in the county of Lucas, this twentieth day of April, A. D. 1853, thereby certifying that we agree upon and adopt the articles of incorporation hereinabove contained.

ELIAS B. HOLMES.	[SEAL.]
JOEL RATHBONE.	[SEAL.]
A. BOODY.	[SEAL.]
EDWARD WHITEHOUSE.	[SEAL.]
I. C. COTTON.	[SEAL.]
M. JOHNSON.	[SEAL.]
JNO. ROSS.	[SEAL.]
WARREN COLBURN.	[SEAL.]
WILLIAM BAKER.	[SEAL.]
JOHN R. OSBORN.	[SEAL.]

STATE OF OHIO, *Lucas County:*

Be it remembered that on this 20th day of April A. D., 1853, before me, justice of the peace in and for said county, personally appeared Elias B. Holmes, Joel Rathbone, A. Boody, Edward Whitehouse, I. C. Cotton, M. Johnson, John Ross, Warren Colburn,
1165 William Baker and John R. Osborn, who are known to me to be the same persons described and who signed and executed the foregoing instrument, and severally acknowledged that they had executed the same for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand at Toledo, in said county of Lucas, the day and year aforesaid.

ANDREW YOUNG, *J. P.*

STATE OF OHIO, *County of Lucas, ss:*

I, Dennison Steele, clerk of the Court of Common Pleas, in and for the county of Lucas, in the state of Ohio, do hereby certify that

the above-named Andrew Young, before whom the acknowledgment of the execution of the preceding instrument purports to have been taken and made, was at the date of such acknowledgment a justice of the peace, in and for the said county of Lucas and that the above signature of said Andrew Young appended to such certificate is the proper handwriting of the said justice.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this 20th day of April, 1853.

[L. S.] DENNISON STEELE,
Clerk Lucas Co. Common Pleas.

SECRETARY OF STATE'S OFFICE.

I, William Trevitt, secretary of state, of the state of Ohio, do hereby certify that the foregoing is correctly copied from the original certificate of incorporation recorded and remaining on file in this office.

In witness whereof I have hereunto subscribed my name and affixed the great seal of said state, at Columbus, this twenty-fifth day of April, A. D. 1858.

[L. S.] WILLIAM TREVITT,
Secretary of State.

1166 EXHIBIT NO. 2. AGREED STATEMENT OF FACTS. PARAGRAPH NO. 2.

EXHIBIT 2.

Toledo and Illinois Railroad First Mortgage, $900,000.

(Printed *ante* p. 961).

This mortgage is recorded in Lucas county, Ohio, Vol. 8, page 111, and is also recorded in all other counties along the line of the road.

EXHIBIT 3, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 3.

EXHIBIT 3.

Articles of Association.

STATE OF INDIANA.

Be it known, that the undersigned, whose respective places of residence are set down in the margin, for the purpose of organizing a company, for the construction, owning and maintaining of a contemplated railroad, hereinafter named, in pursuance of an act of the Legislature of the State of Indiana, entitled, "An act to provide for the incorporation of railroad companies," approved May 11th, 1852, do hereby, each for himself, subscribe for the number of shares

in the capital stock of said contemplated railroad company set opposite our respective names, such subscription payable to said company as the board of directors of said company, when elected, or their successors in office may from time to time order and require.

1167 And we do hereby subscribe and agree to the following articles of association, to wit:

1. The name and style of this corporation shall be, "The Lake Erie, Wabash and St. Louis Railroad Company."

2. The capital stock of the company shall be four millions of dollars, to consist of eighty thousand shares of fifty dollars each.

3. The eastern terminus of said road shall be a point on the east line of Allen or DeKalb County, in said state of Indiana; thence running down the valleys of Little and Wabash rivers, and passing through the counties of DeKalb, Allen, Whitley, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain, Warren and Vermillion, or as many of them as may be necessary, all in the state of Indiana, on the most eligible route, and terminating at some point on the west line of said state of Indiana, in the general direction of Danville, Illinois.

4. The length of said road is stated, as near as may be, to be one hundred and ninety miles.

5. The number of directors to manage the affairs of the company shall be thirteen. And we hereby declare that the following are the names of the directors elected by us from our own number, to constitute the first board of directors of said company, to wit:

In witness whereof, we have hereunto set our names as parties to the above articles, and subscribed to the capital stock as aforesaid, this 24th day of June, 1852.

EXHIBIT 4, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 4.

EXHIBIT 4.

This Indenture, made this first day of August, one thousand eight hundred and fifty-three, between the Lake Erie, Wabash and

1168 St. Louis Railroad Company, a corporation duly constituted by the laws of Indiana, of the first part, and the Farmers' Loan and Trust Company of the City of New York, a corporation duly constituted by the laws of the state of New York, of the second part, witnesseth:

Whereas, the party of the first part, pursuant to terms of the statutes of said state of Indiana incorporating them, and amendatory thereto, are engaged in constructing a railroad from the east line of Allen county, in said last named state, to the west line of Warren county, in the same state; and for the purpose of finishing and equipping said road have, by resolution of their board of directors, of the date of May 9th, 1853, determined to issue, negotiate and sell their bonds of the denomination of one thousand dollars each, not to exceed twenty-five hundred in number, bearing an interest of seven per centum per annum, payable semi-annually, at the office

of the said Farmers' Loan and Trust Company of the City of New York; each of said bonds bearing even date herewith, and made payable to the Farmers' Loan and Trust Company of the City of New York, or bearer, at their said office, on the first day of August, one thousand eight hundred and sixty-five, and containing a clause permitting the holder thereof, at any time within six years from the date thereof, to convert the principal sum into the capital stock of said railroad company, at par ($50 per share), on surrender of such bond, with the unpaid interest warrants annexed, and each being authenticated by a certificate signed by the president of the said Farmers' Loan and Trust Company.

Now, therefore, the said party of the first part, in order to secure the payment of the said bonds and interest, and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred and conveyed, and by these presents do grant, bargain, sell, transfer and convey to the said party of the second part and their successors in the trust hereby created and assigned all the following property of the corporation
1169 above named; that is to say, their road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and the tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road, and those to be purchased and paid for with the above described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights and privileges of the said party of the first part, of, in, to or concerning the same.

But nothing herein contained shall be construed to prevent the party of the first part from selling, hypothecating, or otherwise disposing of any property or securities received in payment of stock subscriptions, or of any lands or other property of the company not necessary to be retained for the roadway, depot grounds or stations, nor required for the construction or convenient use of their road; nor from collecting moneys due or to grow due to the company on stock subscriptions or otherwise; nor from making or declaring reasonable dividends to the stockholders out of the assets of the company, nor from allowing interest on stock installments paid or to be paid; provided they shall diligently proceed to collect and faithfully apply the proper means of the company to the construction, equipment and other proper uses of their said road. To have and to hold their said premises and every part thereof, with the appurtenances, unto the said party of the second part and their successors in said trusts, upon the following trusts, that is to say: In case the said party of the first part shall fail to pay the principal or any part thereof, or any of the interest on any of said bonds, at any time when the same may become due and payable, according to the tenor thereof, when demanded then, after sixty days from such default, upon request of the holders of such bonds, the said party of the second part, or their successors in said trust, may enter into and

take possession of all or any part of said premises or prop-
1170 erty; and as the attorney in fact, or agent of the said party of the first part by themselves or agents or substitutes duly constituted, have, use and employ the same, making from time to time all needful repairs, alterations and additions thereto; and after deducting the expenses of such use, repairs, alterations and additions, apply the proceeds thereof to the payment of the principal and interest of all of said bonds remaining due and unpaid; or the said party of the second part, and their successors in said trust, at their discretion may, or on the written request of the holders of at least one-half of the bonds then unpaid and unconverted into stock, shall cause the said premises, or so much thereof as shall be necessary to pay and discharge the principal and interest of all of such of said bonds as may be then due and unpaid and unconverted as aforesaid, to be sold at public auction, in the city of LaFayette, in the state of Indiana, or in the city of New York, giving at least sixty days' notice of the time, place and terms of such sale, and of the specific property to be sold, by publishing the same in one newspaper of general circulation in said city of LaFayette, and in two newspapers, at least, of general circulation in the said city of New York, and wherever else required by law; and execute to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple for the same, which shall be a bar against the party of the first part, their successors and assigns, and all persons claiming under them, of all right, interest or claim in and to the said premises to be sold, or any part thereof; and the said trustee shall, after deducting from the proceeds of said sale the costs and expenses thereof, and of managing such property, apply so much of the proceeds as may be necessary to the payment of said principal and interest due and unpaid on said bonds, and shall restore the residue thereof to the party of the first part, it being hereby expressly understood that in no case shall any claim or advantage be taken of any valuation or appraisement laws by the said party of the first part, nor any injunction or stay of proceedings, or

any process be applied for or obtained by them, to prevent
1171 such entry or sale as aforesaid. And the said party of the first part hereby covenants, for the consideration aforesaid, to execute and deliver any further reasonable and necessary conveyance of the said premises, or any part thereof, to the said party of the second part, and their succesors in said trust, for more fully carrying into effect the objects thereof; particularly for the conveyance of any property subsequently to the date hereof acquired by said party of the first part and comprehended in the description contained in the premises. And the said party of the first part hereby covenants, as aforesaid, that the money borrowed for the purposes aforesaid, upon the security of the said bonds, shall be faithfully applied to the construction and equipment and other proper uses of said road; and that there is no other or former lien on said road or on the property hereby mortgaged. And it is hereby mutually agreed, and these presents are upon this express condition, that on payment of the principal and interest of said bonds or the conversion thereof into stock in manner aforesaid, the estate hereby granted to the said party of the second

part shall cease, determine and become void, and the right to the premises and property hereby conveyed shall revert to and revest in the said party of the first part, without any acknowledgment of satisfaction, reconveyance, re-entry or other act. And it is also further mutually agreed that the said party of the second part, and their successors in said trust, shall only be accountable for reasonable diligence in the management therof, and shall not be responsible for the wrongful acts of any agent employed by them when such agent is selected with reasonable discretion; and that said party of the second part, and their successors in the trust, shall be entitled to receive proper compensation for any labor or service performed by them in the discharge of their trust, in case they shall be compelled to take possession of said premises or any part thereof or manage the same. And it is further mutually agreed that, in case of the dissolution, incapacity or resignation of the above-named trustees after
1172 the trust hereby created shall have devolved on them for thirty days, the holders of a majority of said bonds may apply to the Circuit Court or Court of Common Pleas, or other court of record of Tippecanoe County, Indiana, to supply the vacancy in said trust; and thereupon such new trustee or trustees shall become vested, for the purpose aforesaid, with all the rights and interest hereby conveyed or vested in the said party of the second part, without further assurance or conveyance for the same; but, if the same shall be necessary, both or either of the parties hereto shall execute any necessary releases or conveyances for that purpose.

In witness whereof the party of the first part have caused their corporate seal to be hereto affixed, and these presents to be subscribed by their president and countersigned by their secretary the day and year first above written.

[SEAL.] ALBERT S. WHITE,
President of the Lake Erie, Wabash and St. Louis Railroad Company.

Countersigned:
JOHN N. DRUMMOND,
Secretary.

Signed, sealed and delivered in presence of
ROSWELL C. SMITH.

STATE OF INDIANA, *County of Tippecanoe, ss:*

Be it known, that on this 10th day of August, in the year one thousand eight hundred and fifty-three, before the undersigned, a notary public in and for said state, residing in said county, personally came Albert S. White, president of the Lake Erie, Wabash
1173 and St. Louis Railroad Company, to me personally known, who being by me duly sworn, did depose and say that he resided in LaFayette, in said state of Indiana; that he is the president of the Lake Erie, Wabash and St. Louis Railroad Company; that the seal affixed to the foregoing conveyance is the corporate seal of said company, and was affixed to the said conveyance by the order of

the board of directors of said company, for the uses therein expressed, and that he, by like order, did subscribe his name thereto as president of said company; and at the same time also personally came before me John N. Drummond, secretary of said company, to me personally known, who acknowledged that he countersigned said deed as such secretary, by like order of said board, for the uses and purposes therein expressed, which is to be satisfactory evidence of the execution of said deed by said Lake Erie, Wabash and St. Louis Railroad Company.

Witness my hand and notarial seal, at Lafayette, in said county the day and year above written.

[SEAL.] ROSWELL C. SMITH,
Notary Public.

Recorded in Tippecanoe County, Indiana, Aug. 11, 1853, Book No. 1, pages 138-142 inclusive, and also in all the other counties along the line of the road.

EXHIBIT 5, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 5.

EXHIBIT 5.

Agreement of the Lake Erie, Wabash and St. Louis, and the Toledo and Illinois Railroad Companies for Consol-dation.

(Printed *ante*, p. 1139.)

1174 EXHIBIT 6, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 6.

EXHIBIT 6.

Whereas, a decretal order issued out of the clerk's office of the Circuit Court of the United States within and for the Northern District of Ohio, bearing date on the sixteenth day of August, A. D. 1858, which said order was and is as follows, to wit:

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to Mathew Johnson, Esq., United States Marshal for the Northern District of Ohio and special master commissioner of the circuit court of the United States for the said Northern District of Ohio, Greeting:

Whereas, at the July term of the circuit court for the Northern District of Ohio, A. D. 1858, to wit, on the 13th day of July in said year, a certain decree was made and entered by said court in the words and figures following, to wit:

No. 600. In Chancery.

THE FARMERS' LOAN AND TRUST COMPANY, JOSEPH B. VARNUM AND RUSSELL SAGE

vs.

THE TOLEDO AND ILLINOIS RAILROAD COMPANY, THE TOLEDO, WABASH AND WESTERN RAILROAD COMPANY, THE LAKE ERIE, WABASH AND ST. LOUIS RAILROAD COMPANY and JOHN N. DRUMMOND.

This cause came on to be heard upon the bill of complaint of the complainants and the exhibits, and the said defendants having failed to enter their appearance in the clerk's office of
1175 this court according to the rule of this court in such case made and provided, and having failed to move the court to set aside the interlocutory order heretofore entered in this case, that said bill and all the matters and things therein contained be taken as confessed and true, and the said defendants having been now three times solemnly called come not, but make default. It is therefore ordered, adjudged and decreed that the said interlocutory order be, and the same is hereby, affirmed, and that said bill and all and singular the matters and things therein set forth and contained, be and the same are hereby, taken as confessed and true in all their parts and the court do thereupon find.

I. That the said Farmers' Loan and Trust Company is a corporation created by and under the laws of the state of New York, and has its principal office and place of business in the state of New York. That the said Joseph B. Varnum and Russell Sage are citizens and residents of the State of New York. That the said Toledo and Illinois Railroad Company is a corporation created under the laws of the State of Ohio, and has its principal office and place of business in the Northern District of Ohio. That the said Toledo, Wabash and Western Railroad Company is a corporation created under the laws of Ohio, and has its principal office and place of business in the Northern District of Ohio. That the Lake Erie, Wabash and St. Louis Railroad Company is a corporation created under the laws of the state of Indiana, and has its principal office and place of business in the state of Indiana, and that the said John N. Drummond is a citizen and resident of the state of Indiana.

II. That the said Toledo and Illinois Railroad Company built, owned and operated a line of railroad commencing at Toledo in Lucas County in the state of Ohio, and extending thence to the west line of Paulding County in said state of Ohio, being about eighty miles in length, and that said company stocked and equipped and put the same in full operation.

1176 III. That afterwards, on the eighth day of September, A. D. 1853, the said Toledo and Illinois Railroad Company executed to the said Farmers' Loan and Trust Company the deed of mortgage of that date set forth in said bill. That said mortgage was executed to secure the payment of the principal of the bonds

therein specified. That said bonds were issued pursuant to a resolution of the board of directors of said railroad company. That the company proceeded to sell and dispose of the same, and did sell all thereof and applied the proceeds thereof according to the covenant contained in said mortgage on that subject. That none of said bonds have been converted into the stock of the company. That all of them are outstanding and the principal thereof wholly unsatisfied. The principal of said bonds is $900,000. No interest has been paid upon them since the first day of February, A. D. 1857. The installments of interest overdue and unpaid, and interest upon said installments from the time they respectively became due to the first day of this term, amount together to the sum of $66,055.20.

The said mortgage is the first lien and a valid and effectual lien upon said road and upon all the property and effects therein specified and intended to be hereby embraced, and the order of the sale hereinafter made in this case shall in no wise affect said lien or any other right whatsoever secured by said mortgage, but the same shall be and remain in all respects whatsoever, as if this decree had not been rendered.

IV. That afterwards, to wit, on the first day of February, A. D. 1855, the said Toledo and Illinois Railroad Company executed to the said Farmers' Loan and Trust Company the deed of mortgage of that date set forth in said bill. That the same was duly recorded as set forth in said bill. That the said mortgage was executed to secure the payment of the principal and interest of the bonds therein specified. That said bonds were issued pursuant to an order of the board of directors of said railroad company. That the company proceeded to sell and dispose of the same, and
1177 did sell all thereof and applied the proceeds thereof according to the covenant contained in said mortgage on that subject. That all of said bonds are now outstanding and the principal thereof wholly unpaid. The principal of said bonds is $800,000. No interest has been paid upon them since the first day of November, A. D. 1856.

The installments of interest overdue and unpaid, and interest upon said installments from the time they respectively became due to the first day of this term, amount together to the sum of $87,539.40. The said mortgage so executed and dated on the first day of February, A. D. 1855, is the second lien but a valid and effectual lien upon the said road and upon all the property and effects of every kind and description therein specified and intended to be covered and embraced thereby. It is subordinate only to the lien of the said first mortgage hereinabove mentioned.

V. That afterwards, to wit, on the sixth day of June, A. D. 1856, the said Toledo and Illinois Railroad Company executed to the said Russell Sage and Joseph B. Varnum, the deed of mortgage of that date set forth in said bill. That the same was duly recorded as set forth in said bill. That said mortgage was executed to secure the payment of the principal of said bonds and the dividends therein specified as set forth in said mortgage and said bonds when the same

should be due and payable according to the terms and conditions thereof. That said bonds were issued pursuant to a resolution of the board of directors of said company. That the company proceeded to sell said bonds, and did sell all thereof and applied the proceeds thereof according to the covenant contained in said mortgage on that subject. That all of said bonds amounting to $600,000 are outstanding and wholly unsatisfied, and that no dividend has accrued payable thereon.

Said mortgage is the third lien but a valid and effectual lien on the property and effects therein specified and intended to be covered and embraced by it. It is subordinate to the liens created by the
1178 prior mortgages set forth in said bill and hereinbefore mentioned and declared to be valid and effectual liens upon said premises.

VI. That afterwards, to wit, on the 25th day of June, A. D. 1856, the said Toledo and Illinois Railroad Company and the said Lake Erie, Wabash and St. Louis Railroad Company, under and by virtue of the laws of the states of Ohio and Indiana consolidated and thereafter became one company under the name of the Toledo, Wabash and Western Railroad Company, and the said consolidation was made upon the terms and conditions stated in said bill. That thereafter said consolidated company owned the roads of both said pre-existing companies extending from Toledo in the state of Ohio as its northeast terminus up the valley of the Maumee river to Fort Wayne and thence down the valley of the Wabash to the Illinois state line in the county of Warren in the state of Indiana as its western terminus. And also all the other property and effects of every kind and description which before that time had belonged to said companies respectively, separately. That the said consolidated company also became liable for all and singular the debts and liabilities of said separate corporations of which it was composed. That all rights of creditors and all liens upon the property of said Toledo and Illinois Railroad Company existing before said consolidation are unaffected thereby and the said company is still in existence, and so to be deemed so far as is necessary to enforce the same. That at the time of said consolidation the said Toledo and Illinois Railroad Company possessed and owned the rolling stock and movable property and effects set forth in the schedule marked "E," referred to in said bill. That said consolidated company by said consolidation became the owners thereof, and afterwards acquired a large amount of other property and effects of like kind, all of which became incidents and accessions to said consolidated road. That so much thereof as properly belongs to that portion of said consolidated road which is situated in the state of Ohio, and was formerly the Toledo and Illinois Railroad,
1179 is part and parcel of said road, and is bound by the lien of said mortgages in the same manner and to the same extent that real estate is bound by a mortgage thereof.

VII. That at the time of said consolidation the said Lake Erie, Wabash and St. Louis Railroad Company also owned a large amount of property and effects which passed to and the title whereof became vested in said consolidated company by means of said consolidation.

That before said consolidation the said Lake Erie, Wabash and St. Louis Railroad Company has executed three mortgages and its bonds secured thereby as set forth in said bill. The said bonds are wholly unsatisfied and the interest on these secured by said first mortgage, due and payable on the first day of August A. D. 1857, and the first day of February, 1858, and the interest on those secured by said second mortgage due and payable on the first day of November, 1857, and on the first day of May, A. D. 1858, is wholly unsatisfied.

VIII. That the said Toledo, Wabash and St. Louis Railroad Company executed to Charles N. Richards and the said John N. Drummond the said chattel mortgages mentioned in said bill, and that the same were executed at the dates, and in all respects as set forth in said bill. That the said John Drummond took upon himself the execution of the said trusts created by said instruments, and has acted therein. That the said Charles N. Richards has uniformly refused to accept the trusts intended to be devolved upon him by said chattel mortgages or in any wise to recognize the same. That he is a citizen and resident of the state of New York, and that he is, therefore, properly not made a party to this case. That the liens of said chattel mortgages, whatever they may be, are subordinate, inferior and posterior to those of prior mortgages executed by said Toledo and Illinois Railroad Company and said Lake Erie, Wabash and St. Louis Railroad Company hereinbefore mentioned.

IX. That all the movable property and effects mentioned
1180 in said exhibit "E" which belonged to said Toledo and Illinois Railroad Company at the time of said consolidation are still in existence and can be identified, and

That the same are as follows: Four (4) locomotive engines built by Wm. Mason and company, of Taunton, Mass., numbered and named "No. 16, Zephyr," "No. 17, Atlanta," "No. 18, Camilla," "No. 30, Ariel." Five (5) locomotive engines built by Rogers, Ketcham and Grosvenor, of Paterson, N. J., numbered from 4 to 8, inclusive. One (1) locomotive engine, built by Blanchard and Kimball, of Springfield, Mass., "No. 35."

Eight first-class passenger cars, built by T. W. Wason and Company, of Springfield, Mass., numbered from 1 to 8, inclusive.

Two (2) baggage and mail cars, built by A. J. Field, at Toledo, O., numbered "1 and 2."

Two (2) platform cars, marked "T. and I.," numbered 1 and 2.

Fourteen (14) freights cars, built by Dutton, Rowe and Co., of Rochester, N. Y., original numbers unknown, but have been numbered from 1 to 14, inclusive.

One (1) hand car, built by Thresher and Company.

Nine (9) hand cars, built by Jones, Bass and Co., Fort Wayne.

One (1) stationary engine and boiler complete, now in Toledo, built by Wm. Kidd and Co., Rochester.

22,000 lbs. (about) shafting and pulleys, by same.

One small iron car.

Ten (10) dumping gravel cars, built by Dutton, Rowe and Co., Rochester, N. Y.

Five (5) platform freight cars, built by Dutton, Rowe and Co., of Rochester, N. Y., marked "T. and I.," and numbered from 1 to 5.
One (1) horse power and pump, near Antwerp.
One (1) forty-six-foot turntable in engine house at Toledo.
Four (4) large stoves in engine house at Toledo.
One large safe.
One counter with drawers.
One paymaster's desk.
Two low table-desks.
1181 One stove.
Two lounges.
Ten chairs in superintendent's office at Toledo.
One large clock in superintendent's office.
One safe.
One table.
One low desk with case for papers.
One high desk.
Two stools.
One letter press.
Four chairs.
One counter in general freight agent's office at Toledo.
Six locomotive head lights.
Two safes.
One high desk.
One low table-desk.
One table.
One letter press and stand.
Two stools.
One water cooler.
Eight chairs in Treasurer's office at Toledo.
One low table-desk.
One table.
One high desk.
One stool.
One stove.
Four chairs in chief-engineer's office at Toledo.
One table.
One map case.
One low desk.
Drawing boards.
One stove.
Four chairs.
Two transit instruments.
Four levels.
Three rods.
One chair in engineer's office.
One safe.
Three shovels.
One 2,000 lb. scales.
1182 One truck.
One wheelbarrow.

Two pumps at Defiance station.
Ten stoves at Maumee.
One set blacksmith's tools at Toledo.
About eight (8) thousand cords wood, cut stone caps and sills for freight house at Toledo, value $500. Cut stone caps and sills for machine shop at Toledo, value $10,000.
Ten dozen shovels.
Five dozen picks.
Thirty spike mauls.
Ten track gauges.
Forty bars.
Ten claw bars.
In use on repair of road, sixty tamping bars.

X. That with a view to the rights of the mortgagees in said mortgage of the two original companies and with a view to the foreclosure of said mortgages, the two said original companies and the said consolidated company have made a division of the movable property and effects bought and acquired by said consolidated company since said consolidation took place, and have set off to the Toledo and Illinois Railroad Company, as its share and proportion thereof the following articles—to wit:

Three locomotive engines, built at the Rogers Locomotive Machine Works, at Paterson, New Jersey, known as No. 1, No. 2 and No. 3; two baggage cars, built by Farnsworth and Barnard, of Indianapolis, No. 5 and 6. Thirty-one (31) freight cars, iron trucks, part of the fifty built by Wason and Co., of Cleveland, Ohio, marked "T., W. & W. R. R.," and numbered from 371 to 400, inclusive.

Forty of the fifty freight cars, iron trucks, built by Field and Willmington, of Toledo, marked "T., W. & W. R. R.," and numbered from 401 to 440, inclusive.

One of the two baggage and mail cars built by Field and Willmington, at Toledo, Ohio, numbered "4;" one of the four hand cars built at Fort Wayne.

One small stationary engine and carry pump for pumping
1183 water into engine house at Toledo; at Toledo general ticket office, one high desk, one low desk, one ticket case; one stove at passenger house at Toledo, one ticket case. Two large baggage trucks, six freight trucks, one set scales. At Toledo freight house, one safe, two desks, one large table, one counter, one stove, thirty-six trucks, two sets 2,000-lb. scales, one and a half hogsheads of oil, three dozen shovels, six spike mauls, two sledges, six bars, two claw bars, two truck gauges, ten tamping bars, eighteen of the fifty-one freight cars built by Whittaker and Phillips, and numbered from 247 to 264, inclusive.

At Toledo, 200 cords of wood; between Toledo and Maumee, 200 cords of wood; between Maumee and Washington, 300 cords; at Maumee, 100 cords; at Washington, 700 cords; between Washington and Napoleon, 2,000 cords; at Napoleon, 500 cords; between Napoleon and Defiance, 2,300 cords; at Defiance, 200 cords; between Defiance and Antwerp, 500 cords; at Antwerp, 350 cords. Piled up at various places along said railroad in Ohio, 2,000 cords, besides the

wood above mentioned. The said divisions and partition are found to be fair, and are hereby approved and confirmed by this Court.

XI. That the property and effects embraced and covered by said mortgage of the Toledo and Illinois Railroad Company are as follows:

1st. So much of the roadway of the Toledo, Wabash and Western Railroad Company now held and run over and operated by said company as before said consolidation was the roadway of the Toledo and Illinois Railroad, commencing at Toledo, in the county of Lucas, in the state of Ohio, and extending thence through the counties of Henry, Defiance and Paulding to the state line of Ohio, in said county of Paulding, together with all bridges, viaducts, cattle guards and all the other structures and materials upon said roadway and attached thereto or in anywise belonging to the same, and the switches, turnouts, turn-tables and all other structures connected with said roadway, and the lands belonging to the said company upon which the same are situate. The map of said roadway as prepared
1184 for said Toledo and Illinois Railroad Company, and now deposited in the office of the Toledo, Wabash and Western Railroad Company at Toledo, and the conveyances of the right of way and of lands embraced in said roadway, and the instruments of appropriation of said last-named company, and all records touching such appropriations, are hereby referred to for a more particular description of said roadway and for greater certainty.

2d. All the water stations connected with said roadway, including the grounds and buildings thereto belonging.

3d. All the depot grounds and stations connected with said roadway, and the buildings and fixtures thereon.

4th. All the cattle yards connected with said roadway and the fixtures and structures thereto belonging.

5th. All the machines and work-shops connected with said roadway, including the grounds and buildings thereunto belonging.

6th. All the gravel banks and gravel pits, and the lands on which they are situated, belonging to said consolidated company in Ohio.

7th. All the other real estate belonging to said consolidated company situated in Ohio, and used, or necessary to be used, in completing, repairing or operating said road. Reference is here made to the conveyances of said real estate to the Toledo and Illinois Railroad Company, and to the Toledo, Wabash and Western Railroad Company, and to the records of said conveyances for more particular descriptions of said real estate and for greater certainty.

8th. All the movable property and effects hereinbefore described, which belonged to said Toledo and Illinois Railroad Company at the time of said consolidation, and all the movable property and effects hereinbefore described, bought and acquired by said consolidated company since consolidation took place, and which was set off to said Toledo and Illinois Railroad Company as hereinbefore stated.

1185 9th. All the corporate powers, privileges and franchises of the said Toledo and Illinois Railroad Company.

XII. That the said first, second and third mortgages of the Toledo

and Illinois Railroad Company respectively waive the right and benefit of all appraisement under the laws of Ohio, in the event of foreclosure and sale under the same respectively, and that such waiver is lawful and valid, and that the said mortgaged premises as above set forth and described are liable to be sold under the order and decree of this court by reason of the default in the payment of the interest accruing and overdue on the bonds secured by the second mortgage of the said Toledo and Illinois Railroad Company as hereinbefore set forth; that in order to prevent a great depreciation of said mortgaged premises and a great sacrifice and loss to all concerned in the sale thereof, it is requisite to sell the same as an entirety, and that the lien of said first mortgage of the Toledo and Illinois Railroad Company upon said premises which is to continue unimpaired after the sale thereof hereinafter ordered, renders it necessary that the same should be so sold.

XIII. That the moneys arising from said sale ought of right to be applied, and when realized, shall be applied as follows and in the order here specified:

1st. To the payment of all costs of this suit.

2d. To the payment of the Farmers' Loan and Trust Company of the amount of principal and interest due upon the bonds secured by said second mortgage of the Toledo and Illinois Railroad Company in trust for the benefit of the holders of said bonds.

3d. The residue, if any, or so much thereof as may be necessary for the purposes, shall be paid over to the said Russell Sage and Joseph B. Varnum, to be by them applied in payment of the bonds of the Toledo and Illinois Railroad Company secured by the mortgage of said company to them, deducting from said bonds, however, discount upon the same at the rate of six per cent. per annum for the time they have to run until the maturity thereof.

1186 4th. If there be any residue of said moneys left after the payments aforesaid are made, the same shall be held subject to the future order of this court herein.

XIV. That the said Farmers' Loan and Trust Company and the holders of the bonds secured by the said first mortgage of the Toledo and Illinois Railroad Company, do not seek in this case to enforce any right of theirs under said mortgage, but only ask that their rights be left wholly unimpaired as if this suit had not been instituted.

It is therefore ordered, adjudged and decreed:

1st. That the said Toledo and Illinois Railroad Company, or the said Toledo, Wabash and Western Railroad Company, within thirty days from this date, pay to the clerk of this court the sum of $87,539.40, being the installments of interest now due and unpaid upon the said bonds secured by the second mortgage of the Toledo and Illinois Railroad Company, and interest upon said installments from the time they respectively became due to this date, and that said clerk pay over said moneys when received to the Farmers' Loan and Trust Company for the use and benefit of the holders of said bonds.

2d. That in default of such payment, a decretal order issued to Mathew Johnson, Esq., marshal of the northern district of Ohio, as

special master in this case (who is hereby appointed such master), commanding him to sell the said premises embraced and covered by the said three mortgages of the Toledo and Illinois Railroad Company, as hereinbefore described and set forth, but subject to the lien of the executed of said mortgages and of the liabilities thereby secured; that he sell said mortgaged premises altogether as an entirety and not in separate parcels; that the sale be made at the court house in Toledo in the county of Lucas; that it be conducted according to the law governing sales of real estate under execution, except that there be no appraisement of said mortgaged premises or any part thereof. The master shall report his proceedings under said order to this court, and bring the moneys arising from such sale into this court at the next term thereof.

1187 The sale so to be made and the deed thereafter to be executed, in pursuance of such sale, under the further order of this court, upon the confirmation of said sale, shall convey all the title, legal and equitable, of the said Toledo and Illinois Railroad Company, and of the said Toledo, Wabash and Western Railroad Company, in and to all and singular the property and effects comprised in the said mortgaged premises, and every part and parcel thereof, real, personal and mixed.

3d. That the lien of the first mortgage of the Toledo and Illinois Railroad Company and the liabilities thereby secured shall be in nowise affected by said sale, but the same shall afterwards continue upon said mortgaged premises in all respects whatever as if this bill had not been filed and said sale had not been made, but, as respects said second and third mortgages of the Toledo and Illinois Railroad Company and said chattel mortgages, the said complainants and those whom they represent as *cestuis que trust*, and the said John N. Drummond and those whom he represents as *cestuis que trust*, and all other persons claiming under said parties, or either of them, are hereby enjoined now and hereafter, before and after said sale, perpetually from setting up or prosecuting any claim whatsoever in respect of said mortgaged premises or any part thereof. The rights of all such parties as to said premises are hereby barred and extinguished as to all such persons: the proceeds of said sale shall take the place of said mortgaged premises. All questions not herein specifically disposed of are reserved for the future consideration and determination of this Court, and this cause is continued to the next term. The time mentioned in the foregoing decree for the payment of the money therein ordered to be paid having lapsed, and the same not having been paid to the Clerk of this Court as therein required, now, therefore, you, the said Mathew Johnson, United States marshal and special master commissioner as aforesaid, are hereby commanded that you proceed without delay to execute, according to law, the several provisions and requirements of said decree, and of your proceedings in the premises do you make return, together with

1188 this order, to the said Circuit Court, at the city of Cleveland, in said district, on the second Tuesday of November next.

Witness the Honorable Roger B. Taney, Chief Justice of the

United States, this sixteenth day of August, 1858, and in the eighty-third year of the Independence of the United States of America.

[SEAL.] F. N. GREEN, *Clerk.*

And whereas, the said Mathew Johnson, marshal and special master commissioner, as set forth in said decretal order on the 8th day of October, A. D. 1858, filed said order in the Clerk's Office of said Court, whence it was issued, setting forth that he received said decretal order on the sixteenth day of August, A. D. 1858, and that, pursuant to the command thereof, on the second day of September A. D. 1858, he advertised said premises, property and effects described in said order, and thereby ordered to be sold in the Toledo "Times," a daily newspaper published in the city of Toledo and in the county of Lucas, in the northern district of Ohio, and in general circulation therein, to be sold as an entirety, subject to the lien of said first mortgage in said decretal order set forth, at the court house in said city and county between the hours of ten o'clock A. M. and four o'clock P. M. of said day, and that he attended at said time and place of sale and offered said premises, property and effects for sale at auction as an entirety subject to said lien aforesaid, when the same was openly struck off and sold as an entirety to Azariah Boody, subject to the lien aforesaid, for the sum of eight hundred dollars, which money he had received and held ready to render—and the said circ-circuit court of the United States for the northern district of Ohio, to wit:

On the 8th day of October, A. D. 1858, having carefully examined the proceedings of said marshal and special master commissioner touching said sale, and being satisfied that the same had been made in all respects in conformity to law and according to the re-
1189 quirements of said order, did approve and confirm said sale, and order that the said marshal and special master commissioner should make a deed to the purchaser for the premises, property and effects so sold, as aforesaid.

Now, know all men by these presents that I, the said Mathew Johnson, marshal, and special master commissioner, as aforesaid, by virtue of the authority vested in me, as aforesaid, and in pursuance of said sale so made, as aforesaid, and in obedience to said order of said court, herein last before mentioned, and in consideration of the sum of eight hundred dollars so to me in hand paid by the said Azariah Boody, the receipt whereof is hereby acknowledged, have bargained and sold, and do, by these presents, grant, bargain and sell and convey unto the said Azariah Boody, his heirs and assigns, forever, all and singular, as an entirety, the premises and property and effects described in said decretal order, and thereby required to be sold, and which were so sold by me to the said Azariah Boody, as aforesaid.

Reference is hereby made to said decretal order, hereinbefore set forth, for a more full and particular description of said premises, property and effects, and for greater certainty.

To have and to hold all and singular the said premises, property and effects, and every part and parcel thereof, as an entirety, to the sole and only use, benefit and behoof of him, the said Azariah

Boody, his heirs and assigns forever, subject, nevertheless, to the lien of said first mortgage in said decretal order set forth, but free and wholly discharged from all the other liens and encumbrances therein set forth.

In witness whereof, I have hereunto set my hand and seal this, the 8th day of October, A. D. 1858.

MATHEW JOHNSON, [SEAL.]
Marshal and Special Master Commissioner.

Signed, sealed and acknowledged in presence of
J. H. JOHNSON.
E. P. INGERSOLL.

1190 STATE OF OHIO, *Cuyahoga County, ss:*

Before me, E. P. Ingersoll, a notary in and for the county aforesaid, personally appeared Mathew Johnson, Marshal of the Northern District of Ohio and Special Commissioner in Chancery in the case mentioned in the foregoing deed, and acknowledged the same to be his voluntary act and deed for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and official seal this, the 8th day of October, A. D. 1858.

[SEAL.] E. P. INGERSOLL,
Notary Public.

EXHIBIT 7, AGREED STATEMENT OF FACTS.

EXHIBIT 7.

Whereas, in a certain suit in Chancery, pending in the Circuit Court of the United States for the District of Indiana, wherein the Farmers' Loan and Trust Company, Joseph B. Varnum and Russell Sage were complainants, and the Lake Erie, Wabash and St. Louis Railroad Company, the Toledo and Illinois Railroad Company and John N. Drummond were defendants, a decretal order was issued out of the office of the clerk of said court, bearing date the twenty-fifth day of August, A. D. 1858, and directed to John L. Robinson, Esq., marshal of the United States for said district of Indiana, and as commissioner in said cause, which said decretal order reads as follows:

The President of the United States of America to John L. Robinson, marshal of the district of Indiana and commissioner, greeting:

Whereas, at a Circuit Court of the United States for the Seventh Judicial District and District of Indiana, on the 28th day of May, 1858, in chancery sitting; and, whereas, in a certain suit then
1191 and there pending before said court, wherein The Farmers' Loan and Trust Company, Joseph B. Varnum and Russell Sage were complainants, and the Lake Erie, Wabash and St. Louis Railroad Company, the Toledo, Wabash and Western Railroad Company and John N. Drummond are respondents, and the Court, upon inspection of the bills and exhibits in said case, do make and render

their final decree hereunto annexed: You are therefore hereby commanded to proceed to execute said decree, and to sell said property specified in said decree after giving thirty days' notice of the time and place of such sale, as in said decree directed, and to execute said decree in all things specified and ordered by the court therein set forth, and make return thereof according to the terms and directions of said decree to the next term of said Circuit Court. Witness the Honorable Roger B. Taney, chief-justice of the Supreme Court of the United States for the District of Indiana, hereunto affixed at Indianapolis this twenty-fifth day of August, in the year of our Lord, one thousand eight hundred and fifty-eight.

HORACE BASSETT, *Clerk.*

1192 The decree referred to in the foregoing order of sale reads in substance and effect as follows:

Paragraph No. 6.

In the Circuit Court of the United States for the District of Indiana, May Term, 1858.

MAY 28, 1858.

Before the Honorable Elisha M. Huntington, Judge.

Chancery.

THE FARMERS' LOAN AND TRUST COMPANY, JOSEPH B. VARNUM and RUSSELL SAGE

vs.

THE LAKE ERIE, WABASH AND ST. LOUIS RAILROAD CO., THE TOLEDO, WABASH AND WESTERN CO., TOLEDO AND ILLINOIS RAILROAD, and JOHN N. DRUMMOND.

Come now the complainants by W. L. Stuart, their solicitor, and the Lake Erie, Wabash & St. Louis Railroad Co., The Toledo, Wabash & Western Co. and John N. Drummond, being each three times loudly called, come not but herein wholly make default.

And the said Toledo and Illinois Railroad Company comes by Baker & Osborn, *her* solicitors, and files *her* answer confessing the complaint in these words, to wit: * * *

And the said bill and other matters and things therein contained are ordered to be taken as confessed against all defendants,
1193 viz.: The Lake Erie, Wabash and St. Louis Railroad Company, The Toledo and Illinois Railroad Company and the Toledo, Wabash and Western Railroad Company and John N. Drummond, trustee. Upon inspection of the bill and exhibits this court do find that the said Lake Erie, Wabash and St. Louis Railroad Company executed the said second and third mortgages and mortgage bonds as in the bill alleged; that there is due on the said second mortgage bonds for interest on principal and interest on the overdue coupons, up to the time of decree entered, the sum of $131,095.97.

It is further found that the priority of the several mortgages executed by the said Lake Erie, Wabash and St. Louis Railroad Company is as follows, to wit:

First. The mortgages of August, 1853, called the first mortgage to the plaintiffs the Farmers' Loan and Trust Company to secure the payment of two and a half millions of dollars, the foreclosure of which is not prayed or decreed by this proceeding.

Second. The mortgage of February, 1855, called the second mortgage by the same company to the same plaintiffs, trustees, &c., to secure the payment of $1,200,000 of second mortgage bonds, none of which are yet due, but the interest on which amounting to $131,095.97 is due as above found.

Third. The third mortgage of the same railroad company to the said plaintiffs Sage and Varnum, dated June 6th, 1866, known as the Income bonds and mortgages for the sum of $1,200,000, no part of which—either principal or interest—is due.

Fourth. The fourth or chattel mortgage of May, 1857, of which the said defendant Drummond is trustee, and the court further finds that the said mortgages have priority as above stated and numbered first, second, third and fourth.

The court further finds that the Lake Erie, Wabash and St. Louis Railroad Company, its right of way as surveyed and located and its roadbed and the entire structure, commencing as follows, to wit:

The Toledo, Wabash and Western Railroad enters the State
1194 of Indiana upon the east boundary line thereof in the county of Allen, entering in and upon the north part of fractional section fourteen (14), township thirty-one (31), north, of range fifteen (15) east, running thence in a southwesterly direction to the east line of Huntington county, entering in and upon the Neahlinquah Reservation in township twenty-nine, range ten (10) east, and running thence in a southwesterly direction to the east line of Wabash county, entering in and upon section twenty-nine (29), township twenty-eight (28), range eight (8) east, and running thence in a southwesterly direction to the east line of Miami county, entering in and upon section twenty-second (22), township twenty-seven (27), range five (5) east, running thence in a southwesterly direction to the east line of Cass county, entering in and upon section twenty-seven (27), township twenty-seven (27), range three (3) east, running thence in a southwesterly direction to the north line of Carroll county, entering in and upon section twenty-four, township twenty-six, range one (1) west, running thence in a southwesterly direction to the east line of Tippecanoe county, entering in and upon section one (1), township twenty-four (24), range two (2) west, running thence in a southwesterly direction to the north and east line of Fountain county, entering in and upon section sixteen (16), township twenty-two (22), range seven (7) west, running thence in a southwesterly direction to the east line of Warren county, to the centre of the Wabash river at a point opposite to the north part of the village of Attica in said Fountain county, ranging thence from said point and entering the Chatalie Reservation on the west bank of said river in township twenty-two (22) and range eight (8) west, to

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the west line of said Warren county and to the west boundary line of the state of Indiana, the termination of said railroad upon said boundary line being in and upon section eighteen (18), in township twenty (20), range ten (10) west, and said railroad being of vario-s widths as is more particularly described in the several deeds and grants and instruments of appropriation of lands for railroad
1195 as made to the said Toledo, Wabash and Western Railroad Company, said lands being more particularly designated and described by the maps on file and the deeds of conveyance and instruments of appropriations duly recorded in the offices of the clerks and recorders of the aforesaid counties, including all grounds occupied and used for depot grounds, cattle yards, gravel pits, machine shops, &c., and including also all the depots, depot grounds, iron rail tracks, side tracks, switches, turn tables, water stations and their fixtures, grain houses and every structure, building and erection of every description whatever along the line of said road, and all the rights, privileges and appurtenances thereto attached or pertaining, and the machinery, locomotive power, tools, rolling stock, cord wood, fuel, oil and material in the state of Indiana essential to the operation of the said road are embraced in the second mortgage, subject to the first and prior and superior to the 3d and 4th mortgages.

The court further find that the said defendants, the Toledo and Illinois Railroad Company, lying in the State of Ohio, and the Lake Erie, Wabash and St. Louis Railroad Company lying in the State of Indiana, consolidated in manner and by the authority in the bill alleged, and that the defendant the Toledo, Wabash and Western Railroad Company is the consolidated road; and that at the time of the consolidation the said Lake Erie, Wabash and St. Louis Railroad lying in Indiana owned the following personal property, which was all embraced in and subject to the 2d mortgage, viz.:

Lake Erie, Wabash and St. Louis Railroad Co.

(Previous to consolidation.)

Three (3) locomotive engines built by Rogers, Ketcham and Grosvenor, Paterson, New Jersey, "No. 10," "No. 11," "No. 12."

Four (4) locomotive engines built by the Boston Locomotive Works, "No. 31," "No. 32," "No. 33," "No. 34."

1196 One (1) locomotive engine, "Washington," built by Hinkey and Drury of Boston.

Five (5) locomotive engines built by William Mason & Co., of Taunton, Mass., numbered and named "Mazeppa No. 19," "Titania No. 20," "Oberon No. 21," "Aurora No. 22," and the "Diana No. 23."

Two (2) locomotive engines, 6 feet drivers, built by William Mason & Co., named and numbered "Amazon No. 24," "Nymph No. 25."

Ten (10) passenger cars, built by T. W. Watson & Co., of Springfield, Mass., numbered from 9 to 18 inclusive.

Five (5) box freight cars, original numbers unknown, but since

renumbered from 15 to 19 inclusive, built by C. J. Field, at Toledo, Ohio.

One hundred and twenty (120) box freight cars built by Jones, Bass & Co., of Fort Wayne, marked "L. E., W. & St. L. R. R.," and numbered from 20 to 139 inclusive.

Fifteen (15) platform freight cars built by Dalton, Rowe & Co., of Rochester, N. Y., marked "L. E., W. & St. L. R. R.," and numbered from 1 to 15

Twenty-five (25) platform freight cars built by Jones, Bass & Co., of Fort Wayne, marked "L. E., W. & St. L. R. R.," and numbered from 1001 to 1025 inclusive.

Thirteen (13) platform cars, same as above, numbered from 1030 to 1042 inclusive.

One hundred and eight (108) dumping gravel cars; the greatest part built by Dutton, Rowe & Co., of Rochester, and part by T. W. Wason, of Springfield.

Twenty-two (22) hand cars built by T. W. Wason & Co., Springfield, Mass.

Four (4) hand cars built by C. Wason & Co., Cleveland.

One (1) large (46 feet) turn-table in engine house at Fort Wayne.

One (1) large turn-table in engine house, Lafayette.

One (1) movable turn-table now at State Line.

Fort Wayne Depot—One desk, one table, one ticket can, one safe, one high desk, two wheelbarrows, six trucks, six chairs, one
1197 2,000 lbs. scale, store desk and table, one safe, set scales, two trucks, one water ram, one stove, three chairs.

Lagro Depot—Set scales, one truck, two stoves, desk and table, chairs, &c.

Antioch—One pump, one stove; Mahons, one pump, one stove; Prairie, tank, one pump, one stove.

Wabash Station—One desk, one table, one safe, two trucks, one set 6 tons scales, one grain cart, one wheelbarrow, one stove.

Brady tank—One pump, one stove.

Peru Station—One safe and desk and case, one ticket can, one copying press, one truck, one chair, one grain cart, two stoves, two pumps, one wheelbarrow, one set 6 ton scales.

Logansport Station—One safe, one desk and case, one ticket can, one copying press, two benches, chairs, one grain cart, one set 6 ton scales, two stoves, one water ram, one wheelbarrow, four thousand cords of wood, two safes, one high desk, one counter, one table, four chairs, one stove, in secretary's office at Lafayette; six transit instruments, six cuts, one rod, one chain, sixteen dozen shovels, fifty spike mauls, twenty sledges, twenty track gauges, twenty claw bars, one hundred tamping cars and repairs of road.

The court further finds that the following property belongs to the said last-named road, and is embraced in and subject to the said second mortgage, viz.: The cord wood along the line between Antioch, in Ohio, and New Haven, Indiana:

Between Do.	1,000	cords.
At New Haven	825	"
Between New Haven and Fort Wayne	100	"

At Fort Wayne	75	cords.
Between Fort Wayne and Roanoke	1,000	"
At Roanoke	500	"
Between Roanoke and Mahons	200	"
At Mahons	250	"
Between Mahons and Huntington	300	"
At Huntington	200	"
1198 Between Huntington and Antioch	100	cords.
At Antioch	200	"
Between Antioch and La Gross	150	"
At La Gross	300	"
Between La Gross and Peru	200	"
At Peru	300	"
Between Peru and Logansport	250	"
At Logansport	300	"
Between Logansport and Rock Creek	1,000	"
At Rock Creek	300	"
Between Rock Creek and Delphi	200	"
At Delphi	400	"
Between Delphi and Buck Creek	2,500	"
At Buck Creek	400	"
Between Buck Creek and Lafayette	300	"
At Lafayette	500	"
Between Lafayette and Independence	100	"
At Independence	300	"
Between Independence and Attica	150	"
At Attica	200	"
Between Attica and Williamsport	400	"
Between Williamsport and Lebanon	300	"
At Lebanon	400	"
Between Lebanon and Marsfield	100	"
At State Line	400	"
	21,651	"

Said wood is piled up upon the line of the road and at stations, a portion sawed and prepared for use.

Also, the following inside and outside office furniture, viz.:

Office.

1 safe.
4 desks.
1 Zinc.
1 Counter.
2 Hanging lamps.
2 Arm chairs.
1199 1 Com. chairs.
2 Pails.
5 Paper hooks.
1 Fluid can.
2 Tables.

1 Stove and pipe.
1 Press and stand.
1 Boot rack.
3 Small hand lamps.
2 Cane seat chairs.
4 Stools.
10 Ink stands.
1 Duster.

Outside.

2 Scales.
13 Trucks.
1 Crowbar.
2 Marking pots.
2 Large lamps.
6 Small lamps.
1 Oil can.
1 Lamp filler.
2 Coops.

Treasurer's Office.

Two safes, two desks and secretaries, one large desk, 1 set office chairs, one clerk's desk, four large maps, one safe.

Also the following, marked Exhibit Y:

Schedule of personal property of the consolidated road as divided by the agreement of the two consolidated roads, viz., to the Lake Erie, Wabash and St. Louis R. R. Co., as follows, to wit:

Four (4) locomotive engines built by Wm. Mason, of Taunton, Mass., named and numbered thus: "Boreas, No. 26," "Rushlight, No. 27," "Fairy, No. 28," and "Phantom, No. 29."

1200 Four (4) baggage cars built by Farnsworth and Barnard of Indianapolis, Nos. 7, 8, 9 and 10.

One hundred and forty-seven (147) box freight cars, built by Jones, Bass & Co., of Fort Wayne, Indiana, marked "T. W. & W. R. R. Co." and numbered from 14 to 246 inclusive.

Twenty (20) of the fifty box freight cars built by Watson & Co., Cleveland, Ohio, with iron trucks marked T. W. & W. R. R., and numbered from 351 to 370 inclusive.

Ten (10) of the fifty box freight cars, iron trucks, built by Field and Wilmington, of Toledo, Ohio, and numbered from 441 to 450 inclusive.

Fourteen (14) flat freight cars, built by Jones, Bass & Co., Fort Wayne, marked T. W. & W. R. R., and numbered from 1,043 to 1,056 inclusive.

One (1) baggage and mail car of the two, built by Field and Wilmington at Toledo, and No. 3.

Three of the four hand cars, built at the shop at Fort Wayne.

One (1) horse-power and pump at Lafayette.

One (1) " " " Largro.

One (1) horse-power at Peru.

Twenty (20) tons cast iron chairs.

At Delphi station:

One safe, one desk, one clock, one set 2,000 lbs. scales, one pair trucks, one stove, one table, half dozen chairs and one stove, one [illegible], at Delphi station, tank at Wea, one pump and one stove.

At Attilla station: One safe, one desk, one table, one stove, two chairs, four benches, two stoves, one set 2,000 lbs. scales, two trucks and two grain carts.

Lebanon: One stove, one pump.

Prairie tank; One stove and one pump.

State Line station: Eight stoves, one set six-ton scales, one desk, one table, one safe, chairs and copying press.

Nineteen (19) locomotive headlights.

Four hundred thousand (400,000) cords of wood.

One (1) straightening machine, three dozen shovels, fourteen spike mauls, four sledges, fourteen bars, four chainbars, four
1201 track gauges, twenty tamping cars, thirty-three (33) of the 51 box freight cars built by Whittaker and Phipps, and numbered from 265 to 297 inclusive.

And the following marked "Exhibit L:"

Property of Fort Wayne shops and Eng. H. belonging to the Lake Erie, Wabash and St. Louis R. R. Co.: One (1) stationary engine "Red Bird," and tender, one (1) wheel lathe, one (1) wheel press, one (1) iron planer, two (2) heavy lathes, three (3) small screw lathes (also one at safe), two (2) vertical drills, six (6) ratchet drills, one (1) bolt cutter, shafting, pulling counters, hangers and belting, one (1) scroll chuck, thirteen (13) iron vises, six (6) screw jacks, twelve (12) lever jacks, two (2) rattan pumps, one (1) patent fan blower, ten (10) bells, two (2) bolt headers, tools for — (10) fires, swedges, tongs, sledges, &c., five (5) swedge blocks, one (1) surface plate, one (1) 42-inch handsmith's bellows, nine (9) wood (carpenter's) vises, one (1) small lathe for turning wood, one (1) mandrill and pulley for large patterns, forty-eight (48) wood hand screws, one (1) paint mill, one (1) grindstone and frame, three (3) wheelbarrows, two (2) small platform H cars, 1,652 lbs. sqr. cast steel, 162 lbs. round cast steel, 2,000 lbs. spring steel, 211 lbs. blistered steel, 13,341 lbs. square iron, 13,794 lbs. round iron, 19,119 lbs. flat iron, 9,000 lbs. iron casting, 2,624 lbs. brass casting, 3,200 lbs. finished 5½-ft. tires, 15,890 lbs. unfinished 5 and 5½-ft. tires, 16,500 lbs. old tires, 20,000 lbs. old wrought iron and scraps, 15,000 lbs. old cast iron, 12,000 lbs. old spring steel, ten (10) pair new hand-car wheels and shafts, 2,000 lbs. car bolts, &c., twenty (20) bumpers, three (3) new pilots, 228 new car and engine wheels, 32 pair wheels and axles, 69 old car wheels worn, some fit for use; 44 finished axles for cars and engines, 23,000 ft. oak lumber for cars, 3,000 ft. poplar lumber, 1,500 ft. pine lumber, 1,000 ft. walnut lumber, 416 ft. gilt car moulding, 78 file handles, 3 sets figures, 2 sets letters, one (1) 16-inch sqr. file, five (5) 14-inch sqr. files, one (1) 18-inch sqr. file, six (6) 10-inch sqr. files, one (1) 16-inch sqr. file.

1202 Two 8-in. sqr. files; four 8-in. sqr. files, fine.

Eleven 15-in. round files; six 4-in. sqr. files, fine.

Two 12-in. round files; six 10-in. round files, —

Ten 8-in. round files; three 10-in. round files, fine.
Five 5-in. round files; six 14-in. h'f r'd files, —
Five 8-in. h'f r'd files; twelve 8-in. h'f r'd files, fine.
Sixty 4½-in. saw files; twelve 04-in. h'f r'd files, fine.
Six 10-in. bas. files; one 14-in. flat file, —
Nine 12-in. flat files; nine 12-in. flat files, fine.
3 7-in. flat files; 5 6-in. flat files, —
32 4-in. flat bas. files; 6 14-in. mill saw files —
24 4½ saw fine files; 4 12-in mill saw files.
59 12 in. Coe's screen wrenches; 14 No. 1 copper oil cans.
3 10 in. Coe's screen wrenches; 2 No. 3 copper oil cans.
10 large tin 2 qts. cans; 29 No. 1 tin oil cans.
18 large sqr. tin 2 gall. cans; 12 escutcheons for car doors.
1 large sqr. tin 2 gall. cans; 11 scissors for lamps.
4 iron cab door catches; 66 ¾ in. door knobs.
10 brass cab door catches; Round 12 2 in. door knobs.
39 brass cab door catches; Sqr. 54 1½ in. door knobs.
2 1 in. door knobs, white porcelain.
13 1 in. door knobs, brown porcelain; ½ gross 9/16 picture rings.
½ gro. ⅝ picture rings; ½ gro. ¾ picture rings.
Five (5) steam gauges; three (3) steam balances; 2 lbs. beeswax; 6 lamp chimneys holders; 2 large chain door bolts; 11 iron padlocks; lot white made letters for patterns; 2 brass locks; 9 9 in. screw drivers; 24 2 x 2 loose brass hinges; 9 iron braner label locks; 7 brass braner table locks; 10 iron 4 in. chest locks; 9 brass masonic till locks; 3 brass 2½ in. chest locks; 20 brass detectors; 2 keys chest locks; 10 2 in. hooks. 23 ¾ inch brass hooks; 16 1 in. hooks; 30 pr. 2 in. brass butts; 20 1¾ inch brass butts; 24 1½ in. butts; 33 1¼ brass butts; 24 1 inch brass butts; 4 lbs. ⅝ in. copper rivets; 3 lbs. ⅜ inch copper rivets; 2 lbs. copper burns; 1 gro. 2 in. brass cap
1203 screws; 1½ gro. 1¼ in. brass cap screws; 1 gro. ½ in. brass cap screws; 2 gro. 2½ in. brass cap screws; ½ gro. 2 in. brass cap screws; 1½ gro. 1½ in. brass cap screws; 2 gro. 1¼ in. brass screws; 2 gro. ¾ in. brass screws; 1 gro. ½ in. brass screws; 18 gro. 1¼ in. round head blued iron screws; 2 gross 1¼ in. fillister screws.
1 gro. 5 in. gimblet screws; 1 gross 2 in. gimblet screws.
1 gro. 3½ in. gimblet screws; 7 gro. 3 in. gimblet screws.
3½ gro. 2½ in. gimblet screws; 7 gro. 2¼ in. gimblet screws.
13 gro. 2 in. gimblet screws; 8 gro. 1¾ in. gimblet screws.
3 gro. 1½ in. gimblet screws; 2 gro. 1 in. gimblet screws.
6 gro. ¾ in. gimblet screws; 10 gro. ⅝ in. gimblet screws.
4 gro. ½ in. gimblet screws; 3 gro. ⅜ in. gimblet screws.
73 lbs. tank rivets; 41 paper ½ in. brads.
36 papers ⅜ in. brads; 18 papers ¾ in. brads.
18 papers ⅞ in. brads; 4 papers 1 in. brads.
6 papers 1½ in brads; 2 papers 1¼ finishing nails.
4 papers 2 in. finishing nails; 1 paper brass tacks.
5 papers copper tacks; 88 papers iron tacks.
15 papers clout nails; 2½ gro. corks.
20 papers british luster; 30 yds. cotton flannel, for wicks; 2 yds. woolen flannel; 20 yds. white bunting for signals; 15 yds. duck; 60

yds. linen for putting panels to cars; 3 reams sand paper; ½ ream emery cloth; 65 lbs. flour emery; 10 lbs. meal emery; 12 ¾ in. watsas bits; 1 set car bits; 4 braces; 20 7 in. drawing knives; 8 pewter faucets; 18 hose strainers; 11 steel hammers; 3 spike mauls; 9 doz. papers tripalin; 34 picks; 67 shovels; 21 spades; 1 adze; 1 axe; 41 cotton bell cords; 420 chimneys for head lamps; 1 deck scraper; 30 ft. 3 in. leather belting; 25 ft. 2½ in. leather belting; 7 axe
1204 handles; 20 hand saws; 2 buck saws; 7 door latches; 10 stove-door locks; 3 keys; 63 flush iron chest handles 43 flush brass chest handles 30 axle pulleys.

12 5-in. iron butts; 2,500 carriage bolts.

36 4½-in. iron butts; 21 sides lace leather.

48 4-in. iron butts; 2 spring door bolts.

24 3¼-in. iron butts; 8 mineral door knobs for pass. cars.

18 locks and latches for pass. cars; 48 brass seat strappers.

24 hangers and rims for pass. cars; 43 blind springs.

32 brass arm plates for pass. cars; 144 plated lifts.

54 tassel hooks for pass. cars; 12 brass box handles.

11 pearl white door knobs for pass. cars; 20 hat-rack brackets.

20 papers saddle mails for pass. cars; 12 plated lamp shades.

4 gro. seat buttons for pass. cars; 3 lamp ventilators.

4 gro. seat nails for pass. cars; 1 gro. lamp wicks.

100 picture nails; 90 white letters for cars; 3 signal bells for engines; 8 lbs. rosin; 3 sheets tin; 4 ash pails; 2,000 lbs. colored and white waste; 550 lbs. rags; 15 brooms; 90 wood pails; 60 ft. rubber hose; 1 carpenters' hand-boring machine; 200 ft. 2½-in. leather hose, with discharge pipe; 40 ruby lanterns; 19 white lanterns; 180 lbs. bell rope for freight trains; 1,890 lbs. common nails and spikes; 130 lbs. car nails; 200 lbs. coach screws; 95 lbs. rubber packing; 128 lbs. rubber springs; 303 lbs. new engine flues; one (1) bbl. glue; 30 lbs. gum shellack; 15 gall. burning fluid; one (1) bbl. salt; six 40-gall. tin cans for paint shop; 80 galls. varnish; 65 gall. japan; 80 galls. raw oil; 25 gall. turpentine; 120 gall. asphaltum; 30 gall. alcohol; 150 lbs. white lead in oil; assortment of paints and brushes, valued at $200; 120 ft. glass; 46 lbs. hemp packing; 24 jacket lamps; 200 lbs. hinge nails; 6 lbs. sulphur; 50 lbs. candle wicking; one (1) stone jar; 74 lbs. sheet copper; 174 lbs. strap hinges; 60 lbs. iron wire; 24 lbs. brass wire; 6 lbs. sole leather; 3 iron sand
1205 twinalls; 120 lbs. 1½-inch new rope; 250 gall. engine oil; 200 gal. car oil; 45 gall. signal oil; 218 lbs. tallow oil; 64 bbl.; 2 sets oil measures; 17 oil casks; 1,100 lbs. charcoal; 2 lengths heavy shafting; hangers and pulleys; 13 large stoves and pipe; Kidd's pattern; 40 tons blossburg coal; lot patterns, valued at $1,500; 1,200 lbs. nuts and washers; 4 switch ropes; 1 pr. tackle blocks and ropes; 1,000 lbs. ¾-in. coil chain; 7,000 lbs. crossing plate; 9,600 lbs. crossing plates, long; one (1) platform scale (1,200 lbs.); two (2) spring balance scales, small, 4,000 lbs.; bridge bolts; 4,000 lbs. bridge castings; 5,000 ft. bridge timber; 2 desks in office; 2 chairs, do.; 1 stool, do.; 1 stove, do.; 1 looking-glass, do.; 1 arctic cooler, 1,000 lbs. angle iron; are all embraced in and subject to the said second and third mortgages.

The court further finds that the said second mortgage subject to the first and prior to the third and fourth, embraces all the said mortgaged property and all its accessions and incidents up to the time of decree rendered. The court further finds that the said corporation the Lake Erie, Wabash and St. Louis Railroad Company was duly organized under the general railroad law of the state of Indiana, approved May, 1852, the nineteenth section of which authorizes the company to mortgage their corporate property and franchises, to secure the payment of debts contracted by the company, that the debts contracted, for the security of which the said second and third mortgages were given, were construction debts, as alleged in the bill, contracted for the materials and construction of the said railroad in Indiana, on the route above specified; the court further finds that the said second and third mortgages in terms embrace the road then made and to be made, including the right of way and land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials and machinery used or procured therefor, including the furniture and equipments of the road, and these to be furnished or paid for with the above described bonds; and the bridges, viaducts, culverts, fences, depot grounds, erected or to be
1206 erected thereon, and all the franchises, rights and privileges of the said railroad company of, in, to and concerning the same.

The court further finds that the money raised on said bonds was expended in purchasing material, labor and machinery for said road; and that all the franchises and corporate property of the said railroad company, essential and proper for the enjoyment, use and operation of the said road as then existing or since acquired, were embraced in and subject to said mortgage; and on all of which the said plaintiffs are entitled to a foreclosure and sale.

The court further finds that the said mortgaged property cannot be properly sold in parcels without great depreciation and loss to every class of creditors secured thereby, but the entire mortgaged property, real, personal and mixed, including cord wood, materials and everything pertaining appropriate and essential to the operation of the railroad are all but parts of the railroad indispensable to its usefulness to the public and its value to the purchaser; and that therefore the whole mortgaged property, with its accessions should be sold as an entirety subject only to the prior lien of the said first mortgage.

The court further finds that the said second mortgage expressly waives all benefit of valuation or appraisement laws; and that said property is to be sold as an entirety without any benefit whatever from such laws.

The court further finds that the said property embraced in Exhibit O, to wit:

Four (4) locomotive engines, built by William Mason & Co., of Taunton, Mass., numbered and named "No. 16, Zephyr," "No. 17, Atlanta," "No. 18, Camilla," "No. 30, Ariel."

Five (5) locomotive engines, built by Rogers, Ketchum and Grosvenor, of Paterson, N. J., numbered from 4 to 8 inclusive.

One (1) locomotive engine, built by Blanchard & Kimball, of Springfield, Mass., No. 35.

Eight (8) first class passenger cars, built by T. W. Wason
1207 & Co., of Springfield, Mass., numbered from 1 to 8 inclusive.

Two (2) baggage and mail cars built by A. J. Field, at Toledo, O., numbered 1 and 2.

Two (2) platform freight cars, marked "T. & J.," Nos. 1 and 2.

Fourteen (14) box freight cars, built by Dutton, Rowe & Co., of Rochester, N. Y.; original numbers unknown, but have been renumbered from 1 to 14 inclusive.

One (1) hand car, by Thresher & Co.

Nine (9) hand cars, built by Jones, Bass & Co., Fort Wayne.

One (1) stationary engine and boiler, complete, now in Toledo, built by Wm. Kidd & Co., Rochester.

22,000 lbs. (about) of shafting and pulleys, by same.

One (1) small iron car.

Ten (10) dumping gravel cars, built by Dutton, Rowe & Co., of Rochester, N. Y.

Five (5) platform freight cars, built by Dutton, Rowe & Co., of Rochester, marked "T & J," and numbered from "1 to 5."

One (1) horse power and pump near Antwerp.

One (1) 46 feet turntable in engine-house at Toledo.

Four (4) large stoves in engine-house at Toledo; one large safe, one counter with draws, one Paymaster's desk, two low table desks, one stove, two lounges, ten chairs, in Superintendent's office at Toledo; one large clock in Superintendent's office; one safe, one table, one low desk with can for papers, one high desk, two stools, one letter press, four chairs, one counter; in General Freight Agent's office at Toledo, six locomotive headlights.

Two safes, one high desk, one low table desk, one table, one letter press and stand, two stools, one water cooler, eight chairs, in Treasurer's office, Toledo.

One low table desk, one table, one high desk, one stool, one stove, four chairs, in Chief Engineer's office at Toledo.

One table, one low desk, one map, case, drawing board, one
1208 stove, four chairs, two transit instruments, four cuts, three rods, one chain, in Engineer's office.

One safe, three stoves, one 2,000 lb. scale, one truck, one wheelbarrow, two pumps, at Defiance Station.

Two stoves at Shannon's Station.

One set blacksmith tools at Toledo; about eight thousand (8,000) cords of wood, cut stone cap and sills, for freight house at Toledo, value $500; cut stone caps and sills for machine shop at Toledo, value $1,000; ten dozen shovels, five dozen picks, thirty spike mauls, ten track gauges, forty bars, ten claw bars, in or on repairs of road, sixty tamping bars, and Exhibit K.

Schedule of personal property of the consolidation as divided by the agreement of the two consolidated roads, viz.:

To the Toledo and Illinois R. R. Co., as follows, to wit:

Three (3) locomotive engines, built by Rogers Locomotive and

Machine Works, of Paterson, New Jersey, known as No. 1, No. 2 and No. 3.

Two (2) baggage cars, built by Farnsworth & Barnard, of Indianapolis, Nos. 5 and 6.

Thirty-one freight cars, iron trucks, part of the fifty built by Wason & Co., of Cleveland, Ohio, marked "T., W. & W. R. R.," and numbered 371 to 400 inclusive.

Forty (40) of the fifty box freight cars, iron trucks, built by Field & Wilmington, of Toledo, Ohio, marked "T., W. & W. R. R.," and numbered from 401 to 440 inclusive.

One (1) of the two baggage and mail cars built by Field & Wilmington, at Toledo, numbered 4.

One (1) of the four cars built at Fort Wayne.

One (1) small stationary engine and carry pump for pumping water into engine-house, &c., at Toledo.

At Toledo General Ticket Office: one high desk, one low desk, one ticket case, one stove.

Passenger House at Toledo: one ticket case, two large baggage trucks, six freight trucks, one set of scales.

At Toledo Freight House: one safe, two desks, one large
1209 table, one counter, one stove, thirty-six trucks, two sets 2,000 lbs. scales, one and a half hogsheads of oil.

Two hundred thousand (200,000) cords of woods, three dozen shovels, six spike mauls, two sledges, six bars, two claw bars, two track gauges, ten tamping bars.

Eighteen (18) of the fifty-one box freight cars built by Whitaker & Phillips and numbered from 247 to 264 inclusive and Exhibit S. S.

Following stations, to wit:

At Toledo, 200 cords; between Toledo and Maumee, 200 cords; between Maumee and Washington, 300 cords; at Maumee, 100 cords; at Washington, 700 cords; between Washington and Napoleon, 2,000 cords; at Napoleon 500 cords; between Napoleon and Defiance, 2,300 cords; at Defiance, 200 cords; between Defiance and Antwerp, 500 cords; at Antwerp, 350 cords, was and is properly and equitably the property of the said Toledo and Illinois Railroad Company not embraced in or subject to the said second and third mortgages hereby foreclosed, and as to which no decree or order of sale is to be had in this court.

The court further finds that out of the proceeds of the sale, the several liens are to be paid in the order of their priority after paying first the costs of suit, &c., viz.:

1st. The said sum of $131,095.97, interest due on the bonds and coupons secured by the said second mortgage.

2d. The principal of the said second mortgage, viz.: the sum of one million two hundred thousand dollars, and as said principal bears interest payable semi-annually until maturity, no interest to be discounted.

3d. The principal of the third or income bonds of one million two hundred thousand dollars, deducting, however (as the income bonds do not bear interest), and discounting therefrom the legal interest

from the date of the decree until the maturity of the said income bonds.

4th. The residue, if any, to the said Drummond, trustee of
1210 the chattel mortgage, for the use of his beneficiaries.

5th. And should there still be a surplus after the payment of the foregoing debts and demands, then to those who may be legally or equitably entitled, the residue of the assets of the said Lake Erie, Wabash and St. Louis Railroad Company.

It is, therefore, ordered, adjudged and decreed by the court, that the said defendant, the Lake Erie, Wabash and St. Louis Railroad Company do, in ninety days from this date, pay into this court, for the use of the said Farmers' Loan and Trust Company, plaintiff, the said sum of one hundred and thirty-one thousand and ninety-five dollars and ninety-seven cents, so found due on the said second mortgage bonds as aforesaid, with interest thereon from this date, and costs of suit, and in default thereof, that the said railroad hereinabove described, lying and being in the State of Indiana, extending from the Ohio State line, in the county of Allen, Indiana, on the east, and running southwesterly to the State line of Illinois, in Warren county, Indiana, on the west agreeably to the route thereof hereinabove found and described, and in accordance with the plats and surveys, and the road, road bed and land on which it is built, and all the land appropriated to its use, and the tracks, side tracks, depots, machine shops, machinery, rolling stock, cord wood, and all the said property—real, mixed or personal—belonging to or connected with the said Lake Erie, Wabash and St. Louis Railroad, as hereinabove found to be embraced in and subject to said mortgages, and all its corporate property and franchises, its rights, privileges and appurtenances, and everything properly pertaining thereto, and all the estate, right, title and claim of the said defendants, and each of them in, to and concerning the same, be sold subject to the first mortgage, at the door of the court house, in the county of Tippecanoe, where the principal office of the said railroad company is kept in the State of Indiana, as an entirety, to the highest bidder, without any
1211 relief whatever from valuation or appraisement laws, and that an order or orders of sale returnable according to law be issued to the commissioners hereinafter appointed, commanding him to make such sale and conduct it, when it is not otherwise ordered, conformably to the practice on sales on execution at law, and that he bring the money arising from such sale into court at the next ensuing term thereafter.

It is further ordered, adjudged and decreed by the court, that said order of sale shall not embrace any property hereinabove found to belong to the Toledo and Illinois Railroad.

It is further ordered, adjudged and decreed by the court, that upon such sale the commissioners shall make conveyance thereof to the purchasers, and make return of his proceedings under the order of sale to this court, and that after the said sale and conveyance the said defendants and each of them, and all persons claiming under — through the said defendants, or either of them, save as the said first mortgage, shall be forever foreclosed and barred of any and every

title, interest, claim or demand in and to the said property hereby foreclosed, and every part and parcel thereof.

And on the thirty-fourth day of the same May Term as last aforesaid on suggestion of the complainant that in the above entitled — a commissioner to carry into effect the decree of this court, made and entered on the twenty-eighth day of May, 1858, being the eleventh judicial day of the present term, of the sale of the railroad property therein named, wherein it was, among other things, ordered and decreed that a commissioner should be appointed to make the sale, &c. Now, therefore, know ye that in confidence of his prudence and discretion, we have appointed and do by these presents appoint John L. Robinson, the marshal of the district of Indiana, a commissioner in their behalf to make the sale and carry into full execution *on* said decree of May 28, 1858, aforesaid, and that the order of sale provided in said decree do issue to said John L. Robinson, as such commissioner, commanding him to give thirty days' notice of the
1212 time and place of sale agreeable to the terms of said decree, that in all respects he conduct said sale as sales are conducted on execution at law, and we do further by these presents give full power and authority unto said Robinson as such commissioner to make said sale, receive the purchase money and execute a conveyance to the purchasers, and that he make return of his proceedings as such commissioner in writing, together with the order of sale and a copy of this order, to this court at the next term thereof.

It is further ordered and decreed that a copy of this order under the seal of said court do issue with the order of sale, and that the said Robinson do either in open court or before some competent authority, make and subscribe an oath to faithfully and to the best of his skill and ability discharge and execute the duties of commissioner as aforesaid, which oath shall be filed with the papers in this case and a copy thereof endorsed on the transcript of this order so to be issued as aforesaid, all of which is fully ordered, adjudged and decreed by the court; this entry having been omitted to be made on the said 28th day of May, 1858, is now on motion entered *nunc pro tunc*, and whereas I, the said marshal and commissioner, on the 31st day of August, A. D. 1858, advertised in the "Argus," a weekly newspaper published and in general circulation in the county of Tippecanoe in the state and district of Indiana, the rents, issues and profits of the term of seven years of said mortgaged premises, and also said premises themselves as an entirety, to be sold at the court house in the city of Lafayette, in said county, at public auction on the fifth day of October, A. D. 1858, between the hours of ten o'clock A. M. and four P. M. of said day; said advertisement was published in said paper for more than thirty days consecutively before the day of sale named therein, and on said fifth day of October, 1858, between the said hours of ten o'clock A. M. and four o'clock P. M. of said day, I attended at said court house, and then and there offered for sale at public auction the rents, issues and profits of said mortgaged premises pursuant to said decree, and no one bid for the same,
1213 thereupon I offered the said mortgaged premises themselves as an entirety for sale at public auction, pursuant to said de-

cree, whereupon Azariah Boody bid the sum of one thousand dollars, subject to the lien of said first mortgage set forth in said decree, and I thereupon openly struck off and sold the same to him for the said sum of one thousand dollars, he being the highest and best bidder for said premises, property and effects.

Now know all men by these presents that I, John L. Robinson, marshal and commissioner as aforesaid, pursuant to said decree and order of sale and of the sale so made as aforesaid, and in pursuance of the authority vested in me as aforesaid, and for and in consideration of the said sum of one thousand dollars in cash, paid to me in hand by the said Azariah Boody, the receipt whereof I hereby acknowledge, hath bargained and sold and do by these presents grant and convey to the said Azariah Boody, his heirs and assigns forever, all and singular the said mortgaged premises, property and effects of every description as an entirety so decreed to be sold, and so sold as aforesaid, reference being hereby made to said decree as hereinbefore set forth as a more full and particular description thereof; to have and to hold the said premises hereby granted and conveyed to the sole and proper benefit and behoof of him, the said Azariah Boody, his heirs and assigns forever, subject, nevertheless, to the said first mortgage in said decree set forth in all respects as if this deed had not been executed, but free and wholly discharged from all the liens in said decree mentioned and set forth.

[SEAL.] In testimony whereof, I have hereunto set my hand and seal this 5th day of October, A. D. 1858.

[L. S.] JOHN L. ROBINSON.

1214 UNITED STATES OF AMERICA,
District of Columbia, Tippecanoe County, ss:

Before me, the undersigned, a notary public in and for the said county, personally came John L. Robinson, marshal of the said district and special commissioner, as contained in the foregoing deed, and acknowledged the execution of said deed to be his voluntary act and deed as such commissioner, for the uses and purposes and by the authority of the said deed recited.

In testimony whereof, I have hereunto set my hand and notarial seal this 5th day of October, A. D. 1858.

[L. S.] DANIEL ROYSE,
Notary Public.

EXHIBIT 8, AGREED STATEMENT OF FACTS.

Paragraph No. 7.

EXHIBIT 8.

Articles of Association.

Know all men by these presents, that we, the undersigned, being desirous of forming a corporation to construct, own and maintain a

railroad from the city of Toledo, in the county of Lucas and State of Ohio, to the State line between the States of Ohio and Indiana, and having this day associated ourselves together to form a company for the purpose aforesaid, do hereby certify that we have adopted, and do hereby adopt, the following articles of association and corporation, that is to say:

First. The name assumed by the company is the Toledo and Wabash Railroad Company, and by that name shall it be known.

Second. The city of Toledo, in the county of Lucas and state of Ohio, shall be the eastern terminus, and the state line between
1215 the states of Ohio and Indiana and that part of the same which form- the west boundary line of the township of Harrison, in the county of Paulding and state of Ohio, shall be the western terminus. Said railroad shall pass through the counties of Lucas, Henry, Fulton, Defiance and Paulding.

Third. The amount of the capital stock deemed necessary by the undersigned to construct said road is seven hundred and fifty thousand dollars, to be divided into shares of fifty dollars each.

Fourth. The number of directors to manage said company is fixed at seven.

In witness of this certificate and of the adoption of the foregoing articles of association and incorporation of said company, we have hereunto set our hand and seals at Toledo, in the county of Lucas and state of *of* Ohio, the first day of July, A. D. 1856.

J. R. OSBORN. [SEAL.]
GEO. H. BURROWS. [SEAL.]
W. BAKER. [SEAL.]
W. H. RAYMOND. [SEAL.]
C. B. PHILLIPS. [SEAL.]
A. B. STEBBINS. [SEAL.]

STATE OF OHIO, *Lucas County, ss:*

This day came J. R. Osborn, Geo. H. Burrows, W. Baker, W. H. Raymond, C. B. Phillips and A. V. Stebbins, the signers and sealers of the foregoing certificate, and who are known to me to be the same persons who have signed the foregoing certificate, and acknowledged severally that they executed the same, and that the foregoing instrument is their act and deed for the purpose therein expressed.

In witness of which I have set my hand this first day of July, in the year one thousand eight hundred and fifty-eight.

ALEX. H. NEWCOMBE, *J. P.*

1216 STATE OF OHIO, *Lucas County, ss:*

Know all men, that I, Peleg T. Clark, Clerk of the Court of Common Pleas of said County of Lucas, do hereby certify that Alexander Newcombe, before whom the above acknowledgement was made, was at the date thereof and still is *is* a justice of the peace within and for the county of Lucas, and that the signature above named, purporting

to be his, is the true and genuine signature of the said Alexander Newcombe.

In witness of which, I have hereunto set my hand and affixed the seal of the said Court of Common Pleas of Lucas county, at Toledo, this 3d day of July, 1858.

[SEAL.] PELEG T. CLARK, *Clerk.*

SECRETARY OF STATE'S OFFICE,
COLUMBUS, OHIO, *July* 10, 1858.

I, Addison P. Russell, Secretary of the State of Ohio, do hereby certify that the foregoing is a true copy of the certificate of association of the Toledo and Wabash Railroad Company now on file on the record in this office.

Witness my official signature and the great seal of the State at the time and place above written.

[SEAL.] A. P. RUSSELL.

EXHIBIT 8*a*, AGREED STATEMENT OF FACTS,

Paragraph No. 9.

EXHIBIT 8*a*.

This indenture, made this 8th day of October, eighteen hundred and fifty-eight, between Azariah Boody and Ambia Boody,
1217 his wife, of the one part, and the Toledo and Wabash Railroad Company, a body corporate under the laws of the state of Ohio, of the other part witnesseth:

The said party of the first part for and in consideration of the sum of one dollar in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, as well as also for other sufficient and valuable consideration, have bargained, sold, conveyed and confirmed and do by these presents bargain, sell, convey and confirm unto the said party of the second part, their successors and assigns for ever, all that part of the Toledo, Wabash and Western Railroad which lies within the state of Ohio and which was formerly known as the Toledo and Illinois Railroad Company, embracing the said road, road bed, right of way, depots, stations, tracks, side tracks and all the privileges, appurtenances and accessions thereunto belonging, and the rolling stock, material and franchises thereof, being the same identical property in every particular, more fully set out and described in the deed of Matthew Johnson, marshal of the Northern district of Ohio, and special master commissioner, to sell, &c., this day executed to the said Boody, to which deed and to the decree and order of sale in said deed mentioned, reference is more particularly made for a minute description of the property hereby conveyed, together with all the rights, income and profits thereof, and all the accessions and incidents thereto. It being the true intent and meaning of this deed, to embrace and convey to the said party of the second part the same identical property in every respect as that which

the said Johnson by the deed aforesaid conveyed to the said Boody as fully as though the same were herein specially detailed.

To have and to hold the railroad hereby conveyed, and all the privileges and appurtenances, rents, profits, income, accessions, incidents, rights and franchises unto the said party of the second part, viz.: the Toledo and Wabash Railroad Company, and to their successors and assigns for ever, in as full and ample a manner
1218 as the said railroad property could be had and held under the said decree sale and conveyance of the said Johnson hereinabove referred to.

In witness whereof, the said Azariah Boody and Ambia Boody, his wife, the said party of the first part, have hereunto set their hands and seals, the day and year first above written.

AZARIAH BOODY. [L. S.]
AMBIA BOODY. [L. S.]

Signed, sealed and acknowledged in the presence of
E. BISSELL, JR.
L. T. THAYER.

STATE OF OHIO, *Lucas County, ss:*

Before me, the undersigned, a notary public in and for said county, personally appeared the above named Azariah Boody and Ambia Boody, his wife, and acknowledged the signing and sealing of the foregoing conveyance to be their voluntary act and deed, and the said Ambia being at the same time examined by me separate and apart from her husband and the contents of said instrument made known to her by me, she then declared that she did voluntarily sign, seal and acknowledge the same, and that she is still satisfied therewith.

Witness my hand and seal notarial this 8th day of October, 1858.

E. BISSELL, JR.,
Notary Public.

1219 EXHIBIT 8*b*, AGREED STATEMENT OF FACTS.

Paragraph No. 11.

EXHIBIT 8*b*.

This indenture made and executed this seventh day of October, 1858, by and between the Toledo, Wabash and Western Railroad Company, a body corporate, of the one part, and the Toledo and Wabash Railroad Company, also a body corporate, of the other part, witnesseth:

That for and in consideration of the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, and for other good and valuable considerations, the said party of the first part have bergained, sold and quit-claimed into the said party of the second part, their successors and assigns forever, all the railroad and railroad property of every description as specified in the decree of the

United States Circuit Court for the Northern District of Ohio, at the suit of the Farmers' Loan and Trust Company and others, against the said party of the first part and others at the July term, 1858, of said court. For a more particular description of the property hereby conveyed, reference is particularly made to the said decree, being the same identical property in all respects which is advertised to be sold on the seventh day of October, 1858, at Toledo, Lucas County, Ohio, by Mathew Johnson, marshal of the said district, and special commissioner in that behalf in the said decree.

To have and to hold the said railroad property with all its privileges, appurtenances, rents, profits, issues, income, rights and franchises into the said Toledo and Wabash Railroad Company, their successors and assigns forever.

In testimony whereof, the said corporation have ordered this deed to be executed by the president and secretary and sealed with
1220 the seal or the said party of the first part the day and year first above written.

[SEAL.] AZARIAH BRODY,
President Toledo, Wabash & W. R. R.
JNO. N. DRUMMOND,
Secretary Toledo, Wabash & W. R. R.

Signed, sealed and delivered and acknowledged in presence of
CALVIN BULLOCK.
GEO. H. BURROWS.

THE STATE OF OHIO, *Lucas County, ss:*

Before me, the undersigned notary public in and for the said county, personally came Azariah Boody, president of the said Railroad Company, party of the first part, and acknowledged the foregoing deed of conveyance to be the deed of the said Toledo, Wabash and Western Railroad Company; that the foregoing is his signature affixed thereto as president of said railroad company; that the seal affixed to the said conveyance is the proper corporate seal of the said company, and that the signing and ensealing thereof was done by order of the Board of Directors of the said party of the first part. Also at the same time and place personally appeared John N. Drummond, Secretary of the said granting corporation, who acknowledged that he countersigned said conveyance as such secretary by like order of the board of directors for the uses and purposes therein expressed, which is to me satisfactory evidence of the due execution of said conveyance by the said Toledo, Wabash and Western Railroad Company.

Witness my hand and notarial seal at Toledo, Lucas County and State of Ohio, this 17th day of October, A. D. 1858.

[SEAL.] CHAS. PRATT,
Notary Public.

1221 EXHIBIT 9, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 8.

EXHIBIT 9.

Articles of Association.

STATE OF INDIANA, *To wit:*

Be it known that the undersigned, whose respective places of residence are set down in the margin, for the purpose of organizing a company for the construction, owning and maintaining of a contemplated railroad, hereinafter named, in pursuance of an act of the legislature of the State of Indiana, entitled "An act to provide for the incorporation of railroad companies," approved May 11th, 1852, and the several amendments thereto, do hereby each for himself subscribe for the number of shares in the capital stock of said contemplated railroad company set opposite our respective names such subscription payable to said company as the board of directors of said company, when elected, or their successors, may from time to time or at any time order or require, and we do hereby agree to the following articles of association, to wit:

Article First. The name and style of the corporation shall be "The Wabash and Western Railway Company."

Article Second. The capital stock of the company shall be three (3) millions of dollars, to consist of sixty thousand shares of fifty (50) dollars each.

Article Third. The eastern terminus of said road shall be a point on the east line of the State of Indiana, said point being in the north half of fractional section fourteen, township thirty-one north, of range fifteen east; thence running down the valleys of the Little and Wabash rivers, and passing through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, terminating at a point in the west line of "State Line City" in the said last-named county.

1222 Article Fourth. The length of said railroad is stated as near as may be to be one hundred and sixty-eight miles.

Article Fifth. The number of directors to manage the affairs of the company shall be thirteen, and we hereby declare that the following are the names of the directors elected by us from our own number to constitute the first board of directors, to wit:

Azariah Boody, James Spears, Warren Colburn, Reed Case, Albert S. White, John N. Drummond, George Cecil, William Kent, George H. Burrows, Robert Brackenridge, John R. Osborn, Albert H. Tracy, William Baker.

In witness whereof we have hereunto severally set our names as parties to the above articles and subscribers to the capital stock of said company as aforesaid, this 15th day of July, A. D. 1858.

John N. Drummond	Five shares	$250, La Fayette
James Spears	Thirty-six shares	1,800, La Fayette
Reed Case	Forty shares	2,000, La Fayette
M. Fowler	Twenty shares	1,000, La Fayette
Wm. F. Reynolds	Twenty shares	1,000, La Fayette
J. S. Hanna	Fourteen shares	700, La Fayette
Spears, Pierce & Co.	Four shares	200, La Fayette
W. H. Potter	Twenty shares	1,000, La Fayette
James M. Spencer	Two shares	100, La Fayette
Jno. S. Williams	Four shares	200, La Fayette
J. R. Osborn	Five shares	250, Toledo
Wm. Baker	Five shares	250, Toledo
Samuel Rankin	Four shares	200, Wea
N. O. Ross	Two shares	100, Peru
J. D. Connor	Two shares	100, Wabash
W. Kent	Ten shares	500, Williamsport
R. Brackenridge, Jr.	Ten shares	500, Fort Wayne
Warren Colburn	Ten shares	500, Toledo
Parker Dresser	Two shares	100, La Fayette
Albert S White	Five shares	250, La Fayette
A. Boody	Five hundred shares	25,000, New York
E. D. Morgan	Five hundred shares	25,000, New York
E. Whitehouse, Son & Morrison	Five hundred shares	25,000, New York
John E. Terry	One hundred shares	5,000, New York
George D. Morgan	One hundred shares	5,000, New York
Albert H. Tracy	Two hundred shares	10,000, Buffalo
George Cecil	Ten shares	500, Logansport
George H. Burrows	Five shares	250, Toledo

1223

Allen Hamilton	Five shares	250, Fort Wayne
N. C. Porter	Three shares	150, Attica
Azariah Boody	One thousand shares	50,000, New York
Warren Colburn	Five hundred shares	25,000, Toledo
Jno. R. Osborn	Five hundred shares	25,000, Toledo
James Spears	Five hundred shares	25,000, La Fayette
John N. Drummond	Five hundred shares	25,000, La Fayette
George H. Burrows	Five hundred shares	25,000, Toledo

STATE OF INDIANA, *Secretary's Office, ss:*

I, Daniel McClure, Secretary of the State of Indiana, do hereby certify the above and foregoing to be a complete and correct copy of the articles of association of the Wabash and Western Railway Company as appears from said original articles filed in this office on this 27th day of September, 1858.

In testimony whereof I have hereunto set my hand and affixed the seal of the state at the city of Indianapolis this day and year last above written.

[L. S.] DANIEL McCLURE,
Secretary of State.

EXHIBIT 9*a*, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 10.

EXHIBIT 9*a*.

Know all men by these presents, that Azariah Boody and Ambia Boody, his wife, of the one part, and the Wabash and Western Railway Company, a body corporate under the laws of Indiana, of the other part, have contracted as follows:

The said party of the first part for and in consideration of the sum of one dollar in hand paid by the said party of the second
1224 part, the receipt of which is hereby acknowledged, as well as other sufficient and valuable consideration, have bargained, sold and conveyed and confirmed, and do by these presents bargain, sell, convey and confirm unto the said party of the second part, their successors and assigns forever, all that part of the Toledo, Wabash and Western railroad which lies within the state of Indiana, and which was formerly known as the Lake Erie, Wabash and St. Louis railroad, embracing the said road, road bed, right of way, depots, stations, tracks, side tracks, and all the privileges, appurtenances and accessions thereto belonging, and the rolling, stock, material and franchises thereof, being the same property now fully set out and described in the deed of John L. Robinson, marshal of the district and special commissioner to sell, this day executed to the said Boody, to which deed, and to the decree and order of sale therein mentioned, reference is now particularly had for a more minute description of the property hereby conveyed, and all the rights and income thereof, it being the intent and meaning of this deed to embrace and convey to the said party of the second part, the same identical property in every respect as that which the said Robinson by the deed aforesaid conveyed to the said Boody, as fully as though the same were here especially detailed.

To have and to hold the said railroad hereby conveyed, and all the privileges and appurtenances, rents, profits, income, accessions, incidents, rights and franchises into the said party of the second part, viz., the Wabash and Western Railway Company, and to their successors and assigns forever, in as full and ample a manner as the said property hereby conveyed could be had and held under the said decree, sale, and the conveyance of Robinson hereinabove referred to.

In testimony whereof the said Azariah Boody and Ambia Boody, his wife, the party of the first part, have hereunto set their hands and seals this fifth day of October in the year of our Lord one thousand eight hundred and fifty-eight.

AZARIAH BOODY. [SEAL.]
AMBIA BOODY. [SEAL.]

1225 STATE OF INDIANA, *Tippecanoe County, ss:*

Before me, the undersigned, notary public in and for the said county, personally came Azariah Boody and Ambia, his wife, both personally known to me to be the grantors in the above conveyance, and acknowledged the execution of the foregoing conveyance to be their voluntary act and deed for the uses and purposes therein expressed.

In testimony whereof, I have hereunto set my hand and notarial seal, at my office in said Tippecanoe County, the fifth day of October, 1858.

[L. S.]

W. C. L. TAYLOR,
Notary Public.

EXHIBIT 9*b*, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 12.

EXHIBIT 9*b*.

This Indenture made and executed this fifth day of October A. D. 1858, by and between the Toledo, Wabash and Western Railroad Company, a corporation under the laws of Indiana, of the one part, and Wabash and Western Railway Company, a body corporate under the laws of Indiana, witnesseth:

That for and in consideration of the sum of one dollar the receipt of which is hereby acknowledged, and for other good and valuable considerations, the said party of the first part have bargained, sold and quit claimed, and do by these presents bargain, sell and quit claim, unto the said party of the second part, their successors and assigns forever, all the railroad and railroad property of every description, as specified in the decree of the United States Circuit Court for the district of Indiana, at the suit of the Farmers' Loan and Trust Company and others against the said party of
1226 the first part and others, rendered at the May Term 1858, of said court. For a more particular description of the property hereby conveyed, reference is hereby specifically made to said decree, being the same property advertised to be sold this day at Lafayette, Indiana, on said decree. To have and to hold the said railroad and all its said property with its privileges, appurtenances, rents, profits, issues, rights and franchises unto the said Wabash and Western Railway Company, their successors and assigns forever.

In witness whereof, the said corporation have ordered this deed to be executed by the president and secretary, and the seal of the corporation to be thereto affixed, the day and year first-above written.

AZARIAH BOODY, *President.*

Attest and countersigned:

[SEAL.]

JOHN N. DRUMMOND,
Secretary.

STATE OF INDIANA, *Tippecanoe County, ss:*

Personally appeared before me, the undersigned, a notary public in and for said county, Azariah Boody, the president of said company, party of the first part in the foregoing deed, and as such president aforesaid acknowledged that he signed the deed by order of the board of directors of the said party of the first part, and that the seal thereto affixed to the foregoing conveyance is the corporate seal of said company affixed by order of the last-mentioned board of directors, for the uses and purposes in the said deed expressed. Also personally came before me John N. Drummond, secretary of said company, to me personally known, who acknowledged that he countersigned said deed as such secretary by like order of said board for the uses and purposes therein expressed, which is
1227 to me satisfactory evidence of the execution of said deed by said Toledo, Wabash and Western Railroad Company.

[SEAL.] DANIEL ROYCE,
Notary Public.

EXHIBIT 10, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 13.

EXHIBIT 10.

(Printed *ante*, p. 1144.)

1228 EXHIBIT 12, AGREED STATEMENT OF FACTS, PARAGRAPH NO. 15.

EXHIBIT 11.

The Court of Common Pleas, Lucas County, Ohio.

THE STATE OF OHIO, *Lucas County:*

At a term of the above named Court, begun and held before the Hon. Rueben C. Lemmon, Hon. Louis H. Pike, Hon. David H. Commager, Presiding Judges, on the 3d day of April, A. D. 1888, among other proceedings had by and before said Court on the 9th day of May, A. D. 1888, being the 31st day of said term, as appears by its journal of that day, were the following, viz.:

28523.

In re Petition of JAMES JOY ET AL.

This day came on to be heard the petition of James F. Joy, Ossian D. Ashley, Edgar T. Welles and Thomas H. Hubbard to the Judges of the Court of Common Pleas of the county of Lucas, in the State of Ohio, to appoint a successor to the trust named in the mortgage from the Toledo and Wabash Railroad Company to Edwin D. Morgan, in said petition set forth and it appearing to the court that

it was stipulated in said mortgage that in the event of the
1229 death or disability of said trustee, the estate thereby created, should not vest in his legal representatives, but should as to said trust cease and determine, and said The Toledo and Wabash Railroad Company should proceed at once to appoint a successor to said trust, and in the event of the failure to appoint for a term of sixty days, then upon the application of the holders of said bonds to the amount of three hundred thousand dollars, it should be lawful for the person being for the time Judge of the Court of Common Pleas of the county of Lucas, in the state of Ohio, to appoint a successor to said trust, who should have the same privileges and duties in regard to said trust as were named therein at the execution of said deed of mortgage.

And, it further appearing to the Court that the said Edwin D. Morgan has now been dead more than three years, that no successor to said trust has been appointed by said The Toledo and Wabash Railroad Company; that said company went out of existence many years ago, and no successor of said corporation or other party or person interested has heretofore taken any step to secure the appointment of any successor to said trust, and it further appearing that the petitioners are the holders of more than three hundred of the bonds secured by said mortgage;

Thereupon the Hon. Louis H. Pike, one of the Judges of the Court of Common Pleas, of the county of Lucas in the state of Ohio, appointed James F. Joy, of Detroit, Michigan, successor to said trust, with all the privileges and duties named in said mortgage.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at Toledo, this 5th day of January, A. D. 1889.

[L. S.] J. P. BRONSON, *Clerk*,
By M. E. THEUERKAUFF, *Deputy*.

1230 EXHIBIT 11, AGREED STATEMENT OF FACTS.

Paragraph No. 14.

(Printed *ante*, p. 1149.)

EXHIBIT 13, AGREED STATEMENT OF FACTS.

Paragraph No. 15.

EXHIBIT 13.

THE STATE OF INDIANA, *Tippecanoe County, ss:*

In the Tippecanoe Circuit Court of Tippecanoe County, State of Indiana, to the April Term A. D. 1888, Wednesday, the Fifteenth Judicial Day of said Term, May the 9th, 1888.

Present—The Honorable David P. Vinton, sole Judge of said Court.

In re Petition of JAS. F. JOY ET AL.

Comes now the petitioners by Wager Swayne and Charles B. Stuart, their attorneys, and file their petition in this behalf, reading in these words (insert). And the court being duly advised of the death of Edwin D. Morgan, trustee in the mortgage, and the petitioners having shown a compliance with the terms of said mortgage, their prayer for the appointment of a succee-or to the said
1231 Morgan is granted. And the court hereby appoints James F. Joy, of Detroit, Michigan, a trustee in the mortgage, to succeed said Edwin D. Morgan.

And it is further ordered that the petitioners pay the costs and charges in this behalf.

Read in open Court and signed this 9th day of May, 1888.

DAVID P. VINTON, *Judge.*

THE STATE OF INDIANA, *Tippecanoe County, ss:*

I, Henry C. Tinney, Clerk of the Tippecanoe Circuit Court of Indiana, do hereby certify the above and foregoing to be a full, true and complete copy of the order of the Court, appointing James F. Joy, trustee, as successor of Edwin D. Morgan, as the same appears of record now remaining in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at office in Lafayette, Indiana, on this 25th day of January, A. D. 1889.

[SEAL.] HENRY C. TINNEY, *Clerk.*

1232 EXHIBIT 12 (*a*), AGREED STATEMENT OF FACTS.

Paragraph No. 16.

EXHIBIT 14.

Consolidation Agreement.

Wabash and Western Railway Co. with Toledo and Wabash Railroad Co.

(Printed *ante*, p. 1154.)

EXHIBIT 15, AGREED STATEMENT OF FACTS.

Paragraph No. 19.

EXHIBIT 24.

(Printed *ante*, p. 485.)

EXHIBIT 28. PARAGRAPH 20 AND 21, AGREED STATEMENT OF FACTS. DECREE OF LUCAS COUNTY, OHIO, OF FORECLOSURE OF GOLD BOND MORTGAGE.

(Printed *ante*, p. 602.)

1233 Paragraph No. 21.

EXHIBIT 29.

STATE OF INDIANA, *Cass County, ss:*

Cass County Circuit Court.

THE METROPOLITAN NATIONAL BANK, of the City of New York; THE NASSAU NATIONAL BANK, of the City of Brooklyn; THE UNION NATIONAL BANK, of the City of New York; JOHN R. KENNADAY, CHARLES PERKINS, EDWARD LIVINGSTON and HENRY A. V. POST, who are Partners by the Name of Perkins, Livingston, Post & Co., and JAMES F. D. LANIER, Plaintiffs,

against

THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, Trustee; EDWIN D. MORGAN, Trustee; GEORGE GRISWOLD, ALEXANDER M. WHITE, and HENRY H. WARDEN, Trustees; SOLON HUMPHREYS and JAMES R. JESUP, Trustees; JOHN N. A. GRISWOLD, JAMES R. JESUP and LUCIEN TILTON, Trustees; ISAAC H. KNOX, Trustee; ABRAM B. BAYLIS, Trustee; JOHN T. TERRY, Trustee; and VALENTINE H. KETCHAM, Trustee, Defendants.

This day came the parties by their respective attorneys, and this cause came on to be heard upon the pleadings, exhibits, testi-
1234 mony and report of the special master appointed herein, and was argued by counsel.

On consideration whereof the court does find that all the defendants have answered the original petition filed in this cause, and the cross-petition of Valentine H. Ketcham, trustee, one of said defendants, and that the said cause is ready for a final decree, in accordance with the rules and practice of this court. And the court having inspected and fully considered the report of W. B. Corneau, special master appointed herein, and finding the same to be in all respects regular and correct, does in all things approve and confirm said report. And the court does further find, that the facts stated and averments made in the said original petition, and the cross-petition of the said Valentine H. Ketcham, trustee, are correct and true, and that the equity of the cause is with the said plaintiff and the said Valentine H. Ketcham, trustee, and that they are entitled to the relief therein prayed. That the said Toledo, Wabash and Western Railway Company is composed and organized as therein stated, and for the purposes stated, and that its line of railroad constitutes a very important and valuable channel for transportation and travel through the states of Ohio, Indiana and Illinois, which the best interests of all interested in its property as well as the public at large require should be kept and operated together, and that upon a sale thereof, all the property, real and personal, and the franchises of said company described in said trust deed, to the New York Guaranty and Indemnity Company, and now represented by said V. H. Ketcham, trustee, should be sold as an unit and in its entirety. And it appearing to the court that to accomplish this object, like proceedings to those instituted in this court have been taken in the courts of proper jurisdiction in the states of Ohio and Illinois, and that in the action so instituted in the Court of Common Pleas for the county of Lucas in the State of Ohio, a final judgment or decree has been made and entered in the words and figures following, to wit:

(Here follows the decree entered in the Court of Common Pleas of Lucas County, Ohio.)

1235 And the court upon the pleadings, exhibits and master's report filed herein, and the evidence adduced, does find and determine that the several findings of fact in the said judgment and decree of said Court of Common Pleas contained are truly and correctly found, and that the orders, judgment and decree are properly made and adjudged, and this court does make all such findings and the orders, judgment and decree of said Court of Common Pleas part of the judgment and decree of this court, to the same effect as they would have if repeated in this decree.

And it appearing to this court that the said Toledo, Wabash and Western Railway Company was, on the 18th day of October, 1875, in default of payment on the bonds issued under and secured by the several mortgages and trust deeds in the judgment and decree of the said Court of Common Pleas particularly specified, and to the amounts therein stated, and that the same, together with the accrued interest thereon, and upon said bonds still remains due and unpaid, and that at the same date there was due to the said Valen-

tine H. Ketcham, trustee, the sum of $3,636,197.30, payable in the manner particularly specified in said judgment and decree; and to the end that the said trust deed of the said V. H. Ketcham, trustee, may be enforced against all the property and franchises therein named by the concurrent judgments and decrees of the courts of competent jurisdiction in the several states in which such property and franchises are situated, subject to all the prior liens upon said property and franchises, as found and set forth in the judgment and decree of said Court of Common Pleas, it is by this court ordered, adjudged and decreed, that the said Toledo, Wabash and Western Railway Company, within ten days from the entry of a like decree in the state of Illinois, pay into the hands of the receiver appointed in this cause the said sum of $3,636,197.30 so due to the said V. H. Ketcham, trustee, together with the accrued interest thereon, from the 18th day of October, 1875, at the rate of seven per cent. per annum, and the costs of this suit; and in de-
1236 fault thereof, that all the property, rights and fra-chises of said railway company, particularly described in the judgment and decree of said Court of Common Pleas of Lucas county, subject to the liens aforesaid, be sold by a special master commissioner to satisfy the same, upon the terms, limitations and conditions in the judgment and decree of said Court of Common Pleas, fully and particularly set forth and prescribed.

And it is further ordered, that Jacob D. Cox be, and he is hereby, appointed such special master commissioner to carry this judgment and decree into execution, and that in executing the same, and in all the steps taken by him he be governed by the provisions and directions in the decree of said Court of Common Pleas contained, and that he make full report of his doings in the premises to this court.

Ordered, that a decretal order be issued by the clerk of this court to the said special master upon the *precipe* of the said V. H. Ketcham, trustee, requiring him to carry this judgment and decree into execution, and that he return the same with his doings thereunder.

And it is further ordered that this cause stand continued to the next term of this court, with a reservation to the parties of the right to correct any errors or mistakes in computation of otherwise, by any further order of the court.

1237 Paragraph No. 21.

EXHIBIT 30.

STATE OF ILLINOIS, *Vermilion County, ss:*

Vermilion Circuit Court.

THE METROPOLITAN NATIONAL BANK, of the City of New York; THE NASSAU NATIONAL BANK, of the City of Brooklyn; THE UNION NATIONAL BANK, of the City of New York; JOHN R. KENNADAY, CHARLES PERKINS, EDWARD LIVINGSTON, and HENRY A. V. POST, who are Partners by the Name of Perkins, Livingston, Post & Co., and JAMES F. D. LANIER, Plaintiffs,

against

THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, Trustee; EDWIN D. MORGAN, Trustee; GEORGE N. GRISWOLD, ALEXANDER M. WHITE and HENRY H. WARDEN, Trustees; SOLON HUMPHREYS, and JAMES R. JESUP, Trustee; JOHN N. A. GRISWOLD, JAMES R. JESUP and LUCIEN TILTON, Trustees; ISAAC H. KNOX, Trustee; ABRAM B. BAYLIS, Trustee; JOHN T. TERRY, Trustee, and VALENTINE H. KETCHAM, Trustees, Defendants.

This day came the parties by their respective attorneys and this cause came on to be heard upon the pleadings, exhibits, testi-
1238 mony and report of the special master appointed herein and was argued by counsel.

On consideration whereof the court does find that all of the defendants have answered the original petition filed in this cause and the cross-petition of Valentine H. Ketcham, trustee, one of said defendants. And that the said cause is ready for a final decree in accordance with the rules and practice of this court. And the court having inspected and fully considered the report of W. B. Corneau, special master appointed herein, and finding the same to be in all respects regular and correct, does in all things approve and confirm said report.

And the court does further find that the facts stated and averments made in the said original petition and the cross-petition of the said Valentine H. Ketcham, trustee, are correct and true, and that the equity of the cause is with the said plaintiff and the said Valentine H. Ketcham, trustee, and that they are entitled to the relief therein prayed.

That the said Toledo, Wabash and Western Railway Company is composed and organized as therein stated and for the purposes stated; and that its lines of railroad constitute a very important and valuable channel for transportation and travel through the states of Ohio, Indiana and Illinois which the best interests of all interested in its property as well as the public at large require should be kept and operated together, and that upon a sale thereof all the property, real and personal, and the franchises of said company described in

said trust deed to the New York Guaranty and Indemnity Company, and now represented by said V. H. Ketcham, trustee, should be sold as a unit and in its entirety; and it appearing to the court that to accomplish this object like proceedings to those instituted in this court have been taken in the courts of proper jurisdiction in the states of Ohio and Indiana, and that in the action so instituted in the Court of Common Pleas for the county of Lucas in the state of Ohio a final judgment or decree has been made and entered in the words and figures following, to wit:

1239 (Here follows the decree as entered in the Court of Common Pleas in and for the State of Ohio.)

And the court, upon the pleadings, exhibits and master's report, filed herein, and the evidence adduced, does find and determine that the several findings of fact in the said judgment and decree of said Court of Common Pleas contained are truly and correctly found, and that the orders, judgment and decree based thereon are properly made and adjudged, and this court does make all such findings, and the orders, judgment and decree of said Court of Common Pleas, a part of the judgment and decree of this court, to the same effect as they would have if repeated in this decree.

And it appearing to this court that the said Toledo, Wabash and Western Railway Company was, on the 18th day of October, 1875, in default of payment on the bonds issued under and secured by the several mortgages and trust deeds in the judgment and decree of the said Court of Common Pleas particularly specified, and to the amounts therein stated, and that the same, together with the accrued interest thereon and upon said bonds, still remains due and unpaid, and that at the same date there was due to the said Valentine H. Ketcham, trustee, the sum of $3,636,197.30, payable in the manner particularly specified in said judgment and decree. And to the end that the said trust deed of the said V. H. Ketcham, trustee, may be enforced against all the property and franchises therein named by the concurrent judgments and decrees of the courts of competent jurisdiction in the several states in which such property and franchises are situated, subject to all the prior liens upon said property and franchises, as found and set forth in the judgment and decree of said Court of Common Pleas, it is by this court ordered, adjudged and decreed that the said Toledo, Wabash and Western Railway Company, within ten days from the entry of a like decree in the state of Indiana, pay into the hands of the receiver appointed in this cause the said sum of $3,636,197.30 so due to the said V. H. Ketcham, trustee, together with the accrued interest thereon from the 18th day of October, 1875, at the rate of seven per cent.

1240 per annum, and the costs of this suit; and, in default thereof, that all the property, rights and franchises of said railway company, particularly described in the judgment and decree of said Court of Common Pleas of Lucas County, subject to the liens aforesaid, be sold by a special master commissioner to satisfy the same upon the terms, limitations and conditions in the judgment and decree of said Court of Common Pleas fully and particularly set forth and prescribed.

And it is further ordered that Jacob D. Cox be, and he is hereby, appointed such special master commissioner to carry this judgment and decree into execution, and that in executing the same, and in all the steps taken by him, he be governed by the provisions and directions in the decree of said Court of Common Pleas contained, and that he make full report of his doings in the premises to this court.

Ordered, that a decretal order be issued by the clerk of this court to the said special master upon the precipe of the said V. H. Ketcham, trustee, requiring him to carry this judgment and decree into execution, and that he return the same with his doings thereunder. And it is further ordered that this cause stand continued to the next term of this court, with a reservation to the parties of the right to correct any errors or mistakes in computation or otherwise by any further order of the court.

STATE OF ILLINOIS, *Vermillion County, ss:*

I, Geo. Dillon, clerk of the circuit court in and for the county and state *of* aforesaid, do hereby certify that the foregoing is a true, perfect and complete copy of the decree rendered in said cause of the Metropolitan National Bank of New York *et al. vs.* The Toledo, Wabash and Western Railway Company *et al.* at the February term, A. D. 1876, of said Court.

1241 Witness my hand and the seal of said Court this March 3d, 1876.

[L. S.]

GEO. DILLON, *Clerk,*
By J. W. LOWELL, *Deputy.*

Paragraph No. 21.

EXHIBIT 31.

The Wabash Railway Company of Ohio.

Certificate of Corporation.

Be it remembered, that we, the undersigned, John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, having become the purchasers of the real and personal property, road beds, rights of way, fixtures and franchises of the Toledo, Wabash and Western Railway Company, which were sold on the 12th day of June, A. D. 1876, at the city of Toledo, and state of Ohio, at a judicial sale made in pursuance of an order of the Court of Common Pleas of the county of Lucas, and state of Ohio, which sale was duly confirmed by order of said court; and having received a deed and grant of the same, in pursuance of said order of said Court of Common Pleas, and having filed a copy of said deed and grant in the office of the secretary of state of the state of Ohio; and by virtue of the act of the legislature of the state of Ohio,, passed May 7, 1869, entitled "An act supplementary to an act" entitled an act to authorize receivers of insolvent railroad companies to sell un-

finished roadbed and franchises, "passed May 14, 1868," having become a corporation with perpetual succession do hereby certify and declare:

1242 First.

That the name by which said corporation is and shall be known, shall be "The Wabash Railway Company of Ohio.

Second.

The capital stock of said company shall be two million dollars, to be divided into forty thousand shares of fifty dollars each.

In witness whereof, we have hereunto set our hands and seals this — day of December, 1876.

Paragraph No. 21.

EXHIBIT 32.

The Wabash Railway Company of Indiana.

Certificate of Incorporation.

Be it remembered, That we, the undersigned, John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, being the purchasers at a judicial sale of the railroad and the property of the Toledo, Wabash and Western Railway Company, which railroad is partly in the state of Ohio and partly in the state of Indiana and partly in the state of Illinois, by virtue of certain judicial proceedings and decrees of the circuit court of the county of Cass in the state of Indiana, as well as of the court of common pleas of the county of Lucas and state of Ohio, and of the circuit court of the county of Vermillion in the state of Illinois for the foreclosure of a mortgage and deed of trust upon said railroad and property, which sale was made on the 10th day of June, A. D. 1877, by
1243 Jacob D. Cox, special master commissioner, duly appointed by said courts, respectively, and said sale confirmed by each of said courts, and a deed ordered to be made by said officer, and the said deed bearing date the — day of December, 1876, has been duly executed and delivered to the undersigned, and the possession of said railroad and property transferred to us do hereby associate ourselves together for the purpose of forming a corporation under the law of the state of Indiana, approved March 3d, 1865, entitled "an Act to authorize, regulate and confirm the sale of railroad to enable purchasers of the same to form corporations and to exercise corporate powers, and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same," and the acts supplemental thereto and amendatory thereof, and we do certify and declare:

First.

The name and style of said corporation shall be the Wabash Railway Company of Indiana.

Second.

The number of directors shall be five, and the following persons shall be directors the first year, viz.: John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post.

Third.

The amount of the original capital stock of said corporation shall be five million dollars, which shall be divided into fifty thousand shares of one hundred dollars each.

Fourth.

The period of service of the directors shall be one year.

In witness whereof, we have hereunto set our hands and seals this — day of December, A. D. 1876.

1244 Paragraph No. 21.

EXHIBIT 33.

The Wabash Railway Company of Illinois.

Articles of Incorporation.

Be it remembered that we, Clark M. Smith, John W. Bunn, Horace S. Leland, Milton Hay and Charles W. Bradley, have this day organized an incorporated company for the purpose of constructing and operating a railroad in the state of Illinois and do hereby adopt and sign the following articles of incorporation, that is to say:

Article I.

The name of said corporation is and shall be the Wabash Railway Company of Illinois.

Article II.

The places from and to which it is intended to construct the proposed railway are as follows, viz.:

Commencing on the eastern line of the state, in the county of Vermillion and at the place where the Toledo, Wabash and Western Railway crosses the same; thence in a southwesterly direction through the counties of Vermillion, Champaign, Piatt, Macon, Christian, Montgomery, Macoupin, Madison and St. Clair to East St. Louis on the easterly bank of the Mississippi river; and from Decatur westerly through the counties of Macon, Sangamon, Morgan, Scott and Pike,

to East Hannibal on the easterly bank of the Mississip-i river; from Bluffs northwesterly through the counties of Scott, Pike, Morgan, Brown and Adams to Quincy on the east bank of the Mississippi river; from Clayton through the counties of Adams and Hancock to Hamilton on the east bank of the Mississippi river, and
1245 Hannibal northerly through the counties of Pike and Adams to Quincy aforesaid.

Article III.

The place at which shall be established and maintained the principal business office of said corporation is and shall be the city of Springfield in the county of Sangamon.

Article IV.

The time of the commencement of said corporation shall be the — day of December, A. D. 1876.

It shall continue for the period of fifty years, and at the end thereof, by such renewals as shall be according to the constitution of the state of Illinois.

Article V.

The amount of capital stock of said corporation shall be nine millions of dollars.

Article VI.

The names and places of residence of the several persons forming this association for incorporation, are as follows:

Clark M. Smith, city of Springfield in the state of Illinois.
Horace S. Leland, city of Springfield in the state of Illinois.
John W. Bunn, city of Springfield in the state of Illinois.
Milton Hay, city of Springfield in the state of Illinois.
Charles W. Bradley, city of Springfield in the state of Illinois.

Article VII.

The government of said corporation shall be vested in a board of directors of not less than five persons; and the government
1246 and management of its affairs shall be vested in said board of directors a president, a secretary, a treasury and such other subordinate officers as may be provided by the by-laws and ordinances of the company or required by law, and its board of directors for the first year shall consist of the following named persons, residents of the places following; that is to say:

Clark M. Smith, city of Springfield, in the state of Illinois.
John W. Bunn, city of Springfield, in the state of Illinois.
Horance S. Leland, city of Springfield, in the state of Illinois.
Milton Hay, city of Springfield, in the state of Illinois.
Charles W. Bradley, city of Springfield, in the state of Illinois.

Article VIII.

The number of shares in the capital stock of said corporation shall be ninety thousand (90,000) shares, each share to be of the amount and denomination of one hundred dollars.

In witness whereof, we have hereunto set our hand and seals this — day of December, A. D. 1876.

—— ——. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]

1247 Paragraph No. 22.

EXHIBIT 34.

Articles of Consolidation.

By and between The Wabash Railway Company, of Ohio, party of the first part, The Wabash Railway Company, of Indiana, party of the second part, and The Wabash Railway Company, of Illinois, party of the third part,

Witnesseth, That, Whereas, By the laws of the several states of Ohio, Indiana and Illinois railroad companies whose roads connect with, or form continuous lines within or at, the boundary lines of these states, or either of them, are authorized to consolidate their property and capital stock with each other and become one corporation;

And, whereas, the said roads above named form continuous lines from Toledo, in the state of Ohio, to the Mississippi River, at East St. Louis, Quincy, Hannibal and Hamilton, respectively, and for the mutual benefit of the stockholders of each of said roads and the greater convenience of the public, the directors of said roads have proposed to unite and consolidate and become one corporation, so as to obviate all change of cars over the whole route, as well as to obviate the frequent failures to connect, when operated as separate roads, and with the unanimous consent of each and every stockholder of the above-named respective corporations.

Now, therefore, the said parties of the first, second and third parts, hereinabove named, by the resolutions of their respective boards of directors, and upon the unanimous assent of each and every stockholder of said several parties hereto, do hereby agree to and with each other, to consolidate their said roads, property and capital stock into one company upon the basis, terms and conditions which are hereinafter specified, and to form one corporation by
1248 the name and style of

The Wabash Railway Company.

All the powers, privileges, immunities and franchises in any manner possessed by or vested in either of said original corporations

under their several charters or incorporations, or under the laws of the several states, or as incidental to the railway property of either of said companies shall be transferred to and fully vested in the consolidated company, and especially the said consolidated company shall become possessed with all the particular powers, privileges and franchises specified in a certain act of the general assembly of the state of Indiana, approved March 3d, 1865, entitled, "An act to authorize, regulate and confirm the sale of railroads, "to enable purchasers of the same to form corporations, and to ex- "ercise corporate powers, and to define their rights, powers and "privileges; to enable such corporations to purchase and construct "connecting and branch roads, and to operate and maintain the "same."

And, also, all and singular the real estate, depot grounds, rights of way, road bed, railroad iron, rails, engines, cars, machinery, machine shops, buildings, structures, rolling stock, debts, dues, demands, choses in action, and property of every description, name and nature in which the said consolidating roads and any or either of them may possess any right, and all property, real, personal and mixed, and all choses in action or in possession, and all privileges and appurtenances, reversions and remainders in any or either of said consolidating companies shall, from the day when this agreement shall be ratified by all the parties hereto, and copies filed with the secretary of state of the several states through which said roads pass, and in which the respective parties hereto were incorporated, be and become vested in the said consolidated company, without any further or other deed, transfer or conveyance in that behalf.

1249 The capital stock of said consolidated company shall be sixteen millions of dollars, to be divided into one hundred and sixty thousand shares of stock, of one hundred dollars each, with power to the directors of said consolidated company to increase the capital stock thereof when necessary. All the books, vouchers, records, muniments of title and other documents pertaining to the business or property of said several companies, parties hereto, shall be placed in the office of the secretary of said consolidated company, and the said books, records and papers shall be deemed and taken, so far as necessary, as the records and books of the consolidated company, and said books, records and vouchers and papers shall be subject to the proper examination and inspection of all persons interested as stockholders therein, during business hours, and at said office, who shall have otherwise the same access thereto as if the same had remained in the offices of the said original companies, parties hereto.

The said books, vouchers, records, muniments of title, and other documents pertaining to the said consolidating companies, parties hereto, shall be and remain in the office aforesaid, as part of the records of the consolidated company, and the secretary for the time being of the consolidated company, shall be the custodian thereof.

The first board of directors of the consolidated company shall consist of the following named persons, viz.:

The officers of said consolidated company shall consist of thirteen

directors, and such other officers to be appointed by the directors as may be required by law, or be deemed proper for the transaction of the business of the company, all of whom shall hold their offices at the pleasure of the directors.

The directors shall be elected annually, after the first regular election, at such time and place as may be designated, and if no other place is designated, then at the principal office of said consolidated company. They shall be elected by the stockholders voting in person or by proxy; every share of consolidated stock shall entitle the holder to one vote, and a majority of all the votes cast shall elect.

The directors shall choose one of their own number to be president of said company, appoint other necessary officers, and perform all other acts necessary for the business and management of the affairs of said consolidated company.

The directors shall have power to issue bonds of said corporation, and they may secure the bonds so issued by mortgage or other lien upon the property of said consolidated company or any specified part thereof.

This article of consolidation shall be signed in triplicate by the president, attested by the secretary, and sealed with the corporate seal of each of the said consolidating companies, parties hereto, and spread upon the records of each, and ratified and agreed to by the written assent of each stockholder of said companies, and one of the said agreement and article of consolidation shall be filed with each of the secretaries of state of the states of Ohio, Indiana and Illinois.

It is further agreed that the consolidation hereby made shall be perpetual during the legal existence of the consolidated company.

In witness whereof, this agreement and article of consolidation have been signed by the presidents, attested by the secretaries of the said Wabash Railway Company of Ohio, The Wabash Railway Company of Indiana, and the Wabash Railway Company of Illinois, the respective parties hereto, and sealed with the corporate seals of each of said companies at a called meeting of the directors of each of said companies, and in pursuance of resolutions passed by said directors, and entered upon the respective records of said companies, and in pursuance of resolutions passed by said directors, and entered upon the respective records of said companies, and in the presence of the said several boards of directors on the following days and places, to wit:

The Wabash Railway Company of Ohio, at Toledo, on — day of ——.

The Wabash Railway Company of Indiana, at Lafayette, on the — day of ——.

The Wabash Railway Company of Illinois, at Springfield, on the — day of ——.

1251 Paragraph No. 23.

EXHIBIT 35.

This Indenture, made the 26th day of December, in the year of our Lord one thousand eight hundred and seventy-six, between Jacob D. Cox, special master commissioner, as hereinafter mentioned, of the first part, and John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, parties of the second part,

Witnesseth, That, whereas the Toledo, Wabash and Western Railway Company, a corporation existing under and by virtue of the laws of the states of Ohio, Indiana and Illinois, did cause to be made and delivered to the New York Guaranty and Indemnity Company, a corporation of the state of New York and duly authorized to receive the same, a certain deed of trust or mortgage, bearing date on the first day of February, A. D. 1873, whereby the said railway company granted and conveyed unto the said New York Guaranty and Indemnity Company all the railroad, roadbed and right of way of the said Toledo, Wabash and Western Railway Company, extending from the city of Toledo, in the state of Ohio, to and through the state of Indiana, and thence through the state of Illinois to Meredosia, with branch of said road to Naples, and from Meredosia to Camp Point, in the state of Illinois, and with a branch of said road from Clayton to the east bank of the Mississippi river, at Hamilton, in said state, and with branch of said road leading from Decatur, in said state, to East St. Louis, in the same state; and all the property, effects, rights and franchises in the said deed of trust or mortgage, and hereinafter particularly described, on the trusts and for the purposes following, among others, that is to say: Whereas, the said company did direct the issue of its railway bonds to the sum of five millions of dollars, dated on the first day of February,
1873, payable in gold coin at the city of New York, on the
1252 first day of February, 1893, to bear interest at the rate of
seven per cent. per annum, payable in gold coin on the first days of February and August each year, in the city of New York, said bonds to be of the denomination of one thousand dollars, numbered from number one to number five thousand, inclusive. If default should occur in the payment of any installment of interest on the bonds therein mentioned and said default should continue for a space of six months after maturity and demand therefor, then, if a majority in value of the holders of the bonds then outstanding and secured by said deed of trust or mortgage should determine and notify said trustee that they required that the principal of all of said bonds become at once due and payable, said bonds should thereby become due and payable, notwithstanding any clause contained therein to the contrary, and if default should occur in payment of any installment of interest and continue for the space of six months after maturity and demand therefor, or if the principal should become due and not be paid by said company according to

the tenor of bonds, then, upon written notice by the holders of a majority of said bonds issued and outstanding, under the authority thereinbefore mentioned, the said trustee should have the power to enter upon and take possession of said railroad, with the appurtenances and all and singular the property and franchises thereby mortgaged; and said trustee should cause said mortgaged premises to be sold at public auction, at the city of New York, or at the city of Toledo, Ohio, Lafayette, Indiana, or Springfield, Illinois, as might be directed by the holders of a majority in interest of said bonds, giving at least sixty days' notice of the time and place and terms of sale and of the specific property to be sold, by publishing the same in two daily newspapers in said city of New York, and one in the said cities of Toledo, Lafayette and Springfield; and should adjourn said sale from time to time, if necessary in its opinion, and if the same should be adjourned, might sell without further
1253 notice of the time and place of sale and should execute to the purchaser or purchasers a good and sufficient deed, in fee simple, for the same, which should be against said railway company and all persons claiming by, through or under it, of all the right, title, claim or demand in and to the mortgaged premises or any part thereof; and out of the proceeds of said sale and the income that might have been received for the use, operation and management of said road while in possession of such trustee, should pay: first, all just allowances and expenses in that behalf incurred; and next, the interest, and afterwards the principal of said bonds ratable, as far as said proceeds were sufficient for that purpose, and any surplus should pay over to said company. But if it should not be deemed proper or expedient in any or all of the states in which the mortgaged premises were found to seize and sell the same in pursuance of the power therein granted, then it should be the duty of said trustee to proceed in any proper tribunal to foreclose the said mortgage according to the usual and established principles of law and equity. And

Whereas, The said railway company failed to pay the interest on the said bonds which fell due on the first days of February and August, 1875, and on the first day of February, 1876, and all the said interest has remained in arrears for more than six months, and is still unpaid. And

Whereas, For the purpose of enforcing their rights as holders of certain of the bonds secured by the aforesaid deed of trust or mortgage, and of all other holders of bonds secured thereby, as well as of the holders of the bonds secured by the several deeds of trust or mortgages creating prior liens upon parts of the railroad and property in the said first mentioned deed of trust or mortgage described—on the 22d day of February, A. D. 1875, a suit was instituted in the Court of Common Pleas of Lucas county, Ohio, in which the Metropolitan National Bank of the city of New York and others are plaintiffs, and the Toledo, Wabash and Western Railway Company, and the said New York Guarantee & Indemnity Company,
1254 trustee, and others were defendants, and wherein the said plaintiffs set forth that said Toledo, Wabash and Western

Railway Company was in default of interest on said bonds and was insolvent, and prayed said court for the appointment of a receiver of the railroad and property of said company, and the foreclosure of said mortgage. And

Whereas, Jacob D. Cox was thereupon, by said court, on said date, appointed receiver in said suit, and directed to take and hold possession of all and singular the property, rights and franchises aforesaid, and thereupon did take and has since held the same as such receiver. And

Whereas, Auxiliary suits were also instituted between the same parties, on the twenty-fourth day of February, 1875, in the Circuit Court of Cass County, in the state of Indiana, and on the twenty-fourth day of February, 1875, in the Circuit Court of Vermilion county, in the state of Illinois; and in each of said auxiliary suits the order of the Court of Common Pleas of Lucas county, Ohio, was confirmed, and made the order of said court as to so much of the railroad and property of said company as was within the jurisdiction of said courts respectively, and the said Jacob D. Cox ordered to take and hold the same in his possession as receiver, and obey the orders of said Court of Common Pleas of Lucas county, Ohio, in regard thereto. And

Whereas, By said deed of trust, or mortgage, bearing date February first, 1873, it was further provided, that in case of the resignation or incapacity of the trustee therein named, to act as trustee, or in case of the death, resignation or incapacity to act of any successor of said trustee, it should be the duty of the board of directors of said railway company immediately thereafter to make application to some proper court of record at the county where the office of said railway company was located, for the appointment of some suitable person, persons or corporation to become the successor of said trustee, as therein more fully set forth. And

1255 Whereas, on the eighteenth day of May, 1875, said New York Guaranty and Indemnity Company resigned as trustee under said deed of trust or mortgage, and thereafter, on the first day of June, 1875, the board of directors of said railway company made application to the Court of Common Pleas of Lucas county, Ohio, being the county at which the general office of said railway company was located, for the appointment of a successor in said trust, and thereupon Valentine H. Ketcham, of the city of Toledo, Ohio, was by said court appointed trustee of the said deed of trust or mortgage, and accepted the said trust, and entered upon the discharge of the duties thereof. And

Whereas, Said Valentine H. Ketcham, thereafter to wit, on or about the fourteenth day of September, 1875, entered his appearance as trustee in each of the suits above-mentioned, and filed in each his answer and cross-petition, setting forth that default had occurred as aforesaid in the payment of the interest on said bonds, which default had continued for the space of six months after maturity and demand therefor; that as such trustee he had received notice from a majority in value of the holders of said bonds then outstanding, that they required that the principal of all of said

bonds become at once due and payable, and written notice by the holders of a majority in value of said bonds issued and outstanding, requesting him to proceed to foreclose said mortgage and cause the said property to be sold and applied in satisfaction of the debt secured thereby, and also prayed each of said Courts that by concurrent decrees thereof the whole of the property, rights and franchises included in said trust deed might be ordered to be foreclosed and sold, subject to the lien of all the other trust deeds or mortgages thereon, or any part thereof, and from the proceeds thereof, that the bonds issued thereunder, and the interest accrued thereon, might be satisfied and paid. And

Whereas, at a term of the Court of Common Pleas of Lucas County, Ohio, begun and held in the city of Toledo, in said county, on the eighteenth day of October, 1875, in and by a decree
1256 of said Court entered December twenty-first, 1875, in the aforesaid suit, it was found and adjudged and decreed, among other things, that the said Toledo, Wabash and Western Railway Company was in default in respect to the two first installments of interest hereinbefore mentioned, and that the principal of said bonds was then due and payable, and that there was due to said Valentine H. Ketcham, as trustee, for said installment of interest, and for increase of interest thereon and for the principal of said bonds, the sum of three millions six hundred and thirty-six thousand one hundred and ninety-seven and $\frac{30}{100}$ dollars upon the aforesaid bonds, and the court also found the amount of the several installments of interest also mentioned in said decree upon the bonds secured by prior liens.

It was further ordered, adjudged and decreed that the said Toledo, Wabash and Western Railway Company should, within ten days from and after the entry of like decrees in the States of Indiana and Illinois in the said cases pending in the courts thereof, pay into the hands of the receiver in said case the money so found to be due to the said Valentine H. Ketcham, trustee, together with the costs of said proceeding and the increase of interest upon the aforesaid amount at the rate of seven per cent. per annum until paid; and unless said company should so pay the same, the property and effects, rights and franchises of said company in the said decree mentioned and hereinafter particularly described should be sold as an entirety, as in said decree ordered and directed. And

Whereas, a decree was made in the said auxiliary suit then pending in the Circuit Court of Cass County, Indiana, at the February Term, A. D. 1876, of said court, and in the Circuit Court of Vermilion County, Illinois, at the February Term, A. D. 1876, of said court, between the same parties, in all particulars the same, and adopting the said decree of the Court of Common Pleas of Lucas County, Ohio, as the decree of the said several courts respectively in so far as respects those parts of the railroad and property of
1257 the said Toledo, Wabash and Western Railway Company in the several decrees respectively referred to which are situated in the territorial jurisdiction of the said several courts respectively. And

Whereas, The said Toledo, Wabash and Western Railway Company wholly failed to make the said payments, as by said courts ordered, adjudged and decreed to be made as aforesaid. And

Whereas, The said courts did further order and direct that all and singular the said property and effects, rights and franchises, as in said mortgage described, should be sold by the said Jacob D. Cox, in his capacity as special master commissioner of each of said courts, and also in pursuance of the power granted by said deed of trust or mortgage, and each of said courts did in and by its said decree constitute and appoint the said Jacob D. Cox special master commissioner in the said states, with full power as such, as well as in pursuance of the provisions of said trust, to execute and carry into effect the orders of sale then made in and by the said decrees; and further directed that said sale should be made in the city of Toledo, at the door of the court house of said county of Lucas, state of Ohio, after advertisement of the time, place and terms of sale, and the specific property to be sold, in not less than two daily newspapers printed in the city of New York, and at least in one daily paper published in the cities of Toledo, Ohio, Lafayette, Indiana and Springfield, Illinois, for a period of time at least sixty days prior to the day of sale, and should be sold as an entirety to the highest bidder and for a sum of not less than one million dollars, payable in cash or in bonds secured by said deed of trust or mortgage of date February first, 1873, ratably, by credit endorsed thereon, as in said decree provided; and did further provide that said property should be so sold without redemption, subject to the prior liens and liabilities in said decree set forth. And

Whereas, In and by said decree it was further adjudged and decreed that upon confirmation by said courts of the sale to be
1258 made as aforesaid in pursuance thereof, the purchaser or purchasers, upon full compliance with the conditions of the same, and the orders of the courts, made, or thereafter to be made in the said case, touching payment of the said purchase money, the said master should be authorized and empowered to execute a deed conveying to the said purchaser or purchasers all the property aforesaid, together with all the title to the said Toledo, Wabash and Western Railway Company in and to the property so sold, but subject to the paramount liens and incumbrances in said decree set forth. And

Whereas, Pursuant to the said decrees, orders were duly issued by and under the seal of said Courts, and signed by the clerk thereof, to the said Jacob D. Cox, embodying so much of the said decree in substance as related to the duty of the said special master commissioner, and requiring him to carry the same into execution. And

Whereas, In conformity with said orders and decrees, the said Jacob D. Cox, in his capacity as special master commissioner, and in pursuance of the provisions of said deed of trust or mortgage made by the said Toledo, Wabash and Western Railway Company, caused the said property and effects, rights and franchises, hereinafter mentioned and described, to be advertised in the manner, and for

the period directed by the said decrees and orders of sale respectively, to be sold as an entirety. And

Whereas, The said Jacob D. Cox, special master commissioner as aforesaid, and party of the first part to these presents, acting in pursuance of the said deed of trust or mortgage, and the power of sale therein contained, and of the said decrees and orders of said courts, did, on the tenth day of June, A. D. 1876, and at the time and place specified in said advertisements, expose for sale at public auction, at the court house of the Court of Common Pleas of Lucas county, Ohio, in the city of Toledo, in the state of Ohio, the said railroad property, effects, rights and franchises hereinafter particularly described, at which sale the said railroad, property and effects,
1259 rights and franchises, were struck off to the said parties of the second part to these presents for the sum of two million five hundred thousand dollars, that being the highest and best bid therefor, and exceeding the minimum sum described in said decree. And

Whereas, It was made to appear to the said Court of Common Pleas of Lucas county, Ohio, and to the said courts of Indiana and Illinois, that the said purchasers had paid to the said special master commissioner the said purchase money by them bid as aforesaid in conformity with the terms of said orders and decrees. And

Whereas, The said Jacob D. Cox, special master commissioner as aforesaid, did, on the twelfth day of June, 1876, return the said order of sale with his report of his proceedings had in pursuance thereof thereto annexed, to the said Court of Common Pleas of Lucas county, Ohio, and has also duly returned the said orders of sale made in the said auxiliary causes to the said several courts named in the said orders repectively, together with his reports of his proceedings had in pursuance thereof thereto respectively. And

Whereas, Upon the return of said report to the said Court of Common Pleas of Lucas County, Ohio, said court has duly inspected said return and said proceedings of the said special master commissioner, did find, in and by a decree entered on the twelfth day of June, 1876, in the said cause, that the sale and proceedings were in all things had and made according to law and in conformity with the order and decree of the said court in that behalf and did approve and confirm the sale and upon the said reports returned in the said several auxiliary causes respectively, the said Circuit Court of Cass County, Indiana, on the twenty-third day of November, A. D. 1876, and the said Circuit Court of Vermilion County, Illinois, on the twenty-second day of November, A. D. 1876, did also find that the said sale and proceedings were in all things had and made according to law and in *in* conformity with the orders and de-
1260 crees of the said several courts respectively in that behalf, and did in like manner approve and confirm the same. And

Whereas, it was further ordered by said courts, in and by the said several decrees, that the said special master commissioner, in his capacity as such and in the execution of said trust, should convey

said property and franchises to the said purchasers, upon their request, in conformity with the former orders of the said courts in the premises. And

Whereas, The said purchasers have duly requested the said special master commissioner to convey the said property and franchises to said purchasers in conformity with the said orders.

Now, therefore, this Indenture Witnesseth, That the said Jacob D. Cox, party of the first part to these preceedings, in his capacity as special master commissioner, and also in the execution of said trust, in order to carry into effect the said sale so made as aforesaid in pursuance of the power of sale and of the decrees and orders above mentioned, and in consideration of the premises and of the sum of two millions five hundred thousand dollars to him in hand paid by the said parties of the second part hereto, the receipt whereof is hereby acknowledged, has granted, bargained and sold and by these presents does grant, bargain and sell unto the said John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and H. A. V. Post, parties of the second part, as joint tenant- and not as tenants in common and to the survivors and survivor of the said parties of the second part and their assigns and to the heirs of the last survivor, all and singular, the railroad of the said Toledo, Wabash and Western Railway Company, extending from the city of Toledo, in the state of Ohio, southwesterly to and through the state of Indiana, and to East St. Louis, and to Hamilton on the Mississippi river, and to Naples and Camp Point in the state of Illinois, an aggregate length of six hundred and one miles, including the right of way, roadbed, and the superstructures of all sorts thereon; all water and other stations, houses, shops and lands connected
1261 therewith; all repair and other shops and manufactories with the fixed and movable machinery, tools and implements thereunto belonging; all engines, cars, rolling stock and equipment of every kind and description; all supplies of timber, lumber, fuel, iron, steel and other supplies intended for use in running said road; all equities to any real or personal property, debts and demands due the said company, together with the franchises of said railway company and of the several original companies of which it is composed, and the right and franchise to be a corporation, together with all corporate franchises of said company and of the said companies severally, including the rights and franchises of said several companies to be and act as a corporation:

To have and to hold the same, with the appurtenances subject as aforesaid, unto the said parties of the second part, as joint tenants, and not tenants in common, and to the survivors and survivor of the parties of the second part, and to their assigns and to the heirs of the last survivor of the said parties forever, as fully and completely as the said party of the first part by virtue of said deed of trust or mortgage held and by virtue of the power of sale contained in said deed, and as special master commissioner, as aforesaid, can or could sell and convey the said premises, property and franchises, and not otherwise.

In Witness Whereof, the said party of the first part hath hereunto set his hand, seal, the day and year above written.

J. D. COX, [SEAL.]
Special Master Commissioner.

Signed, sealed and delivered in presence of
JOHN A. OSBORN,
EDW'D H. SMITH.

1262 STATE OF OHIO, *Lucas County, ss:*

Be it Remembered, That on this 28th day of December, A. D. 1876, at Toledo, in the County of Lucas, and state of Ohio, before me, the undersigned, a notary public, within and for the county aforesaid, personally came Jacob D. Cox, special master commissioner, duly appointed by the Court of Common Pleas, of the county of Lucas, and state of Ohio, by the Circuit Court of the county of Cass, and state of Indiana, and by the Circuit Court of the county of Vermilion, in the state of Illinois, and by virtue of the orders of said several courts, and of the powers conferred upon him, acknowledged that he did sign, seal and deliver the foregoing instrument of writing as such special master commissioner, and that the same is his act and deed as such, for the uses and purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal, at Toledo aforesaid, this day and year above written.

EDWARD H. SMITH, [L. S.]
Notary Public, Lucas County, Ohio.

Paragraph No. 24.

EXHIBIT 36.

This indenture, made this 12th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, by and between John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, parties of the first part, and the Wabash Railway Company, party of the second part, witnesseth:

Whereas, certain judicial proceedings were lately pending in the Court of Common Pleas of the county of Lucas and State of
1263 Ohio, and also in the Circuit Court of the county of Cass and state of Indiana, and also in the Circuit Court of the county of Vermilion in the State of Illinois, at the suit of the Metropolitan National Bank of the city of New York and others, plaintiffs, against the Toledo, Wabash and Western Railway Company and others, defendants, and also at the suit of Valentine H. Ketcham, trustee, an answering defendant of the same, which proceedings were had for the foreclosure of a certain mortgage made and executed by said Toledo, Wabash and Western Railway Company, and in which proceedings by order and decree of said Court of Common Pleas of Lucas county, and by concurrent orders and decrees in the respective

circuit courts of said counties of Cass, in Indiana, and of Vermilion, in Illinois, the railroad and all of the real and personal property and effects, rights, privileges and franchises, and the franchise to be a corporation of the said Toledo, Wabash and Western Railway Company, were ordered to be sold by Jacob D. Cox, special master commissioner, duly appointed for that purpose.

And whereas, the said Jacob D. Cox, special master commissioner, in pursuance of the decretal orders of said courts, did, on the 10th day of June, A. D. 1876, at the door of the court house in the city of Toledo, county of Lucas, in the state of Ohio, offer the aforesaid railroad, property, effects and franchises for sale at public auction;

And Whereas, at that time and place came John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, a committee and trustees, acting for and in behalf of the bondholders secured by the said mortgage, who bid for the same and became the purchasers thereof;

And Whereas, said sale by said master commissioner was afterwards confirmed by the respective courts which are hereinabove described, and a deed ordered to be made to the aforenamed purchasers, by the said special master commissioner;

And whereas, the said Jacob D. Cox, special master commissioner, has duly executed and delivered his deed to the above-named
1264 purchasers in pursuance of the said sale, and of the orders of said courts, and has in said deed granted and conveyed to said purchasers above named, the railroad and all the property, real and personal, and all the effects and choses in action and equities, and the franchises, rights and privileges, and the franchise to be a corporation of the said Toledo, Wabash and Western Railway Company, which deed has been duly filed in the office of the secretary of state of the state of Ohio.

And whereas the railway and property covered by said deed has since been transferred by said special master commissioner to the purchasers above named, who have entered upon and now hold possession of the same;

And whereas the Wabash Railway Company is a corporation, duly incorporated, existing in and by virtue of the laws of the states of Ohio, Indiana and Illinois, and for the purpose of maintaining and operating a railroad or railroads leading from Toledo, in the state of Ohio, through the states of Indiana and Illinois to East St. Louis, and also to East Hannibal, Quincy and Hamilton on the Mississippi river in said state of Illinois;

And whereas the said company has agreed with the parties of the first part to buy the aforesaid railway, and in evidence of the consideration of the same has made and delivered to the parties of the first part its full paid certificates of capital stock in said company in the aggregate of the par value of sixteen millions of dollars.

Now, therefore, this indenture witnesseth, that the said John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, parties of the first part, in consideration of the premises and of the further sum of one dollar to each of them in hand paid, have granted, bargained and sold, and do by these

presents grant, bargain, sell, convey and transfer unto the said Wabash Railway Company, party of the second part, all the right, title and interest of these the parties of the first part, and of any
1265 or either of said parties acquired by virtue of the deed above mentioned, and the order of court made in confirmation of the same, of, in and to all and singular the continuous railway extending from its eastern terminus at Toledo, in the state of Ohio, through the states of Indiana and Illinois to East St. Louis, and also to East Hannibal, Quincy and Hamilton, on the Mississippi river in the state of Illinois, and heretofore known as the Toledo, Wabash and Western Railroad or Railway, including all the railways, ways and rights of way, depot grounds and other lands; all tracks, bridges, viaducts, culverts, fences and other structures; all depots, station houses, engine houses, freight houses, wood houses and other buildings, and all machine shops and other shops held or acquired for use in connection with said railway or the business thereof; and including also all locomotives, tenders, cars and other rolling stock or equipments; and all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway or any part thereof, or any of its equipments or appurtenances; and, also, all franchises connected with or relating to the said railway, or the construction, maintenance or use thereof, and all the property, franchises, rights and things of whatever name or nature which were conveyed by the aforesaid deed of the said Jacob D. Cox, special master commissioner, or have been or shall hereafter be acquired under the aforementioned proceedings and decree by the said parties of the first part as trustees and committee as aforesaid.

Provided, nevertheless, and it is the true intent and meaning of these presents, that nothing herein contained shall be construed to express or imply any covenant by the parties of the first part or either of them, but that this instrument shall operate to convey in behalf of the said parties, all the estates and interests in the railway and appurtenances, property, rights, franchises and things hereinbefore described, which the said parties or either of them, might hold by virtue of the aforesaid conveyances, and which the said parties each for himself or herself, and not one for the other,
1266 can lawfully convey, and no more; and that the said estate and interests are hereby charged with and shall pass by virtue of these presents, subject to the payment of all liabilities incurred in respect to the said railway or its business by the said Jacob D. Cox, as receiver, during the pendency of the legal proceedings aforementioned, or charged upon said property by said decree or orders of said courts. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part or either of them, of, in and to the same, and any and every part thereof, with the appurtenances.

To have and to hold the above-described premises, subject as aforesaid, unto the said party of the second part, and its successors and assigns, to the only proper use and behoof of the said party of the second part, and its successors and assigns forever. And the said parties of the first part in consideration of the premises, do hereby further covenant to and with the party of the second part, that they or the survivors or survivor of them and the executor, administrator and assigns of such survivor, shall and will, from time to time, and at all times hereafter, and as often as requested thereto by the party of the second part or its successors or assigns, execute, deliver and acknowledge all such further deeds, conveyances and assurances in the law, for the better assuring unto the party of the second part, or its successors or assigns, the railway equipment and appurtenances hereinbefore mentioned, or intended so to be, and all other property and things whatsoever, which may hereafter be acquired for use in connection with the same or any part thereof, and all franchises now held or hereafter acquired, including the franchise to be a corporation as by the said party of the second part or its successors or assigns, or by their counsel learned in the law shall be reasonably ad-
1267 vised, desired and acquired.

In witness whereof, the parties of the first part have hereunto set their hands and seals; and the party of the second part has caused its corporate seal to be affixed to these presents, and the same to be attested by the signature of its president and secretary, to evidence the acceptance of the said party of the second part, of the foregoing conveyance and its execution of its covenants and agreements therein contained.

JOHN W. ELLIS. [L. S.]
ALEX. M. WHITE. [L. S.]
JOHN T. MARTIN. [L. S.]
GEORGE I. SENNEY. [L. S.]
H. A. V. POST. [L. S.]

Signed, sealed and delivered in presence of
CHARLES EDGAR MILLS.
CHARLES LANIER.

[Seal Wabash R. W. Co.]

J. A. ROOSEVELT, *President.*
W. B. CORNEAU, *Secretary.*

STATE OF NEW YORK, *City and County of New York, ss:*

Be it remembered that on the 12th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, before me, Charles Nettleton, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Ohio, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared the above-named John W. Ellis, Alexander M. White, John

T. Martin, George I. Seney and Henry A. V. Post, severally
1268 personally known to me, and in due form of law severally acknowledged the above indenture to be their act and deed respectively, and severally desired that the same might be recorded as such.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[Commissioner's seal.]

CHARLES NETTLETON,
Commissioner for Ohio, in New York.

STATE OF NEW YORK, *City and County of New York, ss:*

Be it remembered that on the 12th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, before me, Charles Nettleton, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Indiana, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared the above-named John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, severally personally known to me, and in due form of law severally acknowledged the above indenture to be their act and deed respectively, and severally desired that the same might be recorded as such.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[Commissioner's seal.]

CHARLES NETTLETON,
Commissioner for Indiana, in New York.

1269 STATE OF NEW YORK, *City and County of New York, ss:*

Be it remembered that on the 12th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, before me, Charles Nettleton, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Illinois, to take acknowledgment of deeds, etc., to be used or recorded therein, personally appeared the above-named John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, severally personally known to me, and in due form of law severally acknowledged the above indenture to be their act and deed respectively, and severally desired that the same might be recorded as such.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[Commissioner's seal.]

CHARLES NETTLETON,
Commissioner for Illinois, in New York.

Paragraph No. 25.

EXHIBIT 38-53.

Funded Debt Bond. *Funded Debt Bond.*

UNITED STATES OF AMERICA.

$500. $500.

No. A. 36. No. A. 36.

Wabash Railway Company.

The Wabash Railway Company, a corporation of the states of Ohio, Indiana and Illinois, for value received, promises to
1270 pay to John A. Delamoy or bearer, at the Metropolitan National Bank in the city of New York, on the first day of February, A. D. 1907, five hundred dollars lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each year, upon the surrender of the annexed coupons as they severally become due. This bond is one of a series of bonds issued in exchange for the certificates of deposit in the Metropolitan National Bank, in the city of New York, of certain past due coupons detached from mortgage bonds issued by the several railroads, viz.: the Toledo and Illinois first mortgage, Lake Erie, Wabash and St. Louis first mortgage, Great Western first mortgage, Illinois and Southern Iowa first mortgage, Decatur and East St. Louis first mortgage, Quincy and Toledo first mortgage, Toledo and Wabash second mortgage, Wabash & Western second mortgage, Great Western second mortgage, and the Toledo, Wabash and Western consolidated mortgage, in accordance with the proposition of the Wabash Railway company to the holders of the aforesaid bonds, dated January 24th, 1877; said certificates of deposit herewith exchanged together with their respective coupons being held in trust for the holder hereof as evidenced by the certificate of the said Metropolitan National Bank hereon. In case of default in the payment of the interest or principal of this bond, or default in payment of the interest or principal of any of the aforesaid bonds of the said railroads, the holder hereof, on its surrender to the Metropolitan National Bank, shall be entitled to the respective coupons so held in trust, according to the certificates on which this bond is issued.

This bond is also secured by a sinking fund to be set apart from the earnings of the said Wabash Railway Company at the rate of One hundred thousand dollars annually from and after the year 1882, to be invested in the purchase and cancellation of the bonds of this issue, or of the certificates of deposit of coupons which are

convertible into the same, at not exceeding the par value
1271 thereof, and in the order of priority as provided in the said proposition of January 24th, 1877, viz.: series A first, series B second and series C last. And it is agreed between said company and the holder of this bond that no recourse shall be had to the individual liability of any stockholder of said company.

In witness whereof, the Wabash Railway company has caused this bond to be signed by its president and countersigned by its secretary, and sealed with its corporate seal, this first day of February, 1877.

J. A. ROOSEVELT, *President.*
W. B. CORNEAU, *Secretary.*

The Metropolitan National Bank in the City of New York has received the certificates of deposit of coupons in exchange for which this Bond has been issued, and hold the same in trust together with the coupons pertaining to the said certificates, to be surrendered to the holder of this bond in case of default as provided in the above obligation.

METROPOLITAN NATIONAL BANK, *Trustee,*
By G. I. McGOURKEY, *Cash'r.*

(Endorsement:) Number A. 36. Wabash Railway Company, Funded Debt Bond, $500. Principal Due, 1907. Interest Payable, February and August.

1272

Numbers	A 1	to	A 1226	exclusive	apportioned	to the	Toledo & Illinois First Mortgage.
"	" 227	"	" 826	"	"	"	L. E., Wabash & St. Louis First Mortgage.
"	" 827	"	" 1426	"	"	"	Great Western "
"	" 1427	"	" 1490	"	"	"	Illinois and Southern Iowa "
"	" 1491	"	" 2263	"	"	"	Decatur and East St. Louis "
"	" 2264	"	" 2413	"	"	"	Quincy and Toledo "
"	B 1	"	B 200	"	"	"	Toledo and Wabash Second Mortgage.
"	" 201	"	" 655	"	"	"	Wabash and Western "
"	" 656	"	" 1380	"	"	"	Great Western "
"	C 1	"	C 1054	"	"	"	Toledo, Wabash & Western Cons'd M't'ge.

(*Coupon.*)

$17 50 *Funded Debt Bond.* $17 50

Wabash Railway Company.

Interest Warrant.

Seventeen Dollars and fifty Cents due August 1st, 1887, payable at the Metropolitan National Bank.

W. B. CORNEAU, *Secretary.*

No. A 36.

1273

Paragraph No. 26.

EXHIBIT 41.

This indenture, made the 17th day of May, A. D. 1879, at Toledo, in the state of Ohio, by the Wabash Railway Company, a corporation created by and existing under the laws of the states of Ohio, Indiana and Illinois, and having a continuous line of railroad in said several states, party of the first part, and Solon Humphreys and Daniel A. Lindley, of the city of New York, trustees, parties of the second part, witnesseth:

That whereas, the stockholders of the Wabash Railway Company, at a meeting called for that purpose by the directors of the corporations, and held in Toledo, Ohio, on the 14th of May, 1879, adopted the following resolutions:

Resolved, that for the purpose of completing, finishing, improving and operating the railway of this company and for the payment of debts contracted by this company for such purposes it is necessary to issue and dispose of the bonds of this company to the amount of two millions of dollars, and to secure the same by mortgage upon the corporate property and franchises;

Resolved, that the board of directors are hereby authorized to issue and dispose of the bonds of the company to the amount of two millions of dollars, bearing seven per cent. interest, payable semi-annually, and having thirty years to run, and principal and interest payable in gold in the city of New York; and to secure the same by deed of trust and mortgage upon the entire corporate property and franchises, such mortgage to embrace also a suitable provision for a sinking fund and such other provisions by way of remedy or forfeiture in the event of a default and of reorganization after sale as said board of directors may approve;

And whereas, such meeting was called by the directors as aforesaid by giving notice in writing to each stockholder, which
1274 notice was served personally or by depositing the same in a post-office directed to the post-office address of each of said stockholders severally, with necessary postage for the transmittal of the same prepaid at least sixty days prior to the day appointed for such meeting, and by advertising the same in some newspaper published in each county through or into which the road of said company extends, at least sixty days prior to the day appointed for such meeting;

And whereas, such notice stated the time and place of the meeting and the object thereof, the amount of the bonds of said company which it was proposed to issue and dispose of, and that it was proposed to secure the same by mortgage as above;

And whereas, the resolutions above set forth were adopted by the concurrence of the holders of two-thirds in amount of the stock of such corporation;

And whereas, this indenture with the provisions and trusts hereinafter contained has been duly approved by said board of directors,

and the said board has issued and is about to dispose of the bonds of this company as above set forth;

And whereas, said bonds to be executed and issued under the foregoing resolutions are to be of the form following, that is to say:

UNITED STATES OF AMERICA.

No. ——. $1,000.

Seven Per Cent. Mortgage Bond.

Wabash Railway Company.

The Wabash Railway Company, a corporation of the states of Ohio, Indiana and Illinois, for value received, promise to pay to Solon Humphreys and Daniel A. Lindley, or bearer, at their office or agency in the city of New York, on the 1st day of April, A. D. 1909, one thousand dollars lawful gold coin of the United States, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first days of April and October
1275 in each year, in like gold coin, at their said office or agency, upon the surrender of the annexed coupons as they severally become due, provided that said company may at its option, and upon six months' notice given at the time of the maturity of any of said coupins falling due at or after the first day of April, 1899, pay the principal of this bond with interest to the date of such payment, and thereupon all coupons maturing after such payment shall be void.

In case of the nonpayment of any semi-annual installment of interest which shall have become payable and shall have been demanded, if such default shall continue for the space of six months after the maturity and demand of said installment, the principal of this bond shall become due in the manner and with the effect as provided in the deed of trust hereinafter mentioned. In case of any default in the payment of this bond, the said railway company hereby waives the benefit of any extension, stay or appraisement laws now existing or that may hereafter exist.

This bond is one of a series of two thousand bonds, each of which is for the sum of $1,000, numbered consecutively from 1 to 2000 inclusive, and amounting in the aggregate to two millions of dollars, all of like tenor and date, and the payment of all said bonds is secured by an indenture of mortgage or deed of trust, dated May 17th, A. D. 1879, made by said company to Solon Humphreys and Daniel A. Lindley, trustees, conveying the railroad, equipment, franchises and property of said company, as in said indenture of mortgage or deed of trust described.

The said company further agrees that it will pay to the trustees named in said deed or their successors in said trust, on the first day of October in each year after 1882, the sum of twenty-five thousand dollars, to be applied and used by said trustees as a sinking fund for the payment and extinguishment of the principal of all the bonds

issued under and secured by said deed, and that this bond shall be entitled to all the benefits of said deed as therein provided. This bond shall not become obligatory until it shall have been
1276 authenticated by a certificate endorsed hereon and duly signed by said trustees.

In witness whereof, the said railway company caused their corporate seal to be attested by the signatures of their president and secretary, this seventh day of May, one thousand eight hundred and seventy-five.

[SEAL.]

—— ——, *President.*
—— ——, *Secretary.*

[*Coupon.*]

The Wabash Railway Company will pay the bearer at their office or agency, in the city of New York, thirty-five dollars in United States gold coin, on the 1st day of April —— for six months' interest on bond No. —.

—— ——, *Secretary.*

[*Trustees' Certificate.*]

We hereby certify that the within bond is one of a series of two thousand bonds of $1,000 each, secured by an indenture of mortgage or deed of trust, dated May 17th, 1879, executed by the Wabash Railway Company to us as trustees, and duly recorded.

—— ——,
—— ——,
Trustees.

Now, therefore, be it known, that the Wabash Railway Company, party of the first part, in consideration of the premises, and in order to the security of said bonds hereinbefore described, to the extent of two millions of dollars, and no more, and for the further consideration of the sum of one dollar by the second parties duly paid, the receipt whereof is hereby acknowledged, has this day granted,
1277 bargained, sold, transferred, mortgaged and set over, and by these presents does bargain, sell, assign, transfer and set over, unto the said Solon Humphreys and Daniel A. Lindley, parties of the second part, their successors in said trust and assigns forever, all the railroad, roadbed and right of way of the party of the first part, extending from the city of Toledo, in the state of Ohio, through the state of Indiana, and thence into the state of Illinois, to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the state of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river, at Hamilton, in said state, and with branch of said road leading from Decatur, in said state, to East St. Louis, in the same state, together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turn tables, engine machinery, cars, tools, roll-

ing stock, lots, lands, buildings and offices, and other things, real and personal, now owned or used, or that may hereafter be owned or used, by the party of the first part, in connection with the said railroad, and every appurtenant thereto, and all the powers, privileges, franchises, and chartered or other rights of the said Wabash Railway Company, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and all reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all contracts, leases and rights now existing, or that may hereafter be acquired by said railroad company with other corporations, companies or individuals, and all the estate, right, title, interest and demand, as well at law as in equity, of the said railway company in and to the same and every part thereof, with the said appurtenances, but subject to the prior mortgages, which said party of the first part has caused to be executed and delivered heretofore.

To have and to hold the said premises and every part thereof unto the said parties of the second part, their successors in said
1278 trust and assigns, to the only proper use and behoof of them, the said parties of the second part, and their successors in the trust and assigns, but nevertheless subject to the mortgage liens now subsisting on said property, to and upon the trusts for the purposes of protecting and securing the holders of said bonds, and upon each and every of them, and upon the conditions following—that is to say:

If the said Wabash Railway Company, and its successors and assigns, shall well and truly pay, or cause to be paid, the several sums of money specified in the several bonds hereinbefore described, as well the principal as the installments of interest, according to the tenor and effect of said bonds and of each and every of them, and of the laws of the several states of Ohio, Indiana and Illinois; or if said bonds and the interest payable thereon become in any wise paid or satisfied, then in such case the estate, right, title, interest and demand of said parties of the second part, their successors in said trust and assigns, shall cease, determine and become void; otherwise, to be and remain in full force and virtue in law, and for the benefit and security of the holders of said bonds and each of them.

Until default be made in the payment of the principal or interest of said bonds, or of some or any of them, the said railway company shall be permitted to possess, operate, manage and enjoy said railroad with its appurtenances and to take and use the rents, incomes, tolls, issues and profits thereof in the same manner and with the same effect as if this deed had not been executed.

In case default shall be made in the payment of any installment of interest accruing on said bonds or any of them, and such default shall continue for a period of six months after the maturity thereof, it shall be lawful for said parties of the second part, or their successors in said trust, by themselves, their agents or attorneys, to enter upon, take possession of, manage, operate and control the railroad and property hereby conveyed, owned or held by lease, con-
1279 tract or otherwise, by superintendents, receivers and managers thereof, making from time to time all needful repairs,

replacements and such alterations, additions and improvements as may seem to be judicious and proper, and to collect and receive all rents, tolls, incomes, issues and profits thereof; and after deducting the expenses of operating said railroad and property and leasehold interests and all costs of improvements and any taxes that may have accrued thereon, as well as just and reasonable compensation for their own work and labor in and about the premises, to apply the moneys arising therefrom to the payment of interest in the order in which it becomes due, and ratably to the persons entitled thereto, and when said interest so in default and any installment of interest subsequently maturing shall be fully paid up, then said parties of the second part shall restore the possession of said railroad to the said parties of the first part.

If default shall occur in the payment of any installment of interest, and such default continue for the space of six months after maturity and demand therefor, then if a majority in value of the holders of the bonds then outstanding and secured by this mortgage shall determine and notify said trustees that they require that the principal of all of said bonds become at once due and payable, said bonds shall thereby become due and payable, notwithstanding any clause contained therein to the contrary, and if said principal sum shall become due and not paid by said first party according to the tenor of said bonds, and upon written notice by the holders of a majority of the bonds issued and outstanding, under the authority hereinbefore mentioned, the said trustees shall have the power to enter upon and take possession of said railroad with the appurtenances and all and singular the property and franchises hereby mortgaged, and the agents of the said railway company are hereby authorized and required to deliver up the same; and said trustees shall cause said mortgaged premises to be sold at public auction, at the city of New York; or at the city of Toledo, Ohio; Lafayette, Indiana, or
1280 Springfield, Illinois, as may be directed by the holders in interest of a majority of said bonds, giving at least sixty days' notice of the time and place and terms of sale, and of the specific property to be sold, publishing the same in two daily newspapers in said city of New York, and one in the said cities of Toledo, Lafayette and Springfield; to adjourn said sale from time to time, if necessary in their opinion, and if the same shall be adjourned, to sell without further notice of the time and place of sale, and to execute to the purchaser or purchasers a good and sufficient deed in fee simple for the same, which shall be a bar against the party of the first part and all persons claiming by, through or under it, of all right, title, claim or demand, in and to the mortgaged premises, or any part thereof, and out of the proceeds of such sale and the income that may have been received for the use, operation and management of said road, while in possession of such trustees, after deducting just allowances and expenses as in the preceeding article mentioned, to pay first, the interest and second, the principal of said bonds ratably, as far as said proceeds will go for that purpose, and in case any surplus should remain, to pay the same over to the party of the first part. But in case

it should not be deemed proper or expedient in all or any of the states in which the mortgaged premises are found to seize and sell the same in pursuance of the power herein granted, then it shall be the duty of said trustees to proceed in any proper tribunal to foreclose said mortgage, according to the usual and established principles of law and equity; but it is expressly understood and agreed between the parties, that in no case whatever shall the party of the first part claim any right or advantage by reason of any valuation, appraisement, stay or extension laws that now exist or may hereafter be enacted in any of the states in which said property exists or may be found, and said first named party hereby releases to the second parties all and every such claim and demand, and hereby further agrees that it will neither apply for an injunction nor any stay of proceedings
1281 to arrest or prevent such sale from being made or possession being taken, as hereinbefore provided.

It is hereby expressly declared that this instrument is made and the trust herein declared upon condition that if any sale shall be made under and by virtue of this mortgage, whether by judicial decree of foreclosure or in execution of the trust so created, either by judicial decree or otherwise, the holders of a majority of the said bonds then outstanding shall have the right to have said premises, and all property herein embraced, purchased for the use and benefit of all the holders of said then outstanding bonds.

In case such sale shall be made by any person or officer other than the trustees herein named, or their successors, then the holders of a majority of said bonds outstanding shall have the right, by notice in writing, to require the said trustees, or their successors, to make such purchase on such terms as they, in said notice, shall prescribe. And in case said sale shall be made by said trustees, then the holders of a majority of said outstanding bonds shall have the right to appoint any other person whom they may choose to make such purchase on such terms as they may prescribe. If any person other than such trustees shall be so appointed, such appointment and the terms of purchase shall be in writing, a copy of which writing shall be delivered to said trustees, or their successors, before such sale.

And if the holders of a majority of said outstanding bonds shall elect to have such purchase made as aforesaid, and shall prescribe the terms on which they desire to make the same, then it shall be the duty of said trustees, or their successors, or such other person as may be appointed as aforesaid, to make such purchase, if the same can be made on the terms so prescribed, and having so purchased said premises and property, the right and title thereto shall vest in the said trustees or person so purchasing for the use aforesaid, and no bondholder shall have any claim to the said premises or property, or the proceeds thereof, except his *pro rata* share therein as represented by a new company or corporation, to be formed for the use and
1282 benefit of the holders of all said bonds then outstanding.

And said trustee or other person making said purchase shall take such lawful measures as may be deemed for the interest of all said bondholders, to organize a new company or corporation. Said company or corporation to be so organized upon such terms, condi-

tions and limitations, and in such manner as the holders of a majority of said outstanding bonds shall, in writing, request or direct. And, thereupon, the said trustee or other person making said purchase shall convey said premises and property to the new company or corporation. And it is hereby declared that all persons who shall claim any interest, benefit or advantage by virtue of this instrument, or the trust hereby created, shall take the same, subject to all the terms herein contained, and subject to all the rights and powers conferred by this instrument on the holders of a majority of the bonds hereby secured.

It is further declared that, in case of any sale of the premises and property embraced herein, by decree of any court, or otherwise, the holders of a majority of the bonds then outstanding shall have the right to determine whether said premises and property shall or shall not be sold subject to all prior encumbrances; and such majority shall sufficiently manifest their determination in such respect by giving notice thereof, in writing, to the trustees or person making such sale, at any time before such sale is made.

In case of the resignation or incapacity of the trustees, or either of them herein named, to act as trustee, or in case of the death, resignation or incapacity to act of any successor of said trustees, it shall be the duty of the board of directors of said railway company, immediately thereafter to make application to some proper court of record, at the county where the general office of said railway company is located, for the appointment of some suitable person, persons or corporation to become the successor of said trustees; and thereupon the person, persons or corporation so appointed shall be and are
1283 hereby vested with all the estate, rights and privileges, and liable to all the duties by this instrument conferred upon or to the parties of the second part; to the same extent as if each person, persons or corporation were herein named.

It is hereby agreed and understood that for the better assurance to the parties of the second part and to the holders of the bonds secured by this instrument, the party of the first part agrees that it will on demand, at any or all times hereafter, make execute and deliver all such other and further conveyances and assurances for the better assuring unto said trustees and their successors in the trust hereby created, the said railroad with appurtenances, equipment and property hereinbefore described or intended so to be, and all other property belonging to said party of the first part, now owned or hereafter to be acquired for use in connection with said railroad, or any and all the franchises now held or hereafter to be acquired by said party of the first part, as said trustees, or their successors by their counsel shall reasonably advise, devise or require.

Whenever it shall happen from changes required to be made in said railroad and appurtenances, that any parcels of property, whether real or personal, have become unnecessary, or useless to the said railroad company for its business, by reason of change of line or depot or other grounds, or when any of the personal property shall have become worn out or inefficient and unnecessary to the operation of said railroad, then and in such case, it shall be lawful for the directors of said railway company to make sales, exchanges or other dis-

position of such parcels of real or personal property as they may deem for the best interest of said railway company and upon the sale or exchange of such property for any other, and when any other property shall be acquired in the place of such property, the same shall be held subject to the lien of this mortgage, as if it was the property of said company at the date hereof, and the parcels of property so held and disposed of by said directors shall be exempt from the lien herein created.

1284 In witness whereof, the said party of the first part, that is to say, the said Wabash Railway Company, has caused these presents to be signed in its corporate name by A. L. Hopkins, its vice-president, and attested by W. B. Corneau, its secretary with the corporate seal of said company hereto, as authorized and directed by its board of directors, the day and year above written.

WABASH RAILWAY COMPANY,
[L. S.] By A. L. HOPKINS, *Vice-President.*

Attest:
W. B. CORNEAU, *Secretary.*

Signed and sealed in the presence of
—— ——.

STATE OF OHIO, *Lucas County, ss:*

Be it remembered that on this seventeenth day of May, A. D. 1879, personally came before me, the undersigned, a notary public within and for the county aforesaid, A. L. Hopkins, who, being by me duly sworn, did depose and say that he is vice-president of the Wabash Railway Company, grantor in the foregoing instrument; that the name of said company is signed to said instrument by him and by virtue of the order of the board of directors of said company as vice-president thereof; that the seal of the company attached thereto is the proper and genuine seal of said railway company, and is affixed thereto by order of said board of directors. And likewise came W. B. Corneau, who was also sworn by me, and did depose that he is the secretary of said railway company, and that he countersigned said instrument and affixed the seal of said company thereto by order of the board of directors thereof. And the said A. L. Hopkins, vice-president, and W. B. Corneau, secretary, acknowledged the fore-
1285 going instrument to be the act and deed of the Wabash Railway Company for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office this seventeenth day of May, A. D. 1879.

[SEAL.] EDWARD H. SMITH,
Notary Public, Lucas County, Ohio.

Recorded in Lucas County, Ohio, August 11th, 1879, volume 76, page 281, and in other counties along the line.

Paragraph No. 27.

EXHIBIT 12.

This indenture, made this fourteenth day of August, A. D. 1879, by and between the Wabash Railway Company, a consolidated corporation of Ohio, Indiana and Illinois, of the first part, and the St. Louis, Kansas City and Northern Railway Company, a corporation of Missouri, of the second part, witnesseth:

That whereas, the railway of the party of the first part extends from the city of Toledo in the state of Ohio through the state of Indiana and thence into the state of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point in the State of Illinois, and with branch of said road from Clayton to the east bank of Mississippi river at Hamilton in said state, and with branch of said road leading from Decatur in said state to East St. Louis in the same state; and

Whereas, the railway of the party of the second part extends
1286 from St. Louis in the state of Missouri in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly in the county of Randolph to Ottumwa in the state of Iowa, and a branch from Salisbury in the county of Chariton, State of Missouri, to Glasgow in the county of Howard in said state, and also an extension from Brunswick in said county of Chariton in a northwesterly direction to the city of Council Bluffs in the state of Iowa, which lines of railroad will, when united, form one continuous line of railroad in the same general direction from the waters of Lake Erie at Toledo, Ohio, to the cities of Council Bluffs and Kansas City on the Missouri river as aforesaid; and

Whereas, it is considered to be for the advantage of both companies that the lines of railway above described shall be united and consolidated, and be owned and worked in common; and

Whereas, the capital stock of the party of the first part amounts to sixteen millions of dollars, divided into one hundred and sixty thousand shares of one hundred dollars each, all sharing alike, without discrimination or preference in the distribution of the earnings of its railway; and

Whereas, the capital stock of the party of the second part amounts to twenty-four millions of dollars, divided into two hundred and forty thousand shares of one hundred dollars each, whereof twelve millions or one hundred and twenty thousand shares is known as preferred stock, the holders of which are entitled to a dividend of ten per cent. on its par value from the earnings of said railroad before any dividend whatever can be paid upon the remaining one hundred and twenty thousand shares, which last-named shares are known and designated as the common shares of said company; and

Whereas, it is mutually considered and agreed by the parties above named that the aggregate value of two shares of the capital stock of the party of the first part is the same as the aggregate value of one

share of the preferred stock and one share of the common stock of the party of the second part; and

1287 Whereas, it is intended and agreed that the terms of such consolidation shall be exchange of shares in each of the said two first-named corporations for shares in equal number and amount of the consolidated corporation, upon such conditions as shall duly observe and equalize the preference now vested in the holders of the preferred stock of the party of the second part by the issue to them of preferred shares of stock in the said consolidated corporation, in equal number and amount, and also by the issue of preferred stock in the said consolidated corporation, in due and like proportion, to the holders of the capital stock of the said party of the first part,

Now, therefore, in consideration of the premises, and of the several covenants hereinafter mentioned by the party of the first part and the party of the second part, respectively, to be performed, it is hereby mutually stipulated and agreed:

First. The terms and conditions of this agreement shall be that from and after the consummation of this agreement and act of merger or consolidation by the corporations parties hereto, and filing the same duly certified in the office of the Secretary of State in each of the states hereinbefore mentioned, the share or stockholders of the corporations parties to this agreement shall be share or stockholders, respectively, in the corporation hereby created and established, and upon presentation and surrender for cancellation, as hereinafter provided, of the certificates of shares so holden by them in either of the aforesaid corporations, they shall have issued to them, respectively, certificates for an equal number of shares in the consolidated company, distributed as follows:

For each two shares of the capital stock of the party of the first part the holder thereof shall receive one share of the common stock and one share of the preferred stock in said new corporation, each of the par value of one hundred dollars. For each share of the preferred stock of the party of the second part, the holder shall

1288 receive one share of the preferred stock of the said new corporation, of the par value of one hundred dollars.

For each share of the common stock of the party of the second part the holder shall receive one share of the common stock of said new corporation, of the par value of one hundred dollars.

Second. The mode of carrying this consolidation into effect shall be that upon the ratification of this agreement by the shareholders of either of the corporations parties hereto the shareholders thereof shall further appoint a time and place for the election of directors and other officers of the new corporation provided for by this agreement, which time and place shall be the same for both parties hereto.

All shareholders in either of said corporations parties to this agreement shall be admitted to vote at said election as shareholders in the consolidated corporation, in person or by proxy, each share entitling the holder thereof to one vote.

The directors then chosen shall be the directors of the consolidated corporation, and immediately upon their organization shall assume, enjoy and possess all powers, rights and privileges now held

or enjoyed by the board of directors of either of said corporations parties hereto, and thereupon forthwith all property, rights and franchises, of whatever name or nature, belonging to the parties of the first and second part-, or either of them, shall pass to and be vested in the said new corporation, and the two first-named corporations shall forever cease and determine.

Notice of the time and place of holding such elections shall be given by the secretary of each of the corporations parties hereto, by publication in some newspaper printed at the place where the general offices of each of said companies are situated, at least three weeks previous thereto.

Third. The name of such new corporation shall be The Wabash, St. Louis and Pacific Railway Company.

Fourth. The number of directors of said consolidated cor-
1289 poration shall be fifteen, who shall be residents of the United States. They shall choose from their number a president and first and second vice-presidents, and shall appoint such other officers as may, from time to time, be required. They shall have power to establish and amend by-laws, one of which shall fix the time and place for annual meetings of the consolidated corporation. The board first chosen shall hold office until the next annual meeting of the company, and all officers of the corporation shall serve during the pleasure of the board.

Fifth. The number and amount of shares of the capital stock of such corporation shall be four hundred thousand shares of one hundred dollars each, whereof one-half or two hundred thousand shares shall be known and designated as preferred stock, the holders whereof shall be entitled to a dividend of seven per cent. per annum on their par value from the earnings of said consolidated corporation, but not cumulative, before any dividend whatever shall be paid upon the remaining two hundred thousand shares, which last-named shares shall be known and designated as the common stock of said consolidated corporation.

Sixth. The manner of converting the capital stock of each of said two first-named corporations into that of the new consolidated corportion shall be that the present outstanding certificates of stock in the said two first-named corporations shall be surrendered to the president and secretary of the said new consolidated corporation, who shall, thereupon, issue and deliver to the person surrendering such certificates new certificates representing equal numbers of shares in the said consolidated corporation, which shares shall be in each instance, common or preferred, according as the terms and conditions above mentioned may require.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereto affixed and the same to be attested

1290 by the signatures of their respective presidents and secretaries the day and year first above written.

For the WABASH RAILWAY CO.,

[SEAL.] By CYRUS W. FIELD, *President.*

Attest:

W. B. CORNEAU,
Secretary Wabash Railway Co.

ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY,

[SEAL.] By B. W. LEWIS, JR., *President.*

Attest:

JAMES F. HOW, *Secretary.*

NEW YORK, *October* 10*th*, 1879.

Whereas heretofore to wit: On the fourteenth day of August, A. D. 1879, the Board of Directors of the St. Louis, Kansas City and Northern Railway Company entered into an agreement with the board of directors of the Wabash Railway Company which agreement provided for the consolidation of the capital stock, property and franchises of two companies, the above named, and

Whereas, in and by said agreement, it is provided that the holders of preferred stock to be issued by said consolidated company shall be entitled to a dividend of seven per cent. from the earnings of said company, before any dividend whatever shall be paid upon the remaining shares of said capital stock, but said agreement is silent as to the distribution of any surplus remaining from said earnings, after a like dividend of seven per cent. shall have been paid to the holders of such common or remaining shares.

It is hereby mutually stipulated by the parties to said agree-
1291 ment, and is declared to have been by them intended thereby, that after the owners and holders of said preferred stock shall have received a dividend of seven per cent. upon the par value of their shares from the earnings of said consolidated company for any year they shall receive no more from the earnings of said company for that year until a dividend of seven per cent. upon the par value of the common or remaining shares of said capital stock has been paid to the owners or holders thereof, and after that time all dividends shall be distributed alike among the holders of the preferred and common stock of said consolidated company.

In witness whereof, the parties above named have caused *their* presents to be signed in *these* names by their respective presidents, and have caused their corporate seals to be hereunto affixed and have caused their said seals and signatures to be attested by their respective secretaries the day and year above written.

THE WABASH RAILWAY COMPANY,

[SEAL.] By CYRUS W. FIELD, *President.*

Attest:

W. B. CORNEAU, *Secretary.*

ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY,

[SEAL.] By B. W. LEWIS, JR., *President.*

Attest:

JAMES F. HOW, *Secretary.*

We, B. W. Lewis, Jr., president, and James F. How, secretary, of the St. Louis, Kansas City and Northern Railway Company, do hereby certify that the above and foregoing is a complete, true and perfect copy of agreements heretofore made and entered into by and between the Wabash Railway Company, a consolidated corporation of the States of Ohio, Indiana and Illinois, and the St. Louis, Kansas City and Northern Railway Company, a railroad corporation
1292 existing under the laws of the State of Missouri, for the consolidation of all the capital stock, property, rights and privileges and franchises of said Wabash Railway Company with all the capital stock, property, rights, privileges and franchises of said St. Louis, Kansas City and Northern Railway Company, under the corporate name of the Wabash, St. Louis and Pacific Railway Company.

And we further certify that the agreements aforesaid were executed by us as president and secretary of the said St. Louis, Kansas City and Northern Railway Company, and that we affixed the corporate seal of said company to said agreement with the approval and under the direction of the board of directors of said St. Louis, Kansas City and Northern Railway Company.

In testimony whereof, we have hereunto set our hands and affixed the seal of said corporation this eighth day of November, A. D. 1879.

[SEAL.] B. W. LEWIS, JR., *President.*

Attest:

JAMES F. HOW, *Secretary.*

We, Cyrus W. Field, president, and W. B. Corneau, secretary, of the Wabash Railway Company, do hereby certify that the above and foregoing instrument of writing is a complete, true and perfect copy of agreements heretofore made and entered into by and between the Wabash Railway Company, a consolidated corporation of the states of Ohio, Indiana and Illinois, and the St. Louis, Kansas City and Northern Railway Company, a railroad corporation existing under the laws of the state of Missouri, for the consolidation of all the capital stock, property, rights, privileges and franchises of said Wabash Railway Company with all the capital stock, property, rights and franchises of said St. Louis, Kansas City and Northern Railway Company, under the corporate name of the Wabash, St. Louis and Pacific Railway Company, and we further certify that the agreements aforesaid were executed by us as president and secretary of
1293 said Wabash Railway Company, and that we affixed the corporate seal of said company to said agreement with the approval and under the direction of the board of directors of said Wabash Railway Company.

In witness whereof, we have hereunto set our hands and affixed the seal of said corporation this sixth day of November, A. D. 1879.

For the WABASH RAILWAY COMPANY.

[SEAL.] CYRUS W. FIELD, *President.*

Attest:

W. B. CORNEAU, *Secretary.*

Filed November 10th, 1879.

MICHAEL McGRATH,

Secretary of State, Jefferson City, Mo.

Paragraph No. 28.

EXHIBIT 43.

This Indenture, made and entered into this first day of June, 1880, by and between the Wabash, Saint Louis and Pacific Railway Company, of the first part, and the Central Trust Company of New York, and James Cheney, of Indiana, trustees, of the second part, witnesseth:

Whereas The railroad of the first party is subject to the lien of various mortgages and deeds of trust, which have at different times been made and charged by way of lien on sections of said railroad, which at said times belonged respectively to different railroad companies by whom the same were made; and

Whereas, The aggregate indebtedness of said railroad companies now outstanding and secured as above approximates the sum of thirty-six millions of dollars; and

1294 Whereas, Said first party has incurred a further indebtedness for equipment, purchased by said first party, for use upon said railroad, and has assumed obligations made by its predecessors and constituent corporations for like purchases; and

Whereas, Further purchases will be required and also expenditures for permanent improvements; and

Whereas, The aggregate of such indebtedness and such further contemplated purchases and expenditures approximate the sum of six million dollars; and

Whereas, Said first party contemplates the extension of its railway by additional lines required to complete its system, and to be acquired by contract, purchase, lease, consolidation or construction; and

Whereas, It is further contemplated by said first party that such acquisitions will require, for purchase, completion, improvement and operation of the same, a sum approximating eleven millions of dollars, to be secured by general lien, in addition to such sum as may in each instance be paid or secured by special lien; and

Whereas, A meeting of stockholders of the said Wabash, St. Louis and Pacific Railway Company was held at the office of the company in St. Louis, Missouri, on the 5th day of May, 1880, of which meeting notice in writing, signed by all of the directors of said company, was served personally or by depositing the same in a post-office, directed to the post-office address of each of said stockholders, severally, with necessary postage for the transmittal of the same prepaid, at least sixty days prior to the day appointed for such meeting, and by advertising the same in some newspaper published in each county through or into which the road of said company extends, at least sixty days to the day appointed for such meeting; and

Whereas, Such notice stated the time and place of the meeting and the object thereof, the amount of the bonds of said company which it was proposed to issue and dispose of, and that it was proposed to secure said bonds by mortgage, as above, and generally the purposes above set forth; and

Whereas, At said meeting, by the concurrence of the hold-
1295 ers of more than two-thirds in amount of the stock of such corporation, the following resolutions were adopted.

Resolved, That for retiring and paying the various obligations which are specific liens upon sections of the railway of this company, by virtue of deeds of trust or mortgage made by corporations formerly owning said sections respectively, and for the discharge of indebtedness for purchase of equipment, incurred or assumed by this company, and to provide means for the extension of the railroad of this company by the acquisition, through contract, purchase, lease or consolidation of such additional lines as may be necessary to complete the same, and for the purpose of completing, finishing, improving and operating the railroad of this company as now existing or as hereafter extended, the board of directors of this company are hereby authorized to issue and dispose of the bonds of this company to the amount of fifty millions of dollars, and to secure the same by deed of trust or mortgage, covering the entire property and franchises of this company as now held or hereafter to be acquired, so that as to future acquisitions by this company said mortgage shall be a lien inferior only to such liens as may be specifically charged upon the property acquired at or prior to the acquisition by this company thereof, and shall be assumed by this company as part of the condition of such acquisition;

Resolved, That said bonds shall be in such denominations as the board of directors shall approve, and shall be payable forty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, which, with the principal, shall be payable at the office or agency of this company in the city of New York, in gold coin of the United States, of present value; and there shall be written in said mortgage such provisions, by way of remedy for forfeiture, in the event of default, as the board of directors may approve;

Resolved, That the fifty thousand bonds, which are intended to be secured by the said mortgage, shall, from time to time, here-
1296 after be made, executed and issued when, and as authorized by the resolutions of the board of directors, as sufficient capital stock of the company shall be fully paid and outstanding—to authorize the same without conflict with any law whereby the same would be otherwise affected—the said bonds to be numbered consecutively, and to be of the same denomination, form, tenor and effect and that when and as the said bonds shall be issued, each and all thereof shall have the same rights, lien and privilege of said mortgage, and shall be equally secured thereby, without preference or priority as to lien or otherwise, of any one over another, except as aforesaid, and with the like effect as though all of the said bonds had been made, executed and issued on the day of the date of the said mortgage;

Whereas, This indenture, with the provisions and trusts hereinafter contained, has been duly approved by said board of directors, and the said board has issued and is about to dispose of the bonds of this company as above set forth; and, whereas, said bonds to be exe-

cuted and issued under the foregoing resolutions are to be of the form following, that is to say:

No. —. $1,000.

UNITED STATES OF AMERICA.

Wabash, St. Louis and Pacific Railway Company.

General Mortgage Bond.

Know all men by these presents, that the Wabash, St. Louis and Pacific Railway Company, a consolidated corporation of Ohio, Indiana, Illinois and Missouri, for value received, hereby promises to pay to the Central Trust Company of New York and James Cheney, trustees, or bearer, at its office or agency, in the city of New York, on the first day of June, A. D. 1920,

One Thousand Dollars,

in United States gold coin, of the present standard value, with interest thereon at the rate of six per cent. per annum, payable
1297 semi-annually, on the first days of June and December, in each year, on presentation and surrender of the annexed coupons as they severally become due, free of all taxes, except such taxes as may be imposed by the laws of the State wherein the holder hereof shall have his domicile.

This bond is one of a series of fifty thousand bonds of one thousand dollars each, of like tenor and date, numbered from one to fifty thousand; the payment of the *principal and interest* of which is secured by an indenture of mortgage or deed of trust, conveying to the said trustees, in trust, the entire railroad, equipment, franchises, leaseholds, property and *income* of said company, now held or which may hereafter be acquired, subject only to such prior liens as now exist, and such specific liens on future acquisitions as may be assumed as part of the condition of such acquisition.

If default shall occur in the payment of the interest upon any of said bonds, and such default shall continue for six months, the principal of all of said bonds shall become due in the manner and with the effect provided in said mortgage or deed of trust.

It is, however, agreed between said company and the holder of this bond that no liability thereon shall be enforced against the individual estate of any stockholder of said company, by virtue of any law of any state through which said railroad does now or may hereafter run.

Said company, in such case, hereby waives the benefit of any extension, stay or appraisement laws now existing or that may hereafter exist.

This bond shall not become obligatory upon the company until the certificate endorsed hereon shall have been signed by the said trustees, or one of them.

This bond shall pass by delivery or by transfer on the books of

said company, in the city of New York. After registration of ownership, certified hereon by the transfer agent of said company, no further transfer, except on the books of the company, shall be valid, unless transferred to bearer on said books, after which this bond shall pass by delivery, as at first, but shall continue
1298 subject to registration and transfer to bearer successively, at the option of each holder.

In witness whereof, the said company has caused its corporate seal to be hereto affixed, and the same to be signed by its president and secretary, this first day of June, 1880.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,
By —— ——, *President.*
By —— ——, *Secretary.*

No. —. $30.

The Wabash, St. Louis and Pacific Railway Company will pay the bearer in the city of New York thirty dollars, in U. S. gold coin, on — day of ——, being six months' interest then due on the general mortgage bond No.—.

—— ——, *Treasurer.*

No. —.

Wabash, St. Louis and Pacific Railway Company.

Six Per Cent. General Mortgage Bond.

$1,000.

Principal Due June 1st, 1920.

Interest Payable June 1st and December 1st, in the City of New York.

Trustees' Certificate.

We hereby certify that this bond is one of the fifty thousand bonds, of $1,000, each secured by and mentioned in the mortgage within referred to.

—— ——,
—— ——,
Trustees.

1299 Now, therefore, be it known that the Wabash, St. Louis and Pacific Railway Company, party of the first part, in consideration of the premises, and in order to the security of the bonds hereinbefore described, to the extent of fifty millions of dollars and no more, has this day granted, bargained, sold, conveyed and transferred into the said Central Trust Company of New York,

and James Cheney, of Indiana, trustees, their heirs and successors in said trust, all of the right of way and railroad of the said first party, extending from the city of Toledo, in the State of Ohio, through the state of Indiana, and thence into the state of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point in the state of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river, at Hamilton, in said state, and with branch of said road leading from Decatur, in said state, to East St. Louis, in the same state. And also the railway of the party of the first part extending from St. Louis, in the state of Missouri, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the state of Iowa, and a branch from Salisbury, in the county of Chariton, state of Missouri, to Glasgow, in the county of Howard, in said state, and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction to the city of Council Bluffs, in the state of Iowa, which lines of railroad will, when united, form one continuous line of railway in the same general direction from the waters of Lake Erie, at Toledo, Ohio, to the cities of Council Bluffs and Kansas City on the Missouri river, as aforesaid. Together with all the embankments, bridges, turnouts, sidetracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad, or used in connection therewith, belonging to the said first party, together with all rents, issues and profits, credits and choses in action,
1300 accruing to said first party from said railroad and appurtenances, as owner and holder thereof.

And the said Wabash, St. Louis and Pacific Railway Company, in consideration of the premises above recited, and for the further security of the bonds above described, doth hereby grant, bargain, sell, assign, transfer and convey unto the said Central Trust Company of New York and James Cheney, trustees, their heirs and successors in said trust, all the right, title and interest of said first party, as the same now exists or may hereafter exist, by virtue of any contract, lease, purchase or consolidation in and to the following described railroads now in process of amalgamation with the railroad of the said first party, including with said railroads every appurtenance thereto, or thing used in connection therewith, and all rents, issues and profits arising therefrom, to said first party, all of the above as fully as are above described, with reference to the railroad now owned and held by said first party, and as fully as it is or may be possible for said first party to convey the same.

The Boone County and Booneville Railway, extending from Centralia to Columbia, in the state of Missouri.

The St. Louis, Ottumwa and Cedar Rapids Railway, extending from Moberly, in the state of Missouri, to Ottumwa, in the state of Iowa.

The St. Joseph and St. Louis Railway, extending from New Lex-

ington, and Richmond and Lexington Junction to St. Joseph, in the state of Missouri.

The Brunswick and Chillicothe Railway, extending from Brunswick to Chillicothe, in the state of Missouri.

The St. Louis, Council Bluffs and Omaha Railway, extending from Chillicothe to Elm Flats, in the state of Missouri.

The Chicago and Paducah Railway, extending from Effingham and Altamont to Streator, in the state of Illinois.

The Chicago and Strawn Railway, extending from Strawn to Chicago, in the state of Illinois.

1301 The Eel River Railway, extending from Logansport to Butler, in the state of Indiana.

The Quincy, Missouri and Pacific Railway, extending from West Quincy, in the state of Missouri, to the Missouri river, opposite Brownsville, Nebraska.

The Missouri, Iowa and Nebraska Railway, extending from Keokuk, Iowa, to a junction with the Omaha division of the Wabash, St. Louis and Pacific Railway, near the line between the state of Iowa and the state of Missouri.

The Champaign, Havana and Western Railway, extending from Champaign to Havana, in the state of Illinois, and from White Heath to Decatur, in the state of Illinois.

The Toledo, Peoria and Western Railway, extending from Warsaw, in the state of Illinois, to the state line of Indiana, and from La Harpe, in the state of Illinois, to Burlington, in the state of Iowa.

The Detroit, Butler and St. Louis Railway, from Butler, in the state of Indiana, to Detroit, in the state of Michigan.

To have and to hold the said property, real and personal, including the said railroads, appurtenances, equipment, franchises, rights, credits and choses in action, and every interest herein granted, under the said trustees as joint tenants, and not as tenants in common, and the survivor of them, his heirs and successors; but in trust, nevertheless, for the use and purposes herein declared, and for the purpose of protecting and securing the holders of said fifty thousand bonds, and each and every of them, and upon the conditions following, that is to say:

The estate hereby conveyed and the lien of the trust hereby created shall be expressly subject and inferior to all such prior liens above referred to as are charged upon the several portions of the railroad and equipment of the railroad now of said first party, and to the estate and lien of such specific trusts and mortgages or other

1302 obligations as may be hereafter made and charged by the said first party upon specific property, which said first party hereafter may acquire, and shall form part of the purchase money or condition of the acquisition of the property so charged by said first party.

For the purpose of securing to the holders of any of said fifty thousand bonds, that none of said bonds shall be issued except as above set forth, it is hereby stipulated on the part of said first party that the Central Trust Company of New York, one of the trustees

herein, or its successors in said trust, shall certify and deliver said bonds as follows:

1. Said bonds, to an amount not exceeding thirty-three millions of dollars, shall be certified and delivered in such sums as may, from time to time, be required at par value, to such persons as may present for exchange at par value, bonds secured by any of the following described prior liens upon portions of the railroad of the party of the first part:

First mortgage bonds of the Toledo and Illinois Railroad Company, due as extended August 1st, 1890, for the sum of nine hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first party, extending from Toledo to the westerly boundary of the state of Ohio, about seventy-five miles.

Bonds of the Toledo and Wabash Railroad Company, due as extended November 1st, 1893, for one million of dollars, secured by a second mortgage on that portion of the road of the party of the first part last above named. First mortgage bonds of the Lake Erie, Wabash and St. Louis Railroad Company, due as extended August 1st, 1890, for the sum of two millions five hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part, running entirely through the state of Indiana, about one hundred and sixty-eight miles.

Bonds of the Wabash and Western Railway Company, due as extended November 1st, 1893, for one million five hundred thousand dollars, secured by a second mortgage on that portion of the road of the party of the first part last named. First mortgage
1303 bonds of the Great Western Railroad Company of 1859, due August 1st, 1888, for the sum of two millions five hundred thousand dollars, secured by a mortgage of that part of the road of the party of the first part extending in the state of Illinois from Naples and Meredosia, as its western termini, to the boundary line between the state of Illinois and Indiana, about one hundred and seventy-nine miles.

Bonds of the Great Western Railroad Company of 1859, due May 1st, 1893, for two millions five hundred thousand dollars, secured by a second mortgage on that part of the road of the party first named about one hundred and seventy-nine miles.

Bonds of the Illinois and Southern Railroad Company, due August 1st, 1882, for three hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part, extending from Clayton to Carthage, in the state of Illinois, about thirty miles.

Bonds of the Quincy and Toledo Railroad Company, due November 1st, 1890, amounting to five hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part lying between the west bank of the Illinois river, opposite Meredosia, and Clayton, in Illinois, about thirty-four miles.

Bonds of the Decatur and East St. Louis Railroad Company, due August 1st, 1889, amounting to twenty-seven hundred thousand dollars, secured by a first mortgage by said company on that part of the road of the party of the first part lying between Decatur and

East St. Louis, in the state of Illinois, a distance of about one hundred and eight miles.

Bonds of the Wabash Railway Company, due June 1st, 1909, amounting to five hundred thousand dollars, secured by a first mortgage on that part of the road of the party of the first part, extending from Naples, in Scott county, Illinois, to the Mississippi river, at East Hannibal, a distance of about fifty miles.

Bonds of the Toledo, Wabash and Western Railway Com-
1304 pany, known as consolidated bonds, due February 1st, 1907, secured by a mortgage on the whole line of the road owned by that company, February 1st, 1867, and amounting to twenty-six hundred and ten thousand dollars.

Bonds of the Wabash Railway Company, dated May 17th, 1879, and due April 1st, 1909, for two millions of dollars, secured by a mortgage on the lines of road owned by that company at the date of said mortgage, subject to the prior mortgages hereinbefore specified.

Bonds and scrip secured by funded coupons of the mortgaged bonds of the Wabash Railway Company, amounting to two million nine hundred and forty-two thousand four hundred and fifty dollars.

Bonds of the North Missouri Railroad Company, due March 9th, 1895, amounting to six millions of dollars, secured by a first mortgage on the road of the party of the first part, between St. Louis and St. Joseph Junction, Missouri, about two hundred and sixty-five miles.

Real estate and railway mortgage bonds of the St. Louis, Kansas City and Northern Railway Company, due September 1st, 1895, for three millions of dollars.

Bonds of the St. Louis, Kansas City and Northern Railway Company, called the St. Charles Bridge first mortgage bonds, secured by a first mortgage on the bridge over the Missouri river at St. Charles, due October 1st, 1908, amounting to one million of dollars.

Bonds of the St. Louis, Kansas City and Northern Railway Company, called St. Charles Bridge second mortgage, due October 1st, 1903, for three hundred and eighty-eight thousand five hundred dollars, secured by a second mortgage on the bridge over the Missouri river at St. Charles.

2. Said bonds, to an amount not exceeding six millions of dollars, shall be certified and delivered to said first party in such sums, and from time to time, as the board of directors shall by resolution declare to be required to reimburse or meet the expenditures of said first party, for equipment, and for other permanent improvement of its railroad.

1305 3. The remainder of said bonds, to an amount not exceeding eleven millions of dollars, shall be certified and delivered to said first party, in such sums, from time to time, as the board of directors of said first party shall, by resolution appropriate to the purchase, construction or acquisition otherwise of such additional railroads, bridges or connections as may, in the judgment of said first party, be required for the proper extension of its railway system.

And as to any railroad so acquired, the said first party hereby covenants that the application of said bonds shall not exceed fifteen thousand dollars, par value, for each mile of said railroad; and if, as one of the conditions of such acquisition, the first party shall assume or issue any obligation secured by a specific lien and as to such railroad a prior lien to that of the bonds secured hereby, the said sum of fifteen thousand dollars shall be taken to include such prior lien.

Whenever any of the bonds hereby secured shall be issued in exchange for bonds secured by prior liens upon the railroad and equipment now belonging to the party of the first part, or which said first party shall hereafter acquire, or the proceeds of any of the bonds secured hereby, shall be applied in purchase of said prior bonds, or any of them, then, in either case, whatever bond shall be so received in exchange or purchase, shall not be cancelled, but shall be the property of said trustees as such, and be retained as property belonging to their trust estate, and shall be so endorsed as shall prevent their application otherwise.

If the said Wabash, St. Louis and Pacific Railway Company, or its successors or assigns, shall well and truly pay, or cause to be paid, the several sums of money specified in the several bonds hereinbefore described, as well the principal as the installments of interest according to the tenor and effect of said bonds and of each and every of them, and of the laws of the several states of Ohio, Indiana, Illinois and Missouri, or if said bonds and the interest payable thereon become in any wise paid or satisfied, then, and in
1306 such case, the estate, right, title, interest and demand of said parties of the second part, their successors in said trust and assigns, shall cease, determine and become void, otherwise to be and remain in full force and virtue in the law, and for the benefit and security of the holders of said bonds and each of them.

Until default be made in the payment of the principal or interest of said bonds or of some or any of them, the said railway company shall be permitted to possess, operate, manage and enjoy said railroad, with its appurtenances, and to take and use the rents, incomes, tolls, issues and profits thereof, in the same manner and with the same effect as if this deed had not been executed.

In case default shall be made in the payment of any installment of interest accruing on said bonds or any of them, and such default shall continue for a period of six months after the maturity thereof, it shall be lawful for said parties of the second part or their seccessors in said trust, by themselves, their agents or attorneys, to enter upon, take possession of, manage, operate and control the railroad and property hereby conveyed, owned or held by lease, contract or otherwise, by superintendents, receivers and managers thereof, making from time to time all needful repairs, replacements, and such alterations, additions and improvements as may seem to be judicious and proper, and to collect and receive all rents, tolls, incomes, issues and profits thereof, and, after deducting the expenses of operating said railroad and property and leasehold interest and all costs of improvements and any taxes that may have accrued thereon, as well as just and reasonable compensation for their own work and labor in and about the

premises, to apply the moneys arising therefrom to the payment of interest in the order in which it becomes due and ratably to the persons entitled thereto, and when said interest so in default and any instalment of interest subsequently maturing shall be paid up,
1307 then said parties of the second part shall restore the possession of said railroad to the said party of the first part.

If default shall occur in the payment of any installment of interest and such default continue for the space of six months after maturity and demand therefor then if a majority in value of the holders of said bonds then outstanding and secured by this mortgage shall determine and notify said trustees that they require that the principal of all said bonds become at once due and payable, said bonds shall thereby become due and payable, notwithstanding any clause contained therein to the contrary, and if said principal sum shall become due and not paid by said first party according to the tenor of said bonds and upon written notice by the holders of a majority of the bonds issued and outstanding under the authority hereinbefore mentioned the said trustees shall have the power to enter upon and take possession of said railroad with the appurtenances and all and singular the property and franchises hereby mortgaged, and the agents of said railway company are hereby authorized and required to deliver up the same; and said trustees shall cause said mortgaged premises to be sold at public auction at the city of New York or at the city of St. Louis, Missouri, as may be directed by the holders in interest of a majority of said bonds, giving at least sixty days' notice of the time and place and terms of sale, and of the specific property to be sold, publishing the same in two daily newspapers in said city of New York and one in the cities of Toledo, Lafayette, Springfield and St. Louis; to adjourn said sale from time to time, if necessary in their opinion; and if the same shall be adjourned, to sell without further notice of the time and place of sale, and to execute to the purchaser or purchasers a good and sufficient deed in fee simple for the same, which shall be a bar against the party of the first part and all persons claiming by, through or under it, of all right, title, claim or demand in and to the mortgaged premises, or any part thereof, and out of the proceeds of such sale and income that may have been received for the use, operation and management of said road while in possession of such
1308 trustees, after deducting just allowances and expenses, as in the preceding article mentioned, to pay, first, the interest and, second, the principal of said bonds, ratably and with due regard to the successive maturity of different series of coupons as far as said coupons will go for that purpose; and in case any surplus should remain, to pay the same over to the party of the first part. But in case it shall not be deemed proper or expedient, in all or any of the states in which the mortgaged premises are found, to seize and sell the same in pursuance of the power herein granted, then it shall be the duty of said trustees to proceed, in any proper tribunal, to foreclose said mortgage, according to the usual and established principles of law and equity; but it is expressly understood and agreed between the parties that in no case whatever shall the party of the first part claim any right or advantage by reason any valuation, appraisement, stay or

extension laws that now exist or may hereafter be enacted in any of the states in which said property exists or may be found, and said first named party hereby releases to the second parties all and every such right, claim and demand, and hereby further agrees that it will neither apply for an injunction nor any stay of proceedings to arrest or prevent such sale from being made or possession being taken as hereinbefore provided.

It is expressly declared that this instrument is made and the trust herein declared upon condition, that if any sale shall be made under and by virtue of this mortgage, whether by judicial decree or foreclosure, or in execution of the trust so created, either by judicial decree or otherwise, the holders of a majority of the said bonds then outstanding shall have the right to have said premises, and all property herein embraced, purchased for the use and benefit of all the holders of said then outstanding bonds.

In case such sale shall be made by any person or officer other than the trustees herein named, or their successors, then the holders
1309 of the majority of said bonds outstanding shall have the right, by notice in writing, to require the said trustees or their successors to make such purchase on such terms as they in said notice shall prescribe. And in case said sale shall be made by said trustees, then the holders of a majority of said outstanding bonds shall have the right to appoint any other person whom they may choose to make such purchase on such terms as they may prescribe. If any person other than such trustees shall be so appointed, such appointment and the terms of purchase shall be in writing, a copy of which writing shall be delivered to said trustees or their successors before such sale.

And if the holders of a majority of said outstanding bonds shall elect to have said purchase made as aforesaid, and shall prescribe the terms on which they desire to make the same, then it shall be the duty of said trustees or their successors, or said other person as may be appointed as aforesaid to make such purchase if the same can be made on the terms so prescribed, and having so purchased said premises and property, the right and title thereto shall vest in the said trustees or persons so purchasing, for the use aforesaid, and no bondholder shall have any claim to the said premises or property, or the proceeds thereof, except his *pro rata* share therein, as represented by a new company or corporation, to be formed for the use and benefit of the holders of all said bonds then outstanding. And said trustees or persons making said purchase shall take such lawful measures as may be deemed for the interest of all said bondholders to organize a new company or corporation; said company or corporation to be so organized upon such terms conditions or limitation, and in such manner as the holders of a majority of said outstanding bonds shall in writing request or direct. And thereupon the said trustees, or any person making said purchase, shall convey said premises and property to the new company or corporation. And it is hereby declared that all per-
sons who shall claim any interest, benefit or advantage by
1310 virtue of this instrument, or the trust hereby created, shall take the same, subject to all the terms herein contained, and

subject to all the rights and powers conferred by this instrument on the holders of a majority of the bonds hereby secured.

It is further declared that in case of any sale of the premises and property embraced herein, by decree of any court or otherwise, the holders of a majority of the bonds then outstanding shall have the right to determine whether said premises and property shall or shall not be sold subject to all encumbrances, and such majority shall sufficiently manifest their determination in such respect by giving notice thereof in writing to the trustees or persons making such sale, at any time before such sale is made.

In case of the resignation or incapacity of the trustees, or either of them herein named, to act as trustee, or in case of the death, resignation or incapacity to act of any successor of said trustees, it shall be duty of the board of directors of said railway company, immediately thereafter, to make application to some proper court of record, at the county where the general office of said railway company is located, for the appointment of some suitable person or persons or corporation to become the successor of said trustees and thereupon the person, persons or corporation so appointed shall be and are hereby vested with all the estate, rights and privileges, and liable to all the duties by this instrument conferred upon or to the parties of the second part, to the same extent as if each person, persons or corporation were herein named.

It is hereby agreed and understood that for the better assurance to the parties of the second part, and to the holders of the bonds secured by this instrument, the party of the first part agrees that it will, on demand, at any and all times hereafter, make, execute and deliver all such other and further conveyances and assurances for the better assuring unto said trustees and their successors in the trust hereby created, the said railroad, with appurtenances,
1311 equipment and property hereinbefore described or intended so to be, and all other property belonging to said party of the first part, now owned or hereafter to be acquired, as above provided and set forth, or any and all the franchises now held or hereafter to be acquired by the party of the first part, as said trustees, or their sucessors, by their counsel shall reasonably advise, devise or require.

Whenever it shall happen, from changes required to be made in said railroad and appurtenances, that any parcels of property, whether real or personal, have become unnecessary or useless to the said railroad company for its business, by reason of change of line or depot, or other grounds, or when any of the personal property shall have become worn out or inefficient and unnecessary to the operation of said railroad, then, and in such case, it shall be lawful for the directors of said railway company to make sales, exchanges or other disposition of such parcels of real or personal property as they may deem for the best interest of said railway company, and upon the sale or exchange of such property for any other, and when any other property shall be acquired in the place of such property, the same shall be held subject to the lien of this mortgage, as if it was the property of said company at the date hereof; and the parcels

of property so held and disposed of by said directors shall be exempt from the lien herein created.

It is further agreed that neither of said trustees shall be required to take any action under this deed, in the event of default, until the party asking such action shall have indemnified such trustee for expenditure necessarily involved.

In witness whereof, the said party of the first part, that is to say, the said Wabash, St. Louis and Pacific Railway Company, has caused these presents to be signed in its incorporate name by Solon Humphreys, president, and attested by James F. How, its secretary, with the corporate seal of said company hereto, as authorized
1312 and directed by its board of directors, the day and year above written.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,
[L. S.] By SOLON HUMPHREYS, *President.*

Attest:
JAMES F. HOW, *Secretary.*

Signed and sealed in the presence of
WM. J. HARDING.

STATE, COUNTY AND CITY OF NEW YORK, *ss:*

Be it remembered that on this seventh day of June, 1880, personally came before me the undersigned, a notary public within and for the county aforesaid, Solon Humphreys, who, being by me duly sworn, did depose and say that he is the president of the Wabash, St. Louis and Pacific Railway Company, grantor in the foregoing instrument; that the name of said company is signed to said instrument by him and by virtue of the order of the board of directors of said company, as president thereof; that the seal of the company attached thereto is the proper and genuine seal of the said railway company, and is affixed thereto by order of said board of directors. And the said Solon Humphreys, president, acknowledged the foregoing instrument to be the act and deed of the Wabash, St. Louis and Pacific Railway Company for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this seventh day of June, A. D. 1880.

[NOTARIAL SEAL.] WM. J. HARDING,
Notary Public, Kings Co., State of New York.

Certificate filed in New York County.

1313 STATE OF MISSOURI, *City and County of St. Louis, ss:*

Be it remembered that on this tenth day of June, 1880, personally came before me, the undersigned, a notary public within and for the county aforesaid, James F. How, who, being by me duly sworn, did depose and say that he is the secretary of the Wabash, St. Louis

and Pacific Railway Company, grantor in the foregoing instrument; that he countersigned said instrument and affixed the seal of said company thereto by order of the board of directors thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office this tenth day of June, A. D. 1880.

GEO. S. GROVER,
Notary Public, City of St. Louis, State of Missouri.

Recorded in Lucas county, Ohio, vol. 76, of mortgages, pages 545, &c., and generally in counties along the line of the road.

1314 Paragraph 32.

EXHIBIT 44.

In the Circuit Court of the United States for the Eastern District of Missouri, September Term, A. D. 1885. In Equity.

Consolidated Cause.

THE CENTRAL TRUST COMPANY OF NEW YORK and Others
against
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others.

Now, on this day came the following parties by their solicitors, namely:

The Central Trust Company of New York, James Cheney; The Wabash, St. Louis and Pacific Railway Company; The Mercantile Trust Company of New York; The St. Louis, Iron Mountain and Southern Railway Company, Solon Humphreys, John T. Terry, and all the other defendants who have answered the bill of the Central Trust Company of New York and James Cheney, or the bill filed by the said complainants in the State Court and removed to this court, or the cross-bill filed by the Mercantile Trust Company of New York, viz.:

1. Anthony S. Thomas, } As trustees of the Cairo Division.
2. Charles Edward Tracy, }
3. United States Trust Company of New York.
4. Quincy, Missouri and Pacific Railroad Co.
5. Charles H. Bull.
6. Amos Green.
7. Henry F. Spaulding.
8. St. Joseph and St. Louis Railroad Co.

1315 9. St. Louis Bridge Co.

10. The Tunnel Railroad of St. Louis.
11. St. Louis, Council Bluffs and Omaha Railroad Co.
12. James B. Eads.
13. Joseph A. Jamison.
14. Charles Parsons.

15. Isaac H. Knox.
16. Geo. E. Leighton.
17. Louis H. Meyer.
18. Michigan City and Indianapolis Railroad Co.
19. William Nichols.
20. Geo. S. Coe.
21. Indianapolis, Peru and Chicago Railway Co.
22. German Savings Institution.
23. Boone County and Booneville Railway Co.
24. Brunswick and Chillicothe Railway Co.
25. Geo. M. Rice.
26. Edward P. Burnham.
27. John Kimball.
28. Chicago, Cincinnati and Louisville Railroad Co.
29. Clarinda and St. Louis Railroad Co.
30. Geo. I. Seney.
31. Geo. T. M. Davis.
32. Des Moines Northwestern Railway Co.
33. Farmers' Loan and Trust Co.
34. Henry W. Ford.
35. Richard S. Brock.
36. J. P. Giraud Foster.
37. Edward K. Goodnow.
38. John M. Woodson.
39. Robert A. Betts.
40. Alexander M. White.
41. Henry W. Worden.
42. James R. Jesup.
43. John N. A. Griswold.

And it appearing to the court that all the defendants to the bills of complaint aforesaid have entered their appearance herein, or have been duly served with process herein, or have been notified of the pendency of this cause by personal service or by publication,
1316 as heretofore ordered by the court; such service of process or notice being given, and such publications having been made more than twenty days before the first Monday of October, A. D. 1885.

It also appearing to the court that the following trustees have either resigned their trusts or departed this life, namely:

1. Edwin D. Morgan.
2. H. F. Vail.
3. O. H. Browning.
4. Abram W. Hendricks.
5. Lucien Tilton.

The court also finds that the trusts represented by the parties above named as having resigned their trusts or departed this life are fully represented in this cause, or that such trusts will not be affected by this decree.

The court also finds that of the parties defendant served with process or notified, as aforesaid, a large number have been defaulted more than a month before the rendition of this decree, and the original

removed bills of the Central Trust Company and James Cheney taken for confessed against them and each of them, viz.:

1. John R. Lionberger.
2. Attica, Covington and Southern R. R. Co.
3. Champaign and Southeastern Railway Co.
4. Havana, Rantoul and Eastern R. R. Co.
5. Des Moines and St. Louis R. R. Co.
6. Council Bluffs and St. Louis R. R. Co.
7. Humeston and Shenandoah R. R. Co.
8. St. Louis, Ottumwa and Cedar Rapids R. R. Co.
9. Alfred T. White.
10. Daniel A. Lindley.
11. Wager Swayne.
12. Clifford A. Hand.
13. Robert C. Martin.
14. George J. Gould.
15. John Paton.
16. David J. Tyson.
17. Charles E. Whitehead.
18. William Hill.

1317 19. Theodore Gilman.

20. Edward De Rose.
21. Henry A. Mott.
22. Charles Jackson.
23. G. M. Whittemore.
24. James H. Britton.
25. Townsend Underhill.
26. William H. Ladd.
27. J. C. Rogers.
28. Benjamin Ham.
29. Archibald Hopkins.
30. James Compton.
31. Abram W. Hendricks.
32. Thomas B. Coulter.
33. Thomas Mayo.
34. Philip Henry Brown.
35. Metropolitan National Bank.
36. Eel River R. R. Co.
37. Toledo, Peoria and Western R. R. Co.
38. St. Louis, Jerseyville and Springfield R. R. Co.
39. Peoria and Pekin Union R. R. Co.
40. Chicago and Western Indiana R. R. Co.
41. Chicago, St. Louis and Pittsburgh R. R. Co.
42. Hannibal Bridge Co.
43. Missouri, Iowa and Nebraska R. R. Co.

The court finds and adjudges that because the bills so filed by the Central Trust Company and James Cheney, and the cross-bill filed by the Mercantile Trust Company of New York cover and embrace all the rights and equities upon which the property hereinafter described can or ought to be sold by decree or decrees of this court in this cause, it will not be necessary to found this decree on the original

or amended bills of the Wabash, St. Louis and Pacific Railway Company or the prayers thereof. But said last-named bills will be retained by the court for the purpose of adjusting all such rights as have arisen under the same but not for the purpose of foreclosing under the prayers thereof any of the instruments hereinafter described.

And now this cause coming on for final hearing on the
1318 original removed bill and cross-bills of the Central Trust Company of New York (to be called hereafter the Central Trust Company for the sake of brevity) and James Cheney; the cross-bill of the Mercantile Trust Company; the answer of the Wabash, St. Louis and Pacific Railway Company (to be called hereinafter the Wabash Company for the sake of brevity), and all other answers to the above bills of parties appearing of record; with all replications, exhibits, reports of masters or commissioners to whom any of the questions or issues herein presented were referred; and, also, all evidence taken in said cause relating to said questions and issues; and all replications of the parties or any of them, and also upon the default of all parties who have suffered default as aforesaid.

And the Court having heard the argument of counsel, and being fully advised in the premises, finds and adjudges:

On the first day of June, A. D. 1880, the Wabash Company was a body corporate formed by the consolidation of certain other corporations organized under the laws of the states of Ohio, Indiana, Illinois and Missouri, and that said company then owned certain lines of railroad formerly owned by other bodies or parties, with all the property, real and personal, and all the franchises thereof. That said Wabash Company was then acquiring, or in contemplation of acquiring, still other lines of railroad with the property and franchises thereof, by lease, consolidation or otherwise. All of which lines so owned or held, or so about to be acquired, will be more fully described hereinafter.

On the first day of June, A. D. 1880, the said Wabash company, for the purpose of securing an intended issue of its mortgage bonds to the amount of fifty millions of dollars (to be known as "general mortgage bonds"), and the payment of the principal and interest thereof, duly executed and delivered to the Central Trust Company of New York and James Cheney of Indiana, as trustees, its mortgage or deed of trust (known as "The General Mortgage"),
1319 and thereby conveyed to said trustees, for the purposes in said general mortgage fully set forth, certain lines of railroad and certain interests as the same then existed, or might thereafter exist, in and to certain other lines of railroad, with all the property and franchises, rights, income and choses in action pertaining thereto. The lines of railroad and property and interests specifically described and defined in said mortgage (such description being hereby adopted), and the extent of the lien thereby created as against certain other liens, are set forth in said mortgage as follows; such enumeration however, not embracing other lines of railroad afterwards acquired by the Wabash company, and to which the lien of said general mortgage afterwards attached:

"All of the right of way and railroad of the said first party, extending from the city of Toledo, in the state of Ohio, through the state of Indiana, and thence into the state of Illinois, to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the state of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi River, at Hamilton, in said state, and with branch of said road leading from Decatur, in said state, to East St. Louis, in the same state. And, also, the railway of the party of the first part, extending from St. Louis, in the state of Missouri, in a northwesterly direction, to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the state of Iowa, and a branch from Salisbury, in the county of Chariton, state of Missouri, to Glasgow, in the county of Howard in said state; and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction to the city of Council Bluffs, in the state of Iowa, which lines of railroad will, when united, form one continuous line of railway, in the same general direction, from the waters of Lake Erie, at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri River, as aforesaid, together with all the embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other
1320 houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad, or used in connection therewith, belonging to the said first party, together with all rents, issues and profits, credits and choses in action accruing to said first party from said railroad and appurtenances, as owner and holder thereof.

"And the said Wabash, St. Louis and Pacific Railway Company, in consideration of the premises above recited, and for the further security of the bonds above described, does hereby grant, bargain, sell, assign, transfer and convey unto the Central Trust Company of New York and James Cheney, trustees, their heirs and successors in said trust, all the right, title and interest of said first party, as the same now exists or may hereafter exist, by virtue of any contract, lease, purchase or consolidation in and to the following described railroads now in process of amalgamation with the railroad of the said first party; including with said railroads every appurtenance thereto, or thing used in connection therewith, and all rents, issues and profits arising therefrom to the said first party. All the above as fully as above described, with reference to the railroad now owned and held by said first party, and as fully as it is or may be possible for said first party to convey the same.

"The Boone County and Booneville Railway, extending from Centralia to Columbia, in the state of Missouri.

"The St. Louis, Ottumwa and Cedar Rapids Railway, extending from Moberly in the state of Missouri, to Ottumwa, in the state of Iowa.

"The St. Joseph and St. Louis Railway, extending from New Lexington, and Richmond and Lexington Junction, to St. Joseph in the state of Missouri.

"The Brunswick and Chillicothe Railway, extending from Brunswick to Chillicothe, in the state of Missouri.

"The St. Louis, Council Bluffs and Omaha Railway, extending from Chillicothe to Elm Flats, in the state of Missouri. 1321

"The Chicago and Paducah Railway, extending from Effingham and Altamont, to Strator, in the state of Illinois.

"The Chicago and Strawn Railway, extending from Strawn to Chicago, in the state of Illinois.

"The Eel River Railway, extending from Logansport to Butler, in the state of Indiana.

"The Quincy, Missouri and Pacific Railway, extending from West Quincy, in the state of Missouri, to the Missouri river, opposite Brownsville, Nebraska.

"The Missouri, Iowa and Nebraska Railway, extending from Keokuk, Iowa, to a junction with the Omaha division of the Wabash, St. Louis and Pacific Railway, near the line between the state of Iowa and the state of Missouri.

"The Champaign, Havana and Western Railway, extending from Champaign to Havana, in the state of Illinois, and from White Heath to Decatur, in the state of Illinois.

"The Toledo, Peoria and Western Railway, extending from Warsaw, in the state of Illinois, to the state line of Indiana, and from La Harpe, in the state of Illinois, to Burlington, in the state of Iowa.

"The Detroit, Butler and St. Louis Railway, from Butler, in the state of Indiana, to Detroit, in the state of Michigan. To have and to hold the said property, real and personal, including the said railroads, appurtenances, equipment, franchises, rights, credits and choses in action, and every interest herein granted, to the said trustees, as joint tenants, and not as tenants in common, and the survivor of them, his heirs and successors; but in trust, nevertheless, for the use and purposes herein declared, and for the purpose of protecting and securing the holders of said fifty thousand bonds, and each and every of them, and upon the conditions following, that is to say:

"The estate hereby conveyed, and the lien of the trust hereby created, shall be expressly subject and inferior to 1322
all such prior liens above referred to, as are charged upon the several portions of the railroad and equipment of the railroad now of said first party, and to the estate and lien of such specific trusts and mortgages or other obligations as may be hereafter made and charged by the said first party upon specific property, which said first party hereafter may acquire, and shall form part of the purchase-money or condition of the acquisition of the property so charged by said first party."

The court further finds and adjudges that in addition to the lines of railroad specifically described in said general mortgage, the lien thereof also attached to all the right and title of the Wabash company in and to the following railroads, property, franchises, rights

and interests, whether acquired before or after the execution of the said general mortgage, and whether acquired by purchase, lease, or consolidation or contract, viz.:

The Clarinda and St. Louis Railway, being 10.1 miles long in the state of Missouri, and 11.7 miles in the state of Iowa, making a railroad 21½ miles in length, extending from Clarinda, Iowa, to Roseberry, Missouri. Said Wabash company acquired title in fee to the Missouri portion of said railroad, and a leasehold title to the remainder.

The Peoria, Pekin and Jacksonville Railroad, extending from Pekin, Illinois, to Jacksonville, Illinois, a distance of 72.2 miles, said railroad having been acquired by purchase July 25, 1881.

The Springfield and Northwestern Railroad, extending from Springfield, Illinois, to Havana, Illinois, a distance of 44.1 miles, said railroad being acquired by purchase July 30, 1881.

The Centreville, Moravia and Albia Railroad, extending from Centreville, Iowa, to Albia, Iowa, a distance of about 25 miles. Said railroad was leased to the Missouri, Iowa and Nebraska Rail-
1323 road Company, and came to the Wabash company with the property of said last-named company.

The Des Moines and St. Louis Railroad, extending from Des Moines, in the state of Iowa, to Albia, in said state, through the counties of Polk, Marion and Monroe, in said state, a distance of 67.3 miles, leased to the Wabash company on the first day of March, 1882.

The St. Louis, Jerseyville and Springfield Railroad, extending from Grafton, Illinois, to a point near Bates, Illinois, a distance of 71.4 miles. Said railroad was acquired by lease August 6, 1881.

The Attica, Covington and Southern Railroad, extending from Attica, Indiana, to Covington, Indiana, a distance of 14½ miles, leased to said Wabash Company July 18, 1881.

The Michigan City and Indianapolis Railroad, extending from Michigan City to La Porte, Indiana, a distance of 12.75 miles, leased to the Wabash Company June 1st, 1881.

The Indianapolis, Peru and Chicago Railroad, extending from Indianapolis, Indiana, to Peru, Indiana, a distance of 75 miles, leased to said Wabash company June 1st, 1881.

The Braidwood branch, being a line ten and nine-tenths miles long, extending from near Braidwood, Illinois, to the Chicago branch of the Wabash Railroad. Said branch is partially constructed, and was built by moneys arising from the sale of general mortgage bonds aforesaid.

The Champaign and Southeastern Railroad, extending from Champaign, Illinois, to Sidney, Illinois, a distance of 11.6 miles, which was leased by the Wabash company March 1st, 1882.

The Madison County Railroad, extending from Edwardsville, Illinois, to its junction with the Chicago and Alton Railroad, a distance of 8.5 miles, acquired by the Wabash company by purchase.

The Humeston and Shenandoah Railroad, extending from Humestown to Shenandoah, Iowa, a distance of 113 miles,
1324 in which the Wabash company owns a one-half interest.

Certain real estate and terminal privileges in Burlington,

Iowa, more particularly described in mortgage hereinafter referred to.

The bridge over the Mississippi river at St. Louis, with the tunnel and terminal rights in said city, leased by said Wabash company and the Missouri Pacific Railway Company, as set forth in a certain lease hereinafter referred to.

The bridge over the Mississippi river at Hannibal, Missouri, leased by the two last-named companies, as set forth in a lease hereinafter referred to.

Certain right of use of the bridge over the Missouri river at Kansas City, Missouri, held under a lease or contract with Hannibal and St. Joseph Railroad Company, hereafter referred to.

The right to use certain tracks and terminal facilities in Cook county, Illinois, and in Chicago, Illinois, under lease or contract with the Chicago and Western Railroad Company, hereinafter referred to.

The right to use certain tracks and terminal facilities owned by the Peoria and Pekin Union Railway Company in Illinois, under contract with the said last-named company, dated February 1st, 1881, hereafter referred to.

The right to use certain tracks and depot facilities in the Union depot in Kansas City, Missouri, under contract with the Kansas City Depot Company, dated June 1st, 1876, hereinafter referred to.

The right to use certain tracks and depot facilities in the Union depot in Hannibal, Missouri, under contract with Hannibal Depot Company, dated June 30, 1881, hereinafter referred to.

The right to use certain tracks and depot facilities in the Union depot in St. Joseph, Missouri, under contract with St. Joseph Union Depot Company, dated September 2, 1880.

The right to use certain tracks and depot facilities in
1325 the Union Depot at Detroit, Michigan, under contract October 20, 1881, hereinafter referred to.

The right to use certain tracks extending from Clayton, Illinois, to Quincy, Illinois, and certain depot and station facilities in said last-named city, said right arising under a contract or lease, dated January 1st, 1878, between the Chicago, Burlington and Quincy Railway Company and said Wabash Company.

An interest in the Elevator Company at Council Bluffs, Iowa, upon which a payment to the amount of $41,666.66 has been made by the Wabash Railway Company, for which no certificate has been issued.

Three hundred coal cars acquired from the National Rolling Stock Company November 23d, 1883, under an agreement to pay mileage on the same, with privilege of purchase at end of any one year, etc.

The following tracts or parcels of land, the title to which was taken in the name of James F. How, as trustee, before the appointment of receivers in this cause:

Marion County, Iowa:

Lot 6, subdiv. of s. 7, t. 77, r. 21.

In the city of Chicago, State of Illinois:

In the Assessor's div. of nw. ¼ of w. ½ ne. ¼ sec. 32, t. 39, n. r. 14 east. Block 13.

In Brown's Addition in the ne. ¼ sec. 32, t. 39, n. r. 14 e.; lot 8 in block 3; lots 8, 9, 43, 44 in block 4.

Gallaher's subdiv. of the s. ½ of block 9 in Canal Trustees' subdiv. of sec. 33, t. 39, n. r. 14 east.

Lots 19, 20 and 28 in block 2; lots 24, 34, 31 and 32 in block 1.

T. J. Foster's subdiv. of the part of block 10, Canal Trustees' subdiv. sec. 33, t. 39, n. r. 14 east.

Lots 1 and 37 in blk. 1; and lots 1 and 37 in blk. 2.

Guno's subdiv. of part block 10, Canal Trustees' subdiv. sec. 33, t. 39, n. r. 14 east. Lot 47.

Canal Trustees' subdiv. of sec. 33, t. 39, n. r. 14 e.; sw. part 364.6 and 480 ft. of block 12.

Sutton's subdiv. of blk. 28, of Canal Trustees' subdiv. s. 33, t, 39, n. r. 14 e.

Lots 5, 44 and 45 in block 2.

1326 In Assessor's div. of blk. 11 of Canal Trustees' subdiv., sec. 33, t. 39, n. r. 14 e.

Lots 61 and 62 in block 11.

In the city of St. Joseph, State of Missouri:

In South St. Joseph, addition to said city.

Lots 1, 2, 3, 4, 5, 6 and 7, in block 56; lots 1, 2, 3, 4, 5, 6 and 7, in block 57; lots 5, 6 and 7, in block 58; lots 12, 13 and 14, in block 55.

In the city of St. Louis, state of Missouri:

In Scott's addition to said city.

Lots 25, 26, 1, 2, 36, 33, and four feet and eight inches of lot 32 of block 6.

The Court also finds and adjudges that the Wabash Company acquired title to the following lines of railroad, with all the franchises and property, real and personal, and all choses in action, rights, incomes, revenues and credits pertaining thereto, or used in connection therewith, by the use of the general mortgage bonds aforesaid, and that said lines, rights, property and interests were purchased by said company with said general mortgage bonds, viz.:

The Peoria, Pekin and Jacksonville Railroad, hereinbefore described.

The Springfield and Northwestern Railroad, hereinbefore described.

The Braidwood Branch, hereinbefore described.

It is adjudged that as to all property, rights, interests and choses in action required by the Wabash Company, after the execution of said general mortgage, whether described in the same or not (except such as are herein otherwise adjudged, and such as pertain, to railroads not herein declared to be subject to the general mortgage), the lien of said mortgage attached and is now in force.

It is, however, adjudged that the said general mortgage on the property of the Wabash Company did not attach to or become a

lien on the railroad or property of the Havana, Rantoul and Eastern Railroad Company.

The Court finds that said mortgage was duly recorded as required by law, and for all the contents and provisions thereof, and
1327 for the terms and provisions of the bonds secured thereby, and the coupons attached thereto, reference is hereby made to a true copy of said mortgage, filed by said Wabash Company with its original and amended bills in this cause, marked "Exhibit B," and commencing on page 1 of volume 1 of the printed volume of exhibits.

The Court further finds and adjudges that afterwards on the first day of May, A. D. 1883, for the purpose of securing an intended issue of its bonds (called collateral trust bonds), amounting to ten millions of dollars, said Wabash Company executed and delivered to the Mercantile Trust Company, of New York, as trustee, a certain other indenture called and known as "the Collateral Trust," and thereby assigned and transferred to said last-named company, for the purposes of said trust, all the bonds, stocks, cars, steamboats, rolling stock and interest in real estate specified in said instrument, and then and there delivered all said bonds, stocks and evidences of title to said trustee.

And for the terms and conditions of said collateral trust and of the bonds and coupons intended to be secured thereby reference is hereby made to a true copy thereof, filed by said Wabash Company, with its original and amended bills herein, marked "Exhibit D," appearing in said printed volume 1 of Exhibits, beginning on page 33.

The Court finds and adjudges that at the time of the execution of the collateral trust the said Wabash Company transferred and delivered to the Mercantile Trust Company, trustee under said instrument, certain stocks, bonds, assignments, bills of sale and other evidences of title to property, real and personal, pledged in and by said collateral trust; and that said stocks, bonds, assignments, bills of sale and other evidences of title were as follows—this decree adopting the description given in said instrument, and the preamble by which said description is introduced therein:

"Whereas, the Wabash, St. Louis and Pacific Railway Company
"has deposited with the Mercantile Trust Company of New
1328 "York, assignments, bills of sale or other evidences of title
"to the following described bonds, shares, real estate and "other property, viz.:

"$46,000 Union Bridge Company bonds;

"$1,342,000 Humeston and Shenandoah Railroad Company first "mortgage 7 per cent. bonds;

"$1,000,000 Wabash, St. Louis and Pacific Railway Company "general mortgage six per cent. bonds;

"$400,000 Wabash Railway Company mortgage seven per cent. "bonds of 1879;

"$199,000 Wabash, St. Louis and Pacific Railway Company— "Detroit division—six per cent. bonds;

"248,000 Quincy, Missouri and Pacific Railroad Company income bonds;
"$1,711,000 Toledo, Peoria and Western Railroad Company first preferred income bonds;
"$728,000 Toledo, Peoria and Western Railroad Company second preferred income bonds;
"13,404 shares Toledo, Peoria and Western Railroad Company;
"10 shares St. Joseph Union Depot;
"210 shares Union Depot Company, of Kansas City, Missouri;
"10 shares Hannibal Union Depot Company;
"5,187 shares Des Moines Northwestern Railway Company;
"2,214 shares Havana, Rantoul and Eastern Railroad Company;
"9,996 shares Des Moines and St. Louis Railroad Company;
"20,127 shares Humeston and Shenandoah Railroad Company;
"21,534 96/100 shares Missouri, Iowa and Nebraska Railroad Company;
"9,000 shares St. Louis, Jerseyville and Springfield Railroad Company;
"2,030 shares Clarinda and St. Louis Railroad Company;
"14,246 shares Quincy, Missouri and Pacific Railroad Company;
1329 "5,380 shares St. Louis, Ottumwa and Cedar Rapids Railway Company;
"11,089 shares Council Bluffs and St. Louis Railway Company;
"7,281 shares St. Louis, Council Bluffs and Omaha Railroad Company;
"4,332 shares Brunswick and Chillicothe Railroad Company;
"2,687 shares Centreville, Moravia and Albia Railroad Company;
"750 shares Attica, Covington and Southern Railway Company;
"1,665 shares American Refrigerator Transit Company, of Illinois;
"60 shares Union Bridge Company, of Toledo, Ohio;
"17 shares St. Louis County Railroad Company;
"4,994 shares Peoria and Pekin Union Railway Company;
"9,999 shares Chicago and Western Indiana Railroad Company;
"12,500 shares St. Louis Bridge Company Common Stock;
"1,160 shares St. Louis and Mississippi Valley Transportation Company;
"Steamers now on Lake Erie, known as the 'Russell Sage,' 'John C. Gault,' 'A. L. Hopkins,' and 'Morley.'
"15 locomotives manufactured by the Rhode Island Locomotive Works;
"13 passenger cars manufactured by Barney, Smith & Co.;
"5 passenger cars manufactured by Barney, Smith & Co.;
"1,210 freight cars manufactured by Barney, Smith & Co.;
"All the right, title and interest of said party of the first part in and to certain rolling stock, being all the rolling stock mentioned and described in certain agreements between the party of the first part and the New York and Pacific Car Trust Association."

1330 But the Court finds that of the stock of the Des Moines Northwestern Railway Company the said Mercantile Trust Company now holds only 5,037 shares subject to said mortgage.

The said collateral trust also embraced and attached to certain real estate therein referred to, situate in the county of Cook and State of Illinois, held in trust for said Wabash Company by Solon Humphreys, and which the Court finds was conveyed to said Solon Humphreys alone, in trust for said Wabash Company; said real estate is more particularly described as follows:

The whole of lots 1 and 2 in block 9.

The whole of lots 3 and 4 in block 9.

The whole of lots 5 and 6 in block 9.

All in Springer and Fox addition to the City of Chicago, in Cook County, state of Illinois.

Also, Assessors' Division of the N. W. ¼ and W. ½ N. E. ¼, section 32, town 39 N., range 14 east, all lying east of the south branch of the Chicago river of latitude 32, and all being in the county of Cook aforesaid.

It is further found and adjudged by the Court that of the general mortgage bonds intended to be issued as aforesaid there were in fact issued and are now outstanding and unpaid a number thereof, the principal of which amounts to seventeen million dollars, and that there is due for interest thereon and upon coupons attached thereto since the latter matured the further sum of two millions one hundred and thirty-two thousand seven hundred and fifty-three dollars and forty cents up to December 1, 1885, of which number sixteen millions of dollars were sold for value, and the remaining one million were hypothecated to the Mercantile Trust Company of New York, as trustee in the Collateral Trust Mortgage and now held subject to said trust. And reference is hereby made to the report of the special master to whom was referred the matter of taking proof as to the number and amount of said bonds now outstanding, the amount of principal and interest due thereon, and the names of the parties owning and holding the same as far as now known.

1331 The court further finds that the Wabash Company on the first day of June, A. D. 1884, made default in the payment of all interest which became due on said bonds on said day, and that such default was continued ever since that time. That said company also made default in the payment of all installments of interest maturing on said bonds since said first day of June, A. D. 1884, and that all such defaults have continued ever since.

The court finds further that demand was duly made by the holders of a large number of said bonds and coupons at the office of said Wabash Company, in the city of New York, for the payment of interest maturing thereon on the first day of June, A. D. 1884, such demand being made on or after said day, and payment was then and there refused.

That in the month of December, 1885, after the said default had continued for more than six months after the maturity of said coupons on the first day of June, 1884, and the demand made for the payment thereof as aforesaid, the holders of more than a majority in value of all the general mortgage bonds then outstanding and secured by said general mortgage, determined that they required the principal of all said bonds then outstanding to become at once due

and payable, and so notified the trustees named in said mortgage; and also gave notice in writing to said trustees of their having so determined, and thereby required said trustees to exercise the powers conferred on them by said mortgage to enforce the payment of the indebtedness, and to proceed to foreclose the said mortgage by judicial decree.

It is therefore adjudged and decreed by the court that the principal sum specified in the general mortgage bonds aforesaid, as well as the interest thereon, have now become due and payable according to the terms and conditions of said instrument.

The court, being fully advised, also finds and adjudges that of the collateral trust bonds aforesaid there were issued and either
1332 sold for value, or so pledged as to entitle the parties holding the same to the proceeds thereof, and the security created therefor as aforesaid, the whole amount of ten million of dollars of principal; that there is due thereon to Dec. 1, 1885, the additional sum of $1,109,268.80 as interest on said bonds and on coupons attached thereto since the maturing of such coupons.

That the Wabash company made default in the payment of interest maturing of said collateral trust bonds on the first day of May, A. D. 1884, and on each installment of interest maturing since that time; that demand was duly made for the payment of interest maturing as aforesaid on the first day of May, A. D. 1884, at the office of the Wabash company, in the city of New York, by the holders of a large number of said bonds and coupons, such demand being made on and after said first day of May, 1884. That after said default had been so made, and after the demand aforesaid the holders of more than twenty-five per cent. of all said collateral bonds then outstanding, in writing, requested the Mercantile Trust Company aforesaid, to proceed under the power contained in said indenture to sell all or a sufficient amount of the securities in said collateral trust mentioned, to produce a sum sufficient to pay all the principal and interest of said entire issue of said bonds. That due notice of such request and of the purpose of said trustee to comply therewith was given to the Wabash Railway Company more than sixty days before said Mercantile Trust Company filed its cross-bill herein. But that all said property embraced in said collateral trust being under the control of this court, said trustee did not exercise its power of sale, but filed its cross-bill for the foreclosure of said instrument as a mortgage. The court therefore adjudges and decrees that the holders of said collateral trust bonds are now entitled to have the property embraced in said collateral trust sold, and the proceeds applied to the payment of both the principal and interest of said bonds.

1333 And for the number of said collateral trust bonds now outstanding, and the names of the persons owning or holding the same, reference is hereby made to the report of the master to whom said matter was referred by order of court.

The court further adjudges that upon the execution and recording of the general mortgage aforesaid, the same became and was, and still is, a lien on the lines of railroad, franchises, interests and property described in said mortgage as having been conveyed to said trus-

tees at the time of the execution thereof, and that the said mortgage also became a lien on all the right, title and interest of the Wabash company in and to all such other lines of railroad, with all their property, rights and franchises as are described in said mortgage as being then in course of amalgamation with the property of said Wabash company. The said last-mentioned lien attached to each of said lines of railroad with the franchises and property thereof to the extent of the interest and title of the Wabash company therein, whether acquired at the time of the execution of the said mortgage or after that time.

The court also adjudges, as aforesaid, that the Wabash company before or after the execution of said general mortgage, by lease, consolidation, purchase or contract, acquired title to or interests in certain other lines of railroad, franchises or property not specifically described in said general mortgage, but hereinbefore referred to. That the lien of said general mortgage under the terms and provisions thereof attached to all of said railroads, franchises, property rights, choses in action and interests to the extent of the title and interest of the Wabash company therein. But the court adjudges that the lien so created on any line of railroad franchises, interests or property acquired by the Wabash company after the execution of said general mortgage was and is subject to any lien prior or subsequent thereto created to secure the purchase money of said railroad, franchise, property or interest, or to secure the performance of any condition on which said Wabash company acquired the same.

1334 It is further adjudged, that at the time of the execution of said collateral trust, and the delivery of the stocks, bonds, assignments, bills of sale and other evidence of title to the property embraced therein by the Wabash company to the Mercantile Trust Company, as trustee, said instrument became a lien on all the right, title and interest of said Wabash company in and to all the property, rights and interests embraced in said collateral trust, in favor of all owners and holders of said bonds, and that said lien is still in force.

It is further ordered and adjudged, that this decree, or any sale made thereunder, shall not in any way prejudice or affect the rights of parties to or persons interested in certain mortgages, deeds of trust, leases and contracts hereinafter set forth, but all the rights of such persons and parties are hereby reserved to them. The deeds of trust, mortgages, leases and contracts in regard to which such reservation is made are as follows:

A mortgage or deed of trust to secure the principal and interest of bonds, amounting to $900,000, with interest thereon at the rate of 7 per cent. per annum, executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, as trustee. Said mortgage became lien on that portion of said railroad extending from Toledo, Ohio, to the Indiana State line, a distance of 75.5 miles. The said interest was paid up to August 1st, 1884, except that represented by certain coupons funded under an agreement made in 1877.

A mortgage dated August 1st, 1853, executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company, as trustee, to secure bonds amounting to $2,500,000,

with interest at the rate of 7 per cent. per annum. Said mortgage became a lien on that portion of the railroad of the Wabash, St. Louis and Pacific Railway Company extending from the western boundary of the state of Ohio at the western terminus of the Toledo and Illinois Railroad to the eastern boundary of Illinois, a distance of 166.1 miles.

A deed of trust, dated October 15, 1858, executed by the
1335 Toledo and Wabash Railroad Company to Edwin D. Morgan, as trustee, to secure bonds amounting to $1,000,000, with interest thereon at the rate of 7 per cent. per annum. Said deed of trust became a lien on that portion of said railroad extending from Toledo, Ohio, to the eastern boundary of the state of Indiana, all lying within the state of Ohio.

A deed of trust, dated October 15, 1858, executed by the Wabash and Western Railway Company to Edwin D. Morgan, as trustee, to secure the payment of bonds amounting to $1,500,000, with interest thereon at 7 per cent. per annum. Said deed of trust became a lien on all the said line of railroad in the state of Indiana, extending from the west line of the State of Ohio to the east line of the state of Illinois, a distance of 166.1 miles.

A deed of trust, dated May 25, A. D. 1863, executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White and Henry Warden, as trustees, to secure bonds amounting to $2,496,000, with interest thereon at the rate of seven per cent. per annum. That said mortgage became a lien on all said lines of railroad extending from Meredosia and Naples, in the state of Illinois, to the eastern boundary of Illinois, being 180.7 miles in length.

A deed of trust dated May 11, A. D. 1865, executed by the Great Western Railway Company of 1859 to Solon Humphreys and James R. Jesup, to secure bonds amounting to $2,500,000, with interest thereon at the rate of seven per cent. per annum; which said deed of trust became a lien on all that portion of railroad last above described.

A deed of trust, dated March 1st, 1862, executed by the Illinois and Southern Iowa Railroad Company to John N. A. Griswold, James R. Jesup and Lucien Tilton, as trustees, which became a lien on all that portion of the railroad aforesaid, extending from Carthage, Illinois, to Clayton, Illinois, a distance of 29.1 miles; said mortgage being executed to secure bonds amounting to $300,000, with interest at six per cent. per annum, said interest being
1336 paid up to August 1st, 1884, except coupons funded as aforesaid.

A deed of trust, dated May 29, 1865, executed by the Quincy and Toledo Railroad Company to John T. Terry, as Trustee, to secure the payment of bonds amounting to $500,000, with interest at seven per cent. per annum, which deed became a lien on all that portion of railroad extending from the West bank of the Illinois river, opposite Meredosia, to Camp Point and Clayton, in the state of Illinois, a distance of 33.6 miles.

A deed of trust, dated the first day of February, A. D. 1867, executed by the Toledo, Wabash and Western Railway Company to

Isaac H. Knox and James R. Jesup, as trustees, to secure an intended issue of bonds amounting to $15,000,000, with interest at seven per cent. per annum thereon. That of the bonds so intended to be secured by said trust deed only $2,610,000 are now outstanding.

Said deed of trust became a lien on all said railroad extending from Toledo, Ohio, to Meredosia and Naples, Illinois, and from Meredosia to Camp Point, Illinois; and also from Clayton, Illinois, to the east bank of the Mississippi river at Hamilton, Illinois; also on all property afterwards acquired by said Toledo, Wabash and Western Railway Company which might be used in connection with said railroad, and all property that said company might acquire in the city of Quincy, Illinois; and also all interests of said company for traffic purposes with the Chicago, Burlington and Quincy Railroad Company.

A deed of trust dated June 3d, A. D. 1869, executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox, as trustee, to secure the payment of bonds amounting to $2,700,000, with interest at seven per cent. per annum thereon; said mortgage became a lien on all said railroad extending from Decatur, Illinois, to East St. Louis, Illinois.

A deed of trust dated May 17, 1879, executed by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, as trustees, to secure the payment of bonds amounting to
1337 $2,000,000, with interest at the rate of seven per cent. per annum, which deed of trust became a lien subject to other prior liens on the following lines of railroad, with all their franchises, property, issues, rents and profits; all the railroad of said Wabash, Railway Company extending from the city of Toledo, Ohio, through the state of Indiana, and thence into the state of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the state of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said state, and with branch of said road leading from Decatur to East St. Louis, in the same state; said interest was paid up to October 1st, 1884.

A deed of trust dated May 16, 1879, was executed by the Wabash Railway Company to Alfred T. White, as trustee, to secure the payment of bonds amounting to $500,000, with interest at seven per cent. per annum; said deed of trust became a first lien on all of said railroad extending from Naples, Illinois, to East Hannibal, Illinois, and was given to secure the purchase money of said property.

A deed of trust dated March 9, 1865, was executed by the North Missouri Railroad Company to Edwin D. Morgan and Louis H. Meyer, as trustees, to secure the payment of bonds amounting to $6,000,000, with interest thereon at the rate of seven per cent. per annum. Said deed of trust became a lien on all that portion of the railroad of the Wabash Company extending from St. Louis, Missouri, to Coatsville, Missouri, and from Moberly, Missouri, to North Missouri Junction, about eight miles from Kansas City, Missouri.

The railroad embraced in said deed of trust is about 354.1 miles in length.

A deed of trust dated August 12, A. D. 1874, executed by the St. Louis, Kansas City and Northern Railway Company to the Farmers' Loan and Trust Company of the city of New York, as trustee, to secure the payment of bonds amounting to $3,000,000, with interest thereon at seven per cent. per annum. Said mortgage be-
1338 came a lien on all the railroad of the St. Louis, Kansas City and Northern Railway Company in the state of Missouri, being 353 miles in length as then constructed, from North Market street, in the city of St. Louis, to the southern boundary line of the state of Iowa, and from Moberly, Missouri, to North Missouri Junction, in Clay county, Missouri, and as the same might be thereafter constructed through Clay county, a distance of about eight miles to the bridge across the Missouri river at Kansas City, in Jackson county, Missouri.

Also, as the same might then or thereafter be located in or through the county of St. Louis, to connect with the Union depot in said city. Also, as the same might then or thereafter be located south of North Market street, in said city of St. Louis, together with all real estate, right of way, shops, rolling stock, depots, appurtenances, property and franchises of said company.

Also, certain blocks and lots of land, structures and buildings, described in said mortgage, a copy of which is marked Sub-Exhibit "F" No. 14, and is filed with the amended bill of the Wabash, St. Louis and Pacific Railway Company, consolidated in this cause.

A mortgage, dated October 1st, A. D. 1878, executed by the St. Louis, Kansas City and Northern Railway Company to Henry F. Vail and Charles Parsons as trustees, to secure the payment of bonds amounting to $1,000,000, with interest at 6 per cent. per annum, which interest has been paid to October 1st, 1885, which said mortgage became a lien on all the bridge of said last-named company, and all franchises thereof, and all the real estate, approaches and appurtenances thereof, situated in the county of Louis, on the south side of the Missouri river, and in the county of St. Charles, on the north side of said river, in the state of Missouri.

A deed of trust, executed by the St. Louis, Kansas City and Northern Railway Company, on the 9th day of July, A. D. 1878, to Solon Humphreys and George A. Leighton as trustees, to secure the payment of bonds amounting to $388,500, with interest
1339 at the rate of 7 per cent. per annum, which interest has been paid up to October 1st, 1885. Said deed of trust became a second lien on all the bridge franchises and property last above described.

A deed of trust, dated February 15th, A. D. 1879, executed by the St. Louis, Kansas City and Northern Railroad Company to the United States Trust Company of New York as trustees, to secure the payment of bonds amounting to $2,350,000, with interest thereon at the rate of 7 per cent. per annum. That said deed of trust became a lien on a line of railroad purchased by said last-named company from the Council Bluffs and St. Louis Railroad Company, a

corporation of the state of Missouri, extending from Elm Flats in Daviess county, Missouri, in a northwesterly direction through the counties of Daviess, Gentry, Nodaway and Atchison, in said state, to the boundary line between the states of Missouri and Iowa, a distance of 78 miles; and said deed of trust also became a lien on the leasehold interest of said St. Louis, Kansas City and Northern Railway Company, in and to a certain other line of railroad extending from Council Bluffs in the state of Iowa, in a southeasterly direction through the counties of Pottawatomie, Mills, Fremont and Page, in said state, to the boundary line between the states of Iowa and Missouri, a distance of 65 miles; said last-mentioned railroad having been leased by said St. Louis, Kansas City and Northern Railway Company, from the Council Bluffs and St. Louis Railway Company, a corporation of the state of Iowa, as said railroad was then or might thereafter be constructed, together with all the franchises, rights and other appurtenances thereto belonging.

A guarantee mortgage, dated February 15th, A. D. 1879, executed by the Council Bluffs and St. Louis Railway Company to the United States Trust Company of New York, intended to further secure the principal and interest of the issue of bonds last before mentioned. Said mortgage became a lien on all the right, title and interest of said Council Bluffs and St. Louis Railway Com-
1340 pany in and to the line of railroad last aforesaid, commencing at Council Bluffs, Iowa, and extending to the boundary line between the states of Iowa and Missouri, with all the rights, franchises and property of mortgagor company therein as then or thereafter constructed.

A deed of trust, dated July 15, 1879, executed by the St. Louis, Kansas City and Northern Railway Company to George I. Seney, of New York, to secure bonds amounting to $264,000, with interest thereon at the rate of 6 per cent. per annum; said trust deed became a lien on all that part of said railroad extending from Roseberry, Missouri, to the state line between the states of Missouri and Iowa, being 10.1 miles in length; and also upon all the right, title and interest of said grantor company in and to that portion of railroad between said state line and Clarinda, Iowa, a distance of 11.4 miles, which said grantor company acquired from the Clarinda and St. Louis Railroad Company of Iowa.

A guaranty trust deed, dated July 15, 1879, executed by the Clarinda and St. Louis Railroad Company to George I. Seney, as trustee, to secure the payment of bonds amounting to $264,000, with interest at 6 per cent. per annum, being the bonds last aforesaid, which deed of trust became a lien on all the right, title and interest of said last-mentioned company in the railroad commencing at the town of Clarinda, in the state of Iowa, and extending in a southerly direction through the county of Page, in the state of Iowa, to the boundary line between the states of Iowa and Missouri.

A deed of trust, dated July 1st, 1879, executed by the Champaign, Havana and Western Railroad Company to Henry W. Ford and Richard S. Brock, as trustees, intended to secure the payment of

bonds amounting to the sum of $1,450,000; of which $340,900 are now outstanding, with interest thereon at the rate of 7 per cent. per annum, which deed of trust became a lien on the railroad, property and franchises of said grantor company, extending from the city of Champaign, in the county of Champaign, in the state
1341 of Illinois, running thence by way of White Heath, Clinton, Lincoln and Mason City to Havana, near the east bank of the Illinois river, with a branch extending from White Heath to Decatur; all said bonds being in the state of Illinois, and said railroad and branch being of the aggregate length of 131 miles.

A deed of trust, dated on the first day of December, A. D. 1880, executed by the Wabash, St. Louis and Pacific Railway Company to Henry F. Spaulding and John T. Terry, as trustees, intended to secure the payment of bonds amounting to $1,600,000, with interest thereon at the rate of six per cent. per annum, of which bonds so intended to be secured only $1,200,000 were ever issued; said deed of trust became a lien on the railroad and franchises last above described; and said bonds were issued for the purpose of being exchanged for the bonds last above described.

A deed of trust, dated February 6th, 1880, executed by the Centreville, Moravia and Albia Railroad Company to the Farmers' Loan and Trust Company, as trustee, to secure bonds amounting to $400,000, with interest thereon at six per cent. per annum, which deed of trust became a lien on the railroad and franchises of the last-named railroad company, projected to extend from a junction with the railroads of the Missouri, Iowa and Nebraska Railroad Company in the vicinity of Centreville, Appanoose County, Iowa, to a junction with the railroad of the Central Iowa Railway Company, in the vicinity of Albia, Monroe County, Iowa, being about twenty-four miles in length.

A deed of trust, dated March 1st, 1881, executed by the Missouri, Iowa and Nebraska Railway Company to the Mercantile Trust Company of New York, as trustee, to secure the payment of bonds amounting to $2,269,000, with interest thereon at the rate of six per cent. per annum, and which deed of trust became a lien upon the railroad, franchises and property of said last-named company, extending from Keokuk, Lee County, Iowa, to the south line of said county and state; thence through the counties of Clark, Scotland and Schuyler, in the state of Missouri, to the north line of
1342 said state; thence through the counties of Appanoose, Wayne and Decatur to Van Wert, Iowa; said line being about 143½ miles in length.

That said deed of trust, by its terms, referred to a certain prior deed of trust, dated June 1st, 1870, executed by the Missouri, Iowa and Nebraska Railway Company to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds amounting to $3,025,000, with interest, and being a lien on the same property, in whole or in part. The said deed of trust of March 1st, 1881, and the deed of trust of June 1st, 1870, are to be taken together as representing substantially the same debt, and are to be taken together

with any judgment or decree rendered by any competent court upon any of the bonds thereby secured.

A deed of trust, dated May 22, 1880, executed by the Toledo, Peoria and Western Railroad Company to Philip Henry Brown, Robert C. Martin and John Paton, as trustees, to secure the payment of an issue of bonds, amounting to $4,500,000, with interest thereon at seven per cent. per annum; said deed became a lien on the railroad, franchises and property of said last-named company, extending from a point at the eastern boundary of the state of Illinois, where it connects with the Toledo, Logansport and Burlington Railway, and extending westwardly to the western boundary of the state of Illinois, in the city of Warsaw, and in the town of Hamilton, Illinois, on the Mississippi river; and also from La Harpe to Burlington, Iowa, in the state of Iowa. The said company was a corporation of the state of Illinois, and not of Missouri, as by mistake stated in the amended bill of the Wabash company. This court does not by this decree determine whether said last-mentioned deed of trust did or did not become a lien on any property in the city of Burlington, Iowa.

A deed of trust, dated May 22, 1880, executed by said Toledo, Peoria and Western Railroad Company to Charles E. Whitehead, J. P. Giraud Foster and William Hill, as trustees, to secure issues of income bonds aggregating to 3,900,000, with interest at the
1343 rate — four per cent. per annum, which deed of trust became a lien on all the railroad, franchises and property last above described, but subject to the lien of the trust deed last above described.

A deed of trust, dated July 1, 1880, executed by said Wabash Railway Company to Henry F. Spaulding and John T. Terry, as trustees, to secure bonds amounting to $4,500,000, with interest at five per cent. per annum; that said trust deed became a lien on the railroad, franchises and property, extending from Effingham, in the county of Effingham, Illinois, by way of Strawn, in Livingston county, in said state, to Streator, in the county of La Salle, with a branch at Altamont, Illinois; being the railroad formerly know- as the Chicago and Paducah Railroad; and also upon the railroad formerly known as the Chicago and Strawn Railway, extending from Strawn aforesaid to or near Chicago, Illinois. Said bonds so secured were issued for the purchase money of the railroad, franchises and property described therein.

A deed of trust, dated May 31, 1881, executed by the Humeston and Shenandoah Railroad Company to W. J. Ladd and John T. Terry, as trustees, to secure bonds amounting to $2,684,000, with interest at the rate of seven per cent.; said mortgage became a lien on the railroad, franchises and property of said last-named company, extending from a point at Humeston, Iowa, 100 feet west of where the Chicago, Burlington and Quincy Railroad crosses the Missouri, Iowa and Nebraska Railroad; thence west to Shenandoah, Iowa, about 112 miles, with all its property and franchises.

A deed of trust, dated February 28, 1881, executed by the Des Moines Northwestern Railway Company to the Central Trust Com-

pany of New York and James Cheney, as trustees, for the purpose of further securing a portion of the bonds issued by the said Wabash Company, and secured by its general mortgage aforesaid; said deed of trust became a lien on all the railroad property and franchises of said grantor company, extending from Des Moines, in the state of Iowa, to Fonda, in said state, a distance of 114.9 miles, said
1344 railroad being a narrow gauge road. Also, that the bonds secured by said deed of trust were so issued for the uses and purposes therein defined, and all rights, as between the Des Moines Northwestern Railway Company and any party to this cause or the receivers herein, arising from said mortgage or the lease of the railroad of said company to the Wabash company, or the contract under which they were made, are hereby expressly reserved from the operation of this decree, and shall be hereafter enforced only in some court having jurisdiction of the property covered by said lease and mortgage.

And any claim that the receivers herein may set up against said Des Moines Northwestern Railway Company, or the property thereof, shall be litigated in some court having jurisdiction of said railroad; and any claim of said railroad company against said receivers of the property in their possession may be litigated in the Circuit Court of the United States for the Southern District of Iowa, Eastern Division.

A deed of trust, dated February 17, 1881, executed by the Attica, Covington and Southern Railway Company of Indiana, to the Central Trust Company of New York, and James Cheney as trustees, to further secure a portion of the general mortgage bonds of the Wabash Company, secured by the general mortgage aforesaid. That said deed of trust became a lien on the railroad property and franchises of said Attica, Covington and Southern Railway Company of Indiana, extending from Attica, Fountain County, Indiana, to Covington in said county, a distance of 14.5 miles; and the bonds thereby secured were equal to ten thousand dollars for each mile of said road.

A deed of trust, dated October 1, 1881, executed by the Wabash, St. Louis and Pacific Railway Company to the Mercantile Trust Company of New York as trustee, to secure bonds amounting to $3,857,000, with interest at the rate of five per cent. per annum. Said deed of trust became a lien on the Cairo Division of the Wabash, St. Louis and Pacific Railway Company, extending from Danville, Illinois, to St. Francisville, in said state, and from Vincennes, Indiana,
1345 by way of St. Francisville to Cairo, Illinois, with all the property thereof. Said bonds were issued in payment of the purchase money of said railroad and property.

A deed of trust, dated April 1, 1879, executed by the St. Louis Bridge Company to J. C. Rogers and C. E. Tracy, as trustees, to secure an issue of bonds amounting to $5,000,000, with interest thereon at the rate of seven per cent. per annum; which deed of trust became a lien on the property of said St. Louis Bridge Company, as therein described.

A deed of trust, dated November 3d, 1881, executed by the said Wabash Company to the Mercantile Trust Company of New York and James Cheney as trustees, to secure bonds amounting to about

$2,052,000, with interest thereon at six per cent. per annum. That said deed of trust became a lien on that portion of the railroad of the Wabash company formerly known as the Detroit, Butler and St. Louis Railroad, extending from a point on the Detroit, Grand Haven and Milwaukie railroad, in or at Detroit, Michigan, where the said Detroit, Butler and St. Louis railroad intersects it, and running thence in a southwesterly direction through the counties of Wayne, Washtenaw, Monroe and Lenawee, in Michigan, and the counties of Fulton and Williams, in Ohio, and the county of De Kalb, in Indiana, to Butler, in said state, being about 114 miles in length, with all the property and franchises pertaining to said railroad and all property then in possession or which might be thereafter acquired for the convenience of said railroad and its business. That said trust deed was also given to remove all doubts as to the validity of a prior trust deed between the same parties, and was given to secure the purchase money of said railroad and property.

A deed of trust, dated February 1st, 1881, executed by the Peoria and Pekin Union Railway Company to the Central Trust Company of New York, as trustee, to secure bonds amounting to $1,500,000, with interest at the rate of six per cent. per annum. Said deed of trust became a lien on the property and franchises of said
1346 Peoria and Pekin Union Railway Company. Also a second mortgage executed by said last named company to the Central Trust Company of New York, as trustee, dated February 1st, 1881, to secure an issue of income bonds amounting to $1,500,000, with interest not exceeding six per cent. per annum. That said deed of trust became a lien on all said property last aforesaid, subject to the superior lien of said prior mortgage or trust deed.

A deed of trust, dated January 1st, 1867, executed by the Chicago, Cincinnati and Louisville Railroad Company to George T. M. Davis, as trustee, to secure bonds amounting to $1,000,000, with interest at the rate of seven per cent. per annum. Said deed of trust became a lien on all the railroad franchises and property of said last-named company, extending from Peru, Indiana, to Laporte, Indiana, a distance of 71.51 miles, such lien operating on said line whether then or thereafter constructed.

A deed of trust, dated June 1st, 1871, executed by the Indianapolis, Peru and Chicago Railway Company to Clifford A. Hand, as trustee, to secure bonds amounting to $275,000, with interest thereon at the rate of seven per cent. per annum. The said deed of trust became a lien on the railroad property and franchises of said last-named company, extending from Indianapolis, in the county of Marion, Indiana, through the counties of Hamilton, Tipton and Howard, to the city of Peru, in the county of Miami, Indiana, a distance of seventy-five miles.

A certain other second deed of trust, dated June 1st, 1881, executed by the said last-named railroad company to Wager Swayne and Abram W. Hendricks, as trustees, to secure an intended issue of bonds not to exceed $2,275,000, of which only $2,000,000 were ever issued, with interest thereon at the rate of six per cent. per annum; said deed

of trust became a lien on the railroad franchises and property of said last-named company, being the railroad and property last described.

1347 A deed of trust, dated, June 1st, 1881, executed by the Michigan City and Indianapolis Railroad Company to Abraham W. Hendricks and Wager Swayne, as trustees; said deed of trust became a lien on the railroad franchises and property of said last-named railroad company, extending from Michigan City, in the county of Laporte, Indiana, to Laporte, in the same county, a distance of 12.75 miles. The said trust deed and two trust deeds last before described are to be taken together as explaining each other.

A deed of trust, dated November 4, 1881, executed by the St. Louis, Jerseyville and Springfield Railroad Company to the Central Trust Company of New York, and James Cheney, of Indiana, as trustees, to secure a portion of the said general mortgage bonds of the Wabash company amounting to $15,000 for each mile of railroad embraced therein. Said deed of trust became a lien on the railroad, franchises and property of the said St. Louis, Jerseyville and Springfield Railroad Company, extending from a point on the railroad of said Wabash company at or near New Berlin, or between New Berlin and Springfield, in Sangamon county, Illinois, to its terminus at Grafton or Jersey Landing, in Jersey county, Illinois, a distance of 71.4 miles, and that said bonds were issued to secure the performance of the condition on which the Wabash company acquired said railroad and property.

A deed of trust, dated December 1st, 1881, executed by the Des Moines and St. Louis Railroad Company to the Central Trust Company of New York and James Cheney, as trustees. Said deed of trust was given to further secure a portion of the aforesaid general mortgage bonds of the Wabash company amounting to $15,000 per mile for each mile of the railroad hereinafter described. Said deed of trust became a lien on the railroad branches and property of said grantor company extending from Albia, Iowa, to Des Moines, Iowa, a distance of 67.3 miles, and was given to secure the performance of the condition on which said Wabash company acquired said railroad and property.

1348 A deed of trust, dated March 1st, 1881, executed by the Champaign and Southeastern Railway Company to the Central Trust Company of New York and James Cheney as trustees, to further secure a portion of the general mortgage bonds of the Wabash company, amounting to $15,000 for each mile of the railroad hereinafter described. Said trust deed became a lien on the railroad, franchises and property of said grantor company, extending from Champaign, Illinois, to Sidney, Illinois, a distance of $11\frac{6}{10}$ miles, and was given to secure the conditions on which said railroad and property was acquired by said Wabash company.

A deed of trust, executed September 1st, 1880, by the Wabash, St. Louis and Pacific Railway Company to J. P. Giraud Foster and Edward K. Goodnow as trustees to secure the payment of seventy-three promissory notes for the sum of one thousand dollars each, with interest at the rate of six per cent. per annum. Said deed of trust was given to secure the purchase money of the property described

therein, and became a lien on lots 13, 13A, 14, 15, 15A, 16, 17, 18, 19, 20, 21, 22, 23 and 24, all in the original plot of the city of Burlington, in the county of Des Moines, Iowa, and upon all the railroad iron therein, and on all improvements and appurtenances thereof, and all rents, issues and profits thereof. The Court further adjudges that four of said notes have been paid and satisfied, and further adjudges that the said deed of trust is a lien upon the property therein described superior to and free and clear of any lien or charges for the payment or contribution to the payment of any claims or demands whatever chargeable against such property herein.

A deed of trust, dated May 1st, 1873, made by the Boone County and Booneville Railway Company to J. M. Worden and R. A. Betts as trustees to secure bonds amounting to $100,000, with interest at seven per cent. per annum. Said trust deed became a lien on a railroad extending from Columbia, Missouri, to Centralia, Missouri, a distance of about 21 miles.

A deed of trust, dated 1st of October, 1875, made by the St. Louis, Ottumwa and Cedar Rapids Railway Company to Solon
1349 Humphreys and George S. Coe as trustees to secure bonds amounting to $322,500, with interest at the rate of seven per cent. per annum. Said deed of trust became a lien on a line of railroad extending from Ottumwa, Iowa, to its intersection with the St. Louis, Kansas City and Northern Railway at the Missouri State line.

A deed of trust, dated August 1st, 1878, executed by the Brunswick and Chillicothe Railroad Company to George M. Rice, J. Kimball and E. P. Burnham as trustees, to secure bonds amounting to $304,500, with interest at the rate of six per cent. per annum. Said deed of trust became a lien on the railroad of said grantor company from its intersection with the St. Louis, Kansas City and Northern Railway at Brunswick, Missouri, to Chillicothe, Livingston county, Missouri, a distance of about thirty-six miles.

A deed of trust dated September 14, 1872, executed by the St. Louis, Council Bluffs and Omaha Railroad Company to James B. Eads and J. A. Jamison, as trustees, to secure bonds to the amount of $626,000, with interest at the rate of 6 per cent. per annum. Said trust deed became a lien on the line of railroad extending from Chillicothe, Missouri, to a point at or near Pattonsburg, Daviess county, Missouri, being about forty-three miles in length.

A deed of trust dated October 1st, 1879, executed by the Quincy, Missouri and Pacific Railroad Company to Solon Humphreys and Orville H. Browning to secure bonds amounting to $1,204,000, with interest at the rate of 6 per cent. per annum. Said deed of trust became a lien on the line of railroad extending from a point in Missouri, opposite the city of Quincy, Illinois, to Trenton, Missouri, a distance of about 134 miles.

A deed of trust dated October 1st, 1879, executed by the Quincy, Missouri and Pacific Railroad Company to Amos Green and Charles H. Bull, as trustees, to secure income bonds to an amount not exceeding $2,000,000, with interest thereon at the rate of 6 per cent. per annum, if earned. Said deed became a lien on the line of railroad last above described.

1350 A lease made by Eel River Railroad Company to the Wabash company, dated August 26, 1879, of a railroad extending from Butler, Indiana, to Logansport, Indiana, on which rent was paid to June 1st, 1884.

A lease of the Quincy, Missouri and Pacific Railway by Wabash company, August 21, 1879; said railroad intended to extend from West Quincy, Missouri, to some point on the Missouri river, but never constructed west of Trenton, Missouri; said rent being paid to January 1st, 1884.

A lease of the St. Joseph and St. Louis Railroad, dated June 1st, 1874, to St. Louis, Kansas City and Northern Railway Company; said road extending from St. Joseph, Missouri, to North Lexington, in said state; the said rent being paid to March 1st, 1884.

A lease of the Boone County and Booneville Railroad to the St. Louis, Kansas City and Northern Railway Company, dated May 1st, 1873; said railroad extends from Centralia, Missouri, to Columbia, Missouri, and said rental was paid to May 1st, 1885.

A lease of the St. Louis, Ottumwa and Cedar Rapids Railway to the St. Louis, Kansas City and Northern Railway Company, dated October 1st, 1875; said railroad extends from Coatsville, Missouri, to Ottumwa, Iowa, and said rent was paid to October 1st, 1884.

A lease of the St. Louis, Council Bluffs and Omaha Railroad to the St. Louis, Kansas City and Northern Railroad Company, executed June 29th, 1878; said railroad extends from Chillicothe, Missouri, to Pattonsburg, Missouri; said rent being paid to January 1st, 1885.

A lease of the Brunswick and Chillicothe Railroad to the St. Louis, Kansas City and Northern Railway Company, dated August 1st, 1878; said railroad extends from Brunswick, Missouri, to Chillicothe, Missouri, and said rental is paid to August 1st, 1885.

A lease of the Council Bluffs and St. Louis Railway (in Iowa) to St. Louis, Kansas City and Northern Railway Company, dated February 10, 1879; said railroad extends from Council Bluffs,
1351 Iowa to the state line between Missouri and Iowa, and said rent was paid to October 1st, 1884.

A lease of the Clarinda and St. Louis Railroad to the St. Louis, Kansas City and Northern Railway Company, dated July 15, 1879; said railroad extends from Clarinda, Iowa, to the state line between Iowa and Missouri; said rent is paid to August 1st, 1884.

Lease by the Chicago and Western Indiana Railroad Company to the Wabash company, dated October 25th, 1879, and a supplemental lease or contract, dated November 1st, 1882, by the Chicago and Western Indiana Railroad Company to the Wabash Company, in which Anthony J. Thomas and Charles Edward Tracy are made parties of the third part as trustees.

A lease of the Centreville, Moravia and Albia Railroad to the Missouri, Iowa and Nebraska Railway Company, dated February 6th, 1880; said railroad extends from Centreville, Iowa, to Albia, Iowa, and said rental is paid up to January 1st, 1884.

A lease of the Missouri, Iowa and Nebraska Railroad to the Wabash company, dated September 3d, 1880; said railroad runs from

Keokuk, Iowa, to Van Wert, Iowa, and said rent is paid up to March 1st, 1884.

A lease of the Toledo, Peoria and Western Railroad to the Wabash company, dated May 22d, 1880; said railroad has been hereinbefore described; the said rent was paid to April 1st, 1884.

A lease of the Humeston and Shenandoah Railroad to the Wabash company and Chicago, Burlington and Quincy Railroad Company, dated April 1st, 1881; said railroad has been hereinbefore described.

A lease of the Des Moines, Northwestern Railroad to the Wabash company, dated February 28th, 1881; said railroad has been hereinbefore described, and said rent has been paid to December 1st, 1883.

A lease of the Attica, Covington and Southern railroad to the Wabash company, dated July 18th, 1881; said railroad has been hereinbefore described and said rent was paid up to December 1st, 1883.

1352 A lease of the St. Louis, Bridge and Tunnel to the Wabash company and Missouri Pacific Railway Company, dated July 1st, 1881; also includes other stipulations and provisions.

A lease of the Peoria and Pekin Union Railroad to the Wabash company and other companies, dated February 1st, 1881. This includes other stipulations and provisions. The property embraced in said instrument has been hereinbefore described.

A lease of the Indianapolis, Peru and Chicago Railway to the Wabash company, dated June 1st, 1881; said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Indianapolis and Michigan City Railroad to the Wabash company, dated June 1st, 1881; said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the St. Louis, Jerseyville and Springfield Railroad to the Wabash company, dated November 22, 1880; said railroad has been hereinbefore described, and said rental was paid up to December 1st, 1883.

A lease of the Des Moines and St. Louis Railroad to the Wabash company, dated March 1st, 1882; said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Champaign and Southern Railway to the Wabash company, dated March 1st, 1882; said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Hannibal bridge to the Wabash company and the Missouri Pacific Railway Company, dated January 1st, 1883; said bridge and property has been hereinabove described.

A contract between the St. Joseph Union Depot Company, the Wabash Railway Company and other companies, for the construction and use of a depot and terminal facilities in St. Joseph, Missouri, dated September 2d, 1880.

A like contract with the Kansas City Union Depot Company, dated June 1st, 1876; the St. Louis, Kansas City and Northern

Railway Company being a party thereto before said Wabash company was created.

1353 A lease and contract between Detroit Union Railway Depot and Station Company and the Wabash company for the use of certain grounds by the last-named company, and for certain privileges and advantages in said contract specified. Said lease and contract is dated October 20, 1881, and a copy thereof is hereby referred to as Sub-Exhibit "F" 89, filed herein with the amended bill of the Wabash company.

A contract for the construction and use of depot and grounds in Hannibal, Missouri, between the Hannibal Union Depot Company and Wabash company, dated June 30, 1881, a copy of said contract being Sub-Exhibit "F" No. 90, filed with the amended bill of said Wabash company in said cause.

A contract between the Hannibal and St. Joseph Railroad Company for the use, by said last-named company, of the bridge over the Missouri river at Kansas City, Missouri, dated June 1st, 1880, a copy of which is filed as Sub-Exhibit "F" No. 83 in the volumes of exhibits aforesaid.

It is adjudged by the court that the lien of the general mortgage on any leasehold, interest or other conditional interest held or owned by the Wabash company, in or to any line or lines of railroad, or any property, rights or franchises, shall not be held to impair the right of the lessor or lessees of such line or lines, or the person or persons under whom the said line or lines were conditionally held by the Wabash Company, to terminate any such lease or conditional interest because of any breach of the terms on which the same was granted to said Wabash Company. The declaration herein of a lien on such property in favor of said general mortgage shall not be held to revive any leasehold or conditional title in said Wabash company in any instance when the same has been heretofore lawfully terminated, or to prevent the future termination thereof for the breach of any conditon for which such lease or interest might be otherwise lawfully terminated or forfeited, and in all cases when any line or lines of railroad have been, by order or decree of court, surrendered to the trustee or trustees in under-

1354 lying and senior mortgages, or to any receiver or person appointed by the court in whose jurisdiction the property is situated, the said leases under which such line or lines were formerly held by said Wabash company shall be and are hereby adjudged and decreed to be lawfully terminated.

The court further finds that since the filing of the original bill of complaint herein by the Wabash company the holders of all the collateral trust bonds, and the holders of a very large majority of the general mortgage bonds, desiring to avoid any controversy as to the priority of said instruments as creating liens on any of the property embraced in the collateral trust; and also, to avoid all delay in effecting the foreclosure of said instruments and the sale of all said property, have entered into an agreement between themselves, and have invited all the other holders of general mortgage bonds to become parties thereto.

And reference is hereby made to a copy of said agreement filed with the report of Edmund T. Allen, special master, to whom this cause was referred to take proof on specified issues; the said copy is hereby referred to with the same effect as if embodied herein.

By the terms of said agreement both instruments are to be foreclosed by judicial decree or decrees, and all property embraced therein sold under such decree or decrees; a committee was by said agreement appointed, authorized to purchase all said property or any portion thereof for the benefit of all bondholders joining in said agreement or accepting the same. The property so to be purchased shall be conveyed to a corporation to be organized for that purpose, and that the owners of both classes of bonds shall be entitled to the securities of such new company on such terms as are in said agreement prescribed.

The court therefore adjudges and decrees that if the property embraced in the general mortgage and collateral trust respectively, and the rights and interests declared to be comprised therein or subject thereto by the terms of this decree, shall be sold under this decree, then all the holders of general mortgage bonds or col-
1355 lateral trust bonds who shall have signed or accepted said agreement, and all other of said bondholders who shall not within ninety days after the filing of this decree file in this court their written dissent from said agreement, and their desire to litigate the question of priority of the liens of said general mortgage and collateral trust as to the property embraced in the latter instrument, shall be bound by the said agreement, and as to bondholders so bound the agreement aforesaid shall be held to settle and determine all such questions of priority and superiority.

In case any of the holders of general mortgage bonds shall not sign or accept said agreement, and shall within the time limited, as aforesaid, file in this court their dissent therefrom, and their desire that any question of priority as aforesaid shall be litigated in said cause, then such issue as may be necessary shall be made up as the court shall direct; but the foreclosure of said general mortgage and collateral trust, and the sale of the property embraced therein, shall not be delayed thereby; but such litigation shall be determined with reference to the proceeds of the sale of the property embraced in said collateral trust, a sufficient portion of which shall be retained under the control of the court to protect the rights of such possible litigants.

The court further finds that there is now pending in the Supreme Court of the State of Ohio a certain cause in which James Compton and certain other persons named in the record thereof seek to establish and maintain a lien adjudged in their favor by the Court of Common Pleas of Lucas county, in the state of Ohio, upon the line of railroad of said Wabash Company, extending from Toledo, Ohio, to the eastern boundary of the State of Indiana; an appeal having been taken from the said judgment and decree of said Court of Lucas county to said Supreme Court. It is ordered that this decree shall in no way affect the rights of said Compton and his co-complainants, as the same shall be determined by said Supreme

Court. Any sale of the property aforesaid under this decree
1356 shall be subject to such rights and interests as said Supreme Court shall adjudge in said cause.

And now the court, being fully advised, does hereby order, adjudge and decree that within sixty days from this date the Wabash Railway Company, or some person or person for it, pay to the Central Trust Company, of New York, for the benefit of the parties entitled, the full sum of money found due as principal and interest aforesaid on said general mortgage bonds and coupons, together with interest from this date at the rate of six per cent. per annum, and all costs of this suit, except such as the court may otherwise apportion. That, in default thereof, the said general mortgage be foreclosed, and all the property, rights and interests aforesaid conveyed thereby or upon which said mortgage is a lien, as hereinbefore decreed, be sold, excepting as hereinafter set forth. And it is hereby ordered, adjudged and decreed that the following named lines of railway, heretofore by order of this court severed from the Wabash system and surrendered to the trustees in underlying and senior mortgages or to some receiver, person or persons appointed by the Federal court in whose jurisdiction said lines are situated, to wit: Havana division, formerly known as the Champaign, Havana and Western Railway; Indianapolis, Peru and Chicago Railroad, the Chicago, Cincinnati and Louisville Railroad, the Michigan City and Indianapolis Railroad, together constituting the Indianapolis, Peru and Chicago division. The Quincy, Missouri and Pacific Railway, the Missouri, Iowa and Nebraska Railway, the Cairo and Vincennes Railway, the Danville and Southwestern Railroad and St. Francisville and Lawrenceville Railroad, together constituting the Cairo Division, and the Toledo, Peoria and Western Railroad, and also the Centreville, Moravia and Albia Railroad, shall not be sold at said sale nor shall any interest in said lines or any or either of them pass by the sale herein provided for, but the complainants herein and all persons interested in said lines are hereby remitted to the said several Federal courts in whose jurisdiction said lines are situated for the adjudication and settlement of their respective claims
1357 and interests. The court further finds the Wabash company to be wholly insolvent, and the property, rights and interests embraced in the general mortgage wholly insufficient security for the amount of indebtedness found due as aforesaid. It is ordered that the sale of said property, rights and interests be without redemption, and said sale, when made and confirmed by the court, and all the conditions thereof fully performed, shall forever bar and foreclose all right, title and equity of redemption of said Wabash company in said railroads, property, interests and franchises, and each part thereof; and also all the rights and interests of all persons claiming through or under said company subsequent to said general mortgage; and also all the rights and interests of all the parties hereto, except so far as the same are by this decree established or reserved.

It is also adjudged and decreed that said Wabash company, or some person for it, within sixty days from this date, pay to the

Mercantile Trust Company of New York the amount of principal and interest found due as aforesaid on said collateral trust bonds with interest thereon from this date at the rate of six per cent. per annum, and also such share of the costs of this proceeding as the court shall apportion. In default thereof all the property, securities, rights and interests covered by and described in the collateral trust shall be sold, and all the right, title and interest of the Wabash company therein, and of all persons claiming through or under said company be forever barred and foreclosed; and also all the rights and interests therein of *of* all parties to said cause except so far as the same are hereby established or reserved. The court finds and adjudges that all the property embraced in said collateral trust is wholly insufficient to pay the indebtedness secured thereby, and orders that the said property be sold with redemption.

It is further adjudged and decreed that if the holders of a majority of the general mortgage bonds, acting through their committee appointed under their agreement aforesaid, shall be satisfied
1358 that any branch or portion of the lines of railroad or property embraced in and covered by said mortgage, and in or to which the Wabash company had only a leasehold or conditional title, shall be wholly insufficient in value to discharge the liens resting thereon superior to said general mortgage, and that sale of such branches or portions of railroad or property would add nothing to the purchase price obtainable for all said property. The commissioner shall at the request of such committee, proceed to sell such branches or portions of railroad, with all the rights and property pertaining thereto, separately from the other property covered by said mortgage.

It appearing to the court that since the commencement of this cause the receivers herein have, under orders of this court, purchased and paid for in whole or in part certain lands and lots adjacent to the lines of railroad constituting the Wabash system, the title thereof being taken to James F. How, as trustee, said How being the agent of said receivers, it is hereby ordered and decreed that all the lands and lots aforesaid, so purchased by said receivers, be sold with the main lines of road covered by the general mortgage; that an account be hereafter taken of all the moneys paid by said receivers for the lands and lots so purchased by them; that after the sale of the property embraced in the general mortgage there shall be taken out of the proceeds of such sale, and out of the proceeds of all property sold in connection therewith, a sum sufficient to repay to said receivers the amount of money expended by them in the purchase of the lands and lots aforesaid, so far as the same have been paid for; and said receiver shall hold the money so to be repaid to them, to be expended under the orders of court for the general purposes of said receivership. Upon the sale of said property and upon full compliance with the conditions of said sale by the purchasers thereof, said James F. How, trustee, shall, upon order of court, make proper conveyance of the said property to such purchasers.

1359 The court further orders that the sale under this decree of any property, rights or interests covered by said general mort-

gage shall not have the effect of debarring the holders of said general mortgage bonds or their trustees from foreclosing any other mortgages or deeds of trust given to secure said general mortgage bonds, or portions thereof, whether such other mortgages or deeds of trust embrace some of the lines of railroad and property covered by the general mortgage or otherwise; but, if the sale or sales under this decree shall not produce a sufficient sum to pay and satisfy all the said general mortgage bonds, the holders thereof, and their trustees, shall be at liberty to resort to such other mortgages and deeds of trust as fully in force and effect.

It is further ordered and adjudged that this decree, or any sale made thereunder of the property embraced in the collateral trust, shall not prevent the owners of the collateral trust bonds, so far as said bonds shall remain unpaid after the application of the proceeds of said sale thereto, from resorting to any other instrument, mortgage or pledge for the protecting of the title to the property so embraced in said collateral trust. But the said bondholders and the purchasers of the property, rights and interests embraced in the collateral trust, at any sale made under this decree, shall be at liberty to resort to such other instrument, mortgage or pledge for the protection of their title to the property so embraced in said collateral trust and sold under the foreclosure thereof.

The court orders and decrees that, subject to conditions aforesaid, the property covered by the general mortgage and collateral trust be sold at public auction to the highest bidder or bidders at the east front door of the United States court house, in the city of St. Louis, in the state of Missouri, between the hours of 10 A. M. and 4 P. M., on such day as the commissioner hereinafter named shall appoint, with power to the commissioner making the sale for proper cause to postpone said sale without further notice, save an announce-
1360 ment of such postponement by said commissioner at the time fixed for such sale.

Public notice of the time, place and terms of said sale shall be given by publication at least once a week for six successive weeks before said sale in one public newspaper in each of the following named cities: New York city, New York; St. Louis, Missouri, and such other places as the courts having ancillary jurisdiction of this cause, or any of them, may direct. Said notice shall describe the property to be sold in general terms, and shall refer to this decree for more particular description.

Said sale shall be made in manner following:

The commissioner executing this decree shall, except as hereinabove otherwise provided, first offer for sale all the right, title and interest of the Wabash company in and to the lines of railroad covered by and described in the general mortgage, and such other lines, interest and property as have been adjudged in this decree to have become subject to the lien of said mortgage, with all the franchises, rights, interest and property, real and personal pertaining thereto, and all rights of way, equipments, structures, shops, tools, machinery and materials properly belonging or appurtenant to said lines, and each of them, excepting only such of said lines with

the property, franchises, interests and appurtenances as are herein adjudged to be subject to said general mortgage only to the extent of the leasehold or conditional title of the Wabash company therein; and also excepting all property described in the collateral trust, whether covered by the general mortgage or not so covered, and which may be sold or offered for sale separately, as hereinbefore directed. In case any such line or property shall not be sold together with the other property covered by the general mortgage, the same shall be offered separately, and the commissioner shall conditionally accept the highest bids received therefor.

The commissioner shall then offer for sale the property embraced in the collateral trust in manner following: He shall offer all
1361 the bonds, stocks and choses in action specified in said collateral trust together, and note the bids received therefor. He shall also offer the cars, rolling stock and equipment described in said instrument for sale together, and note the bids received therefor. He shall then offer the steamers described in said instrument together, and note the bids received therefor. He shall then offer separately the real estate or terminal interests in Cook county, Illinois, described in said instrument, and note the bids received therefor.

After said properties and securities covered by the collateral trust have been so offered for sale separately, the commissioner shall proceed to offer the whole thereof for sale together. And he shall conditionally accept the highest bids made for said lots or parcels of property and securities, when offered separately, or the highest bid for all said property when offered together, according as the one method or the other shall produce the largest sum in the aggregate.

Before any bid for any property sold under this decree shall be conditionally accepted by the commissioner, he shall require the person or persons making such bid to deposit with him, or subject to his order, in some bank to be by the commissioner selected, a sum in cash equal to ten per cent. of the whole amount of said bid, when the amount of such bid shall be more than $100,000, and twenty per cent. on all bids below that sum.

As soon as any sale or sales shall have been made by the commissioner, in pursuance of this decree, he shall report the same to this court for confirmation, further certifying to the court compliance by the purchaser or purchasers with the conditions hereinbefore prescribed.

If any such bid shall be accepted by the court, and the party making the same shall fail to comply with all the conditions of sale, and all orders of the court made or to be made with respect thereto, then the sum so deposited shall be forfeited, and shall be applied to the payment of the expenses of resale, or the costs of this cause,
1362 or the payment of the bonds aforesaid, as the court shall order.

In case any bid shall be rejected by the court the deposit made by the bidder shall be returned.

And if any bid or bids shall be accepted and confirmed by the

court, and all the conditions of sale shall be fully complied with, or if the persons making such bids shall perform all such conditions as the court shall accept as sufficient for the time being, and when the court shall so order, the commissioner shall execute to such purchaser or purchasers deeds of conveyance and transfer of all the property and interests sold by him under this decree.

And thereupon the complainants herein, to wit, the Central Trust Company of New York and James Cheney, as trustees of said general mortgage, and also the Mercantile Trust Company, defendant herein, as trustee of the collateral trust mortgage, and the mortgagee the Wabash, St. Louis and Pacific Railway Company, shall severally and in due form convey to said purchasers all their interest as trustees and as mortgagors in and to the property sold by said commissioners to said purchasers or any of them.

Whenever any bid shall be accepted and approved by the court, the party making the same shall deposit in such depository as the court shall direct such additional cash payment as the court may require, and make such further cash deposits as may be ordered by the court.

It is further ordered that after the purchasers aforesaid shall have made such cash payments as the court shall order the said purchasers shall have the right to discharge the remainder of their respective bids by the use of their bonds aforesaid; that is to say, by using the general mortgage bonds and the collateral trust bonds to make payment for the property so purchased. All said bonds and coupons shall be received in making the payments, to which they may be applied respectively, ratably and without discrimination, and at such valuation as would be equivalent to the distributive share
1363 applicable thereto if the whole sum bid had been paid in cash.

It is further adjudged that in order to enable the purchasers of said lines of railroad and property to raise the means necessary to discharge all claims, debts and demands equitably chargeable against the same in preference to said bonds, by the use of the securities of the new corporation intended to be organized to take said lines of railroad or the chief part thereof, if such purchasers shall make such cash payments as the court shall require and order, and discharge the remainder of their bids respectively, by the payment of cash or the use of bonds as aforesaid, such purchasers shall be entitled to the conveyance and assignment of the property purchased by them and each of them, as hereinbefore provided. But such conveyance or assignment shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property, and the full payment of all the debts and liabilities of said receivers or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may be charged against said property or any part thereof, or said receivers, either by this court or by any other circuit court exercising ancillary jurisdiction or by any other court to which any of the parties hereto, including the receivers, have been

hereby remitted in proceedings or actions ancillary hereto or otherwise.

Nor shall such conveyance, transfer or assignment withdraw any of said railroads, property or interest to be sold under this decree, as hereinbefore directed, from the jurisdiction of this and other courts aforesaid, but the same shall remain in the custody of the receivers until such time as the court shall on motion direct said property in whole or, from time to time in part to be released to said purchaser or purchasers or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sums so charged, or to be charged against said property or any part thereof, or said
1364 receivers as aforesaid, shall not be paid within a reasonable time after being required by order of this or said other courts. The conveyance and transfer of said property shall be subject to the power and jurisdiction of the said courts, and the purchasers of any part of said property shall thereby become and remain subject to said jurisdiction so far as necessary to the enforcement of this decree. And such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said receivers by order of said courts shall be fully paid and discharged. The provisions aforesaid shall apply to the purchasers at said sale, and to all persons taking said property through or under them.

The commissioner executing the decree shall apply the proceeds derived from said sale, and also all the proceeds derived from any body, natural or artificial, in satisfaction of the claims charged or to be charged against said property and all parts thereof, as aforesaid, in the manner following:

First. To the payment of all the costs of this cause in this court and in all other courts wherein ancillary jurisdiction was taken, including such allowances as this and said other courts have or shall make for solicitors' and counsel fees, and for the services of all trustees, masters, commissioners, clerks, stenographers, printers and others rendering services in the prosecution of the several causes consolidated herein or ancillary to the original cause. Also all the expenses of making said sale or sales and otherwise enforcing and carrying out this decree.

Second. To the payment of all the indebtedness of the receivers herein, and all other claims which said courts or some of them may adjudge to be superior to said bonds. And to the payment of all labor and supply claims falling within the order of this court of May 29, 1884, which now are or may be unpaid.

Third. In payment of all expenses incurred by the committee of bondholders and the purchasing committee in bringing about the said agreement between the holders of the general mortgage
1365 bonds and the holders of the collateral trust bonds; and of carrying the same into effect, and generally in the reorganization of the Wabash company, including a proper remuneration for the members of said committee.

Fourth. To the payment of the two classes of bonds aforesaid, *pro rata*, as far as the same can be paid in whole or in part out of the pro-

ceeds of said sale or sales, or by the application of the bonds aforesaid in lieu of purchase-money under the provisions of this decree relating thereto.

Edmund T. Allen is hereby appointed commissioner to execute this decree. He shall make and file in this court an affidavit faithfully and impartially to execute this decree, and to obey the orders of this and the other courts aforesaid in the discharge of the duty hereby imposed. All claims and demands against said property or said receivers, or the proceeds of said sales, not hitherto or herein adjudged and determined, whatever the character of such claims and demands, are hereby reserved for future action by this and said other courts. And all questions arising under any answers of parties hereto, and on all cross-bills and other pleadings or intervening petitions not herein or heretofore determined, are hereby reserved for future adjudication, the settlement of the same being held not necessary to the purposes of this decree.

It is further ordered that The Central Trust Company of New York, and James Cheney and The Mercantile Trust Company of New York, or some of them, present this decree to the other courts entertaining ancillary jurisdiction of the said consolidated cause; and pray that the same be approved by said courts and entered as the decree thereof.

All bids conditionally accepted by said commissioner for any railroad property or interest ordered to be sold by this decree shall be reported to said courts, as their several jurisdictions may require, and be subject to confirmation or rejection by said courts.

The court also adjudges that the indemnity mortgage re-
1366 ferred to in the bills of complaint herein, made by the Wabash Company to the St. Louis, Iron Mountain and Southern Railway Company, is subject and inferior to the lien of the general mortgage and collateral trust.

The statements in this decree of the amount of bonds outstanding, or of interest or rental paid or unpaid, on any of the mortgages, deeds of trust, leases or contracts herein declared to be superior to the lien of the general mortgage or collateral trust, shall not be taken as adjudicating or determining the matters so stated. Such amounts are so stated in this decree only for the purpose of enabling persons who may desire to purchase said property to determine approximately the amount of prior liens or other charges upon said property and each part thereof.

It is ordered that said commissioner make full report of his doings to this Court.

(Signed) DAVID J. BREWER,
Circuit Judge.
SAMUEL TREAT,
District Judge.

1367 Paragraph No. 29.

EXHIBIT 46.

In the Circuit Court of the United States for the Eastern District of Missouri, of the March Term, 1884. In Chancery.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY, THE MERCANTILE TRUST COMPANY, of New York, and Others, Defendants.

Order of Court.

Now, on this 27th day of May, 1884, comes the said complainant by its solicitors and counsel, and, having filed its bill of complaint and exhibits herein, prays the Court to appoint a receiver or receivers, with power to take possession of, manage, operate, control and preserve all the railroads owned, operated or leased by the said complainant, and also all property of every description, real, personal and mixed, and all rights, credits and choses in action of the said complainant, whether situated within the said eastern district of Missouri or elsewhere.

And the complainant having, by the said bill of complaint and exhibits forming a part thereof, shown the court that there is great danger of loss, waste and destruction of the property of complainant, or valuable parts thereof, unless such receiver or receivers
1368 be appointed, and the application having been by the Hon. Samuel Treat, District Judge for the eastern district of Missouri, referred to me for consideration, and the court having duly considered said application, it is

Ordered, adjudged and decreed that Solon Humphreys and Thomas E. Tutt be, and the same are, hereby appointed receivers of the said railroads and all the property of said company, with power and instructions to take possession of the same, and to manage, control and operate said railroad, preserve and protect all said property, and collect, as far as possible, all accounts, choses in action and credits due to said company, acting in all things under the order of this court, or of such other courts as may entertain jurisdiction of parts of said property as ancillary to the jurisdiction of this court.

That the receivers, before entering upon their duties, give their joint and several bond to the master in chancery of this court for the benefit of all whom it may concern, in the penal sum of five hundred thousand dollars, conditioned for the faithful performance by said receivers of their duties as such, and that they will in all things observe and perform the orders of this court now or hereafter to be made.

It is further ordered that the said receivers, out of the income

that shall come into their hands, from the operation of said railroad or otherwise, proceed to pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic, accruing during six months prior hereto.

That said receivers also, in like manner, pay all rentals accrued, or which may hereafter accrue, upon all leased lines of said complainant, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for.

1369 That said receivers also pay, in like manner, out of any incomes or other available revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employees, that have been earned or have matured within six months before the making of this order.

That said receivers present their said bond to this court, or any judge thereof, for approval, and that upon said presentation and approval of said bond, said receivers are entitled and required to proceed at once with the performance of their duties.

It is further ordered that all parties herein, upon being informed of this order, and of the approval of said bond by this court, proceed to surrender all the lines of said railroad, and all the property, choses in action and accounts of said company to said receivers; and the complainant is authorized to apply to any other United States Circuit Court of competent jurisdiction for such order or orders, in aid of the primary jurisdiction vested in this court in said case, as may have ancillary jurisdiction herein.

It is further ordered that said receivers pay all current expenses in the operation of said road, collect all the revenues thereof, and all choses in action, accounts and credits due and to become due to the company.

That such receivers keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived with reference to the interest of all parties herein, and the expenditures by them made.

That said receivers report to this court, from time to time, once in each three months, their doings under this decree, and that they apply for instructions to this court when necessary.

And said receivers having filed their bonds as required by this order, and the court having fully approved the same, said appointment is hereby confirmed, and said receivers are hereby required to proceed with their duties under said appointment.

DAVID J. BREWER,
Circuit Judge.

1370 At Chambers, May 29, 1884.

The order heretofore entered in this case for the appointment of receivers is modified by striking out of the third paragraph of said order the words, "to the master in chancery of this court," so that the paragraph shall read as follows: "That the receivers, before entering upon their duties, give their joint and several bond, for the benefit of all whom it may concern, in the penal sum of five hundred thousand dollars conditioned for the faithful performance by said receivers of their duties as such, and that they will in all things observe and perform the orders of this court now or hereafter to be made."

UNITED STATES OF AMERICA, *Eastern District of Missouri, ss:*

I, A. P. Selby, clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy of the order appointing Solon Humphreys and Thomas E. Tutt receivers of the Wabash, St. Louis and Pacific Railway Company in case No. 2357 of the Wabash, St. Louis and Pacific Railway Company, complainant, against the Central Trust Company of New York and others, defendants, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court at office in the city of St. Louis in said district this 30th day of May, in the year of our Lord eighteen hundred and eighty-four.

[SEAL.]

A. P. SELBY,
Clerk of said Court.
—— ——, *Dep.*

1371 Paragraph No. 37.

EXHIBIT 47.

At a stated Term of the Circuit Court of the United States for the Southern District of Illinois, held on the 16th day of December, 1886.

Present: Hon. Walter Q. Gresham, Circuit Judge.

THOMAS B. ATKINS and HENRY K. MCHARG and Others, Complainants,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

FREDERICK N. LAWRENCE and Others, as a Committee of the First Mortgage Bondholders, Cross-complainants,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Cross-defendants.

1372 JOHN N. A. GRISWOLD and Another, as a Committee of the Second Mortgage Bondholders, Cross-complainants,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Cross-defendants.

And now, to wit, on this 16th day of December, 1886, come the above-entitled causes on to be heard, upon the application of Thomas B. Atkins, Henry K. McHarg and other like bondholders, co-complainants, and of Frederick N. Lawrence, Benjamin F. Romaine and Edward Oothout, as a committee of first mortgage bondholders, and of John N. A. Griswold, and Charles E. Fleming as a committee of second mortgage bondholders, and of John N. A. Griswold, as trustee under the mortgage of the Illinois and Southern Iowa Railroad Company, and of Henry H. Warden as trustee under the first mortgage of the Great Western Railway Company of 1859; and upon the application of others, bondholders secured by mortgages upon the property of the Wabash, St. Louis and Pacific Railway Company executed prior in point of time to June 1, 1880, for the removal of Solon Humphreys and Thomas E. Tutt, present receivers of the property of said railroad company within the State of Illinois, and for the appointment in this cause of some fit person as receiver to take charge of the property and effects, real, personal and mixed, of the said Wabash, St. Louis and Pacific Railway Company, fully set forth and described in the mortgage made and executed by the Toledo, Wabash and Western Railway Company in the year 1867, and by the Wabash Railway Company in 1879, and by the mortgages prior thereto, covering said

property in the possession of or under the control of said
1373 Humphreys and Tutt as receivers; and it appearing to the judge of this court that the said Wabash, St. Louis and Pacific Railway Company, and the parties necessary to be notified of this application, have received due and timely notice of this motion.

Now, upon motion of Henry Crawford, for the complainants Thomas B. Atkins and Henry K. McHarg and certain other bondholders and Julien T. Davies, Isham and Lincoln and D. H. Chamberlain, of counsel for the Lawrence and Griswold committees of first and second mortgage bondholders, and of counsel for certain first and second mortgage bondholders, and of Julien T. Davies, of counsel for John N. A. Griswold and Henry H. Warden, trustees, and after hearing Wager Swayne and Thomas H. Hubbard, of counsel, for the purchasing committee; Wells H. Blodgett for Solon Humphreys and Thomas E. Tutt, receivers; John L. Thompson, of counsel for the trustees of said mortgages of 1867 and 1879, and Charles M. Osborn, of counsel for the Chicago and Western Indiana Railroad Company, opposed to the said motion, and upon the said bill of Atkins and McHarg and others, the said cross-bills of the Lawrence and Griswold committees, the testimony taken by the complainants on stipulation, the affidavits read in opposition to the motion, and the petitions of the bondholders in aid of the motion, and due deliberation being had:

It is hereby ordered, adjudged and decreed, that Solon Humphreys and Thomas E. Tutt, heretofore appointed receivers of the property of the Wabash, St. Louis and Pacific Railway Company within the state of Illinois, by an order made and entered in the United States Circuit Court for the Northern District of Illinois on the twenty-eighth day of May, 1884, and by an order made and entered in the United States Circuit Court for the Southern District of Illinois on the twenty-ninth day of May, 1884, in causes brought in said courts respectively by the said Wabash, St. Louis and Pacific Railway Company against the Central Trust Company and others,

be and they are hereby removed as receivers of the property
1374 of the said Wabash, St. Louis and Pacific Railway Company, covered by the said mortgages of 1867 and 1879, and the mortgages prior thereto, so far as the same is situated or belongs within the state of Illinois.

And it is further ordered, adjudged and decreed that the prayer of the said bill of complaint of Atkins, McHarg and others, of the cross-bills of the Lawrence and Griswold committees, and of the petitions of bondholders for the appointment of a new receiver in this cause be, and the same is, hereby granted, and that Thomas M. Cooley, of Michigan, be, and he hereby is, appointed receiver of the said Wabash, St. Louis and Pacific Railway Company, and of all of its property, personal, real and mixed, situated within or belonging to the lines of railway in the state of Illinois, covered by and embraced in two certain mortgages, one thereof made by the Toledo, Wabash and Western Railway Company in 1867, and the other thereof made by the Wabash Railway Company in 1879,

particularly set forth and described in the bill of complaint of said Atkins and McHarg and others, and in the copies of the said mortgages annexed thereto as exhibits to the said bill of complaint, and in the mortgages made and executed by the Great Western Railroad Company of 1859, in the year 1863, by the Illinois and Southern Iowa Railroad Company in the year 1862, by the Quincy and Toledo Railway Company in the year 1865, and by the Decatur and East St. Louis Railroad Company in the year 1868, copies of which said mortgages are annexed to the said cross-bill of the said Frederick N. Lawrence and others, as exhibits, and in the second mortgage of the Great Western Railroad Company of 1859, made and executed in the year 1865, a copy of which is annexed as an exhibit to the cross-bill of John N. A. Griswold and another, and the said receiver is hereby empowered and instructed to take possession of all of the said property situated within the State of Illinois and belonging to the railway property therein as or appurtenant thereto, and to manage, control and operate the railroads described in the said mortgages, preserve and protect all said
1375 property, and collect, as far as possible, all accounts, choses in action and credits due to said company, acting in all things under the orders of this court, or as to property not within this circuit under the orders of such other courts as may entertain jurisdiction of parts of said property as ancillary to the jurisdiction of this court; and the said receiver is hereby empowered, if necessary, to sue in his own name, and to recover all the property, moneys or earnings of said company covered by the said mortgages, whether real, personal or mixed, and whether in possession or in action, and to retain and employ all necessary attorneys, counselors, agents, laborers and servants, and to fix and alter the compensation of said necessary attorneys, counselors, agents, laborers and servants, for the due administration of his trust and the performance of his duties hereby imposed upon him, subject to the supervision of the court, and the said receiver is hereby empowered and directed to defend all suits, when, in his judgment, it shall be to the interests of said company, or creditors of said company, when said suits shall have been or may hereafter be brought against said company or any property embraced within the terms of this order. Such receiver shall also have authority, subject to the supervision of the court, to make such repairs to said railway or railroad and property as are proper and necessary, in his judgment, for carrying on the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroad, subject to the supervision of this court. The said receiver, before entering upon his duties, shall give his bond for the benefit of all whom it may concern, in the penal sum of one hundred thousand dollars conditioned for the faithful performance by said receiver of all his duties as such, and that he will in all things observe and perform the orders of this court, now or hereafter to be made, with such sureties and in such form as shall be approved by the judge making this order.

It is further ordered that the said receiver, out of the in-
1376 come which shall come into his hands by the operation of said railroads or otherwise, proceed to make payments as follows:

1st. That he pay all current expenses incident to the creation or administration of his trust, and to the operating of said railroads.

2d. That he pay all amounts now legally due, or that shall hereafter become due for taxes on any of the property over which he is appointed receiver.

3d. That he pay all balances due, or to become due, to other railroads or transportation companies on balances growing out of the exchange of traffic accruing six months prior hereto.

4th. That the said receiver report to this court with all convenient speed what properties he finds under lease to the Wabash, St. Louis and Pacific Railway Company, or to Humphreys and Tutt, as receivers, with the particulars of said properties and of said leases, and the names of the lessors, with the view that this court may direct said receiver with respect to the acceptance of the said leases and their terms, or their abrogation, and that until the making of the said report and the instructions of the court thereon that the said receiver pay all rentals which may hereafter accrue upon all leased lines of said Wabash, St. Louis and Pacific Railway Company, within the state of Illinois, and the jurisdiction of this court, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due, for the use of any portion of road or roads or terminal facilities of any other company or companies.

5th. That he pay all *all* rentals to become due upon rolling stock heretofore sold to said railroad company, and partially paid for, and necessary for use in the operation of the road over which the said receiver is appointed, covered by any of the existing mortgages described in the bill herein and which comes into the hands of the receiver under the operation of this order.

That the said receiver present his said bond to the judge making
this order for approval, and that upon said presentation and
1377 approval of said bond said receiver is entitled and required to proceed at once with the performance of his duties.

It is further ordered, adjudged and decreed that all parties herein and the said Humphreys and Tutt, their agents, officers and attorneys, upon being informed of this order, and of the approval of said bond by the judge of this court, proceed to surrender on the thirty-first day of January, 1886, to the receiver hereby appointed, or his duly appointed agent or agents, all the lines of said railroads embraced within the terms of this order, and all the property, real, personal and mixed, including all rolling stock and equipment, choses in action, books, papers and accounts of said Wabash, St. Louis and Pacific Railway Company in the possession of said receivers that relate to the property that is the subject of this order; and said Humphreys and Tutt are permitted to have such inspection and access to the said books, papers and accounts turned over by them to the receiver hereby appointed as may be necessary to enable them

to make and file the accounts they are hereby ordered to make and file, and the receiver hereby appointed, or his agents or employees, shall at all times be permitted to make inspection and copies of all the books, papers, accounts and vouchers kept by said Humphreys and Tutt in the management and operation of any of the property in their charge as received in the state of Illinois or elsewhere.

It is further ordered, adjudged and decreed that, after discharging and making all the payments and outgoes required by the terms of this order, that the said receiver retain any surplus that may remain in his hands to be applicable to the payment of the past due and matured interest coupons of the bondholders secured by mortgages upon the said railroad property, in the due order of their priorities of lien as may be subsequently directed and ordered by this court. That the said receiver keep such accounts as may be necessary to show the sources from which all such income and revenues shall be derived with reference to the interests of all parties herein, and the expenditures by him made. That the said receiver proceed
1378 with all convenient speed to make and file with the clerk of this court his inventory of all the property that may be taken possession of by him under the terms of this order, and that he report to this court from time to time in this cause, once in every month, his doings under this decree, and that he and any of the parties to this cause may apply for instructions to this court when necessary.

It is further ordered, adjudged and decreed, that the said Humphreys and Tutt do forthwith proceed with all convenient speed, not later than sixty days from the date of the making of this order, to file with the clerk of this court in the cause of the Central Trust Company against the Wabash, St. Louis and Pacific Railway Company consolidated cause a just and true account of all their acts and doings as receivers aforesaid, with respect to the property east of the Mississippi river embraced within the mortgage of 1879, from the date of their appointment, including a just and true inventory of all the property, real, personal and mixed, taken possession of by them as such receivers in the state of Illinois.

The following is a more particular and detailed description of the property that is the subject of this order, over which the said receiver is hereby appointed, and of which he is directed to take possession, to wit:

That portion within the state of Illinois of all the railroad roadbed and right of way extending from the city of Toledo, in the state of Ohio, to and through the state of Indiana, and thence in the state of Illinois to Meredosia with branch of said railroad from Clayton to the east bank of the Mississippi river at Hamilton in the said state; and with branch of said railroad leading from Decatur in said state to East St. Louis in the said state; together with all the embankments, bridges and turnouts, side tracks, buildings, water tanks and fixtures, shop, engine and other houses, depots, turn tables, engines, machinery, cars, tools, rolling stock, blocks, lands, buildings and offices, and other things real and personal, now owned and
1379 used, or that may be owned and used hereafter in connection with the said railroad, and the appurtenances thereof; and all

the powers, privileges, franchises and charter, or otherwise, of the said Wabash, St. Louis and Pacific Railway Company with respect thereto; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and all reversions, remainders, tolls, incomes, rents, issues and profits thereof; and all contracts, leases and rights now existing between the said Wabash, St. Louis and Pacific Railway Company, or Humphreys and Tuit, receivers, with other corporations, companies or individuals; and all the estate, right, title, interest and demand, as well in law as at equity of the said railway company in and to the same and every part thereof, with the said appurtenances, including all moneys, books, papers, accounts or choses in action in the hands of any and all agents, clerks or officers of the present receivers, and of all persons indebted to the said receivers or to the trust, intending hereby to direct and require the receiver hereby appointed to take into his possession, as the officer of this court, all and singular the railway property of every kind, real, personal or mixed, whether in possession or in action, covered by said mortgages or any of them within the state of Illinois.

W. Q. GRESHAM.

1380 Paragraph No. 38.

EXHIBIT 48.

In the Circuit Court of the United States for the Southern District of Illinois.

FRIDAY, *April 1st, A. D.* 1887.

Present: The Hon. Walter Q. Gresham, Circuit Judge.

In Chancery. Original Bill.

THOMAS B. ATKINS, HENRY K. MCHARG, and Others
vs.
WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others.

Cross-Bill.

FREDERICK N. LAWRENCE and Others, as a Committee of First Mortgage Bondholders,
vs.
WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others.

Cross-Bill.

JOHN N. A. GRISWOLD and Others, as a Committee of Second Mortgage Bondholders,
vs.
WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others.

1381 On this first day of April, A. D. 1887, came the parties to this cause by their respective counsel, and comes also Thomas M. Cooley, heretofore appointed receiver herein, and presents

to the court his resignation as such receiver, and thereupon by the court

It is ordered, adjudged and decreed that John McNulta be, and he is hereby, appointed receiver herein, as the successor of said Thomas M. Cooley; that said John McNulta give bond for the benefit of all whom it may concern, with such sureties and in such form as shall be approved by the court in the penalty of fifty thousand dollars, conditioned for the faithful performance by himself of all his duties as such receiver in obedience to all orders of the court now made or hereafter to be made; that the said Thomas M. Cooley turn over and surrender to said John McNulta all the property, effects, rights, privileges and franchises of which the said Thomas M. Cooley is such receiver herein, and that said Thomas M. Cooley be thereupon relieved and discharged of his duties as receiver herein, except to the settlement of his accounts.

It is further ordered, adjudged and decreed that said John McNulta, as receiver herein, take immediate possession and control of all and singular the property, effects, rights, privileges and franchises of which said Thomas M. Cooley is receiver herein, and that as such receiver he have all the rights and power, and be subjected to all the duties and restrictions heretofore conferred and imposed upon the said Thomas M. Cooley, as such receiver.

It is further ordered, adjudged and decreed that the said Thomas M. Cooley have thirty days from the date of this order for the settlement of his accounts as receiver herein, and that within said time he render a full and final account of his actings and doings as such receiver to the court.

1382 UNITED STATES OF AMERICA.
Southern District of Illinois, in Circuit Court:

I, James T. Jones, clerk of said court, do hereby certify that the foregoing is a true and complete copy of the order appointing John McNulta receiver in a certain cause wherein Thomas B. Atkins *et al.* are complainants, and the Wabash, St. Louis and Pacific Railway Company *et al.* are defendants, as the same appears of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at Springfield, in said district, this fourth day of October, A. D. 1888.

[L. S.] JAMES F. JONES, *Clerk.*

1383 Paragraph No. 34.

EXHIBIT 49.

In the Circuit Court of the United States for the Eastern District of Missouri.

At a stated term of the circuit court of the United States, for the eastern district of Missouri, in the eighth circuit, held at the United States court house, in the city of St. Louis, on the 15th day of June,

in the year of our Lord, one thousand eight hundred and eighty-six.

Present: Hon. D. J. Brewer, Circuit Judge. Hon. Samuel Treat, District Judge.

In Equity. Consolidated Cause.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY, Complainants,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.

Decree Confirming Report of Sale.

And now on this day, this cause came on further to be heard upon the application of the complainants herein. The Central Trust Company of New York and James Cheney, to confirm the sale made herein on the 26th day of April, 1886, by Edmund T.
1384 Allen, Esq., the commissioner appointed in and by the decree of this court heretofore entered in this suit at the September term, A. D. 1885, among other things to sell the premises, franchises and property in and by said decree directed to be sold, and said commissioner having made his report in writing to this court, which report bears date the 26th day of April, 1886, in and by which it appears that said commissioner after due notice of said sale made as required by law and the rules of this court, proceeded to make sale of, and did sell the said premises, franchises and property at public sale between the hours of 10 A. M. and 4 P. M. on Monday, the 26th day of April, 1886, at the east door of the United States court house, on Eighth street in the city of St. Louis in the State of Missouri, on which sale all and every of the said premises, franchises and property, in and by said decree directed to be sold, were sold, as hereinafter stated, except the leasehold interests of the said Wabash, St. Louis and Pacific Railway Company in the following railroads, to wit:

The Council Bluffs and St. Louis Railway, extending from the Iowa state line to Council Bluffs; that portion of the Clarinda and St. Louis Railway in the state of Iowa; the Des Moines and St. Louis Railroad; the Eel River Railway; the St. Louis, Jerseyville and Springfield Railroad; the Attica, Covington and Southern Railroad, and the Champaign and Southeastern Railroad for none of which there were any bidders, and that the leasehold interest of the Wabash, St. Louis and Pacific Railway Company in the St. Joseph and St. Louis Railway was sold to William F. Nesbitt for the sum of one dollar, he being the highest bidder, and that sum being the highest sum bidden therefor, and that all the rest and residue and remainder of said premises, franchises and property were sold to James F. Joy, O. D. Ashley, T. H. Hubbard and Edgar T. Welles, trustees, for the sum of six hundred and twenty-five thousand dollars, they being the highest bidders, and that sum being the highest sum

bidden therefor, and that the said purchasers had deposited
1385 ten per cent. of the amount of said bids in the Third National Bank in the city of St. Louis, subject to the order of said commissioner.

And upon producing the said report of the commissioner of the said sale, which was filed on the 28th day *day* of April, 1886, and no exception to said report having been filed, and sufficient notice of the hearing of said application having been given to the solicitors for the parties to this cause, and the court having fully examined the said report of the said commissioner of said sale, and his doings in pursuance of the decree of the sale herein, and finding the same correct, and in all respects in conformity to law, and with the orders of this court; and that the amount bid at said sale, as reported by the said commissioner in said report of sale, to wit: the sum of six hundred and twenty-five thousand and one dollars, was the highest and best bid for the premises and property, rights and franchises so ordered to be sold by him at said time.

It is now, therefore, ordered, adjudged, and decreed, that the said sale be, and the same is hereby, ratified and confirmed subject to the terms and conditions hereinafter named, and all proceedings of the said commissioner, in that regard, are hereby approved and confirmed.

And it is further ordered, adjudged and decreed that James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley, the purchasers aforesaid, shall deposit on or before August 1st, 1886, in the Third National Bank, in the city of St. Louis, subject to the order of said commissioner, the further sum of five hundred and sixty-two thousand five hundred dollars; being the full amount remaining unpaid of the aggregate of their several bids reported by said commissioner.

And it is further ordered, adjudged and decreed that, as a further condition of the taking effect of this order, and before the said sale shall stand as finally confirmed, the purchasers last above named shall procure from the trustees of the general mortgage of the
1386 Wabash, St. Louis and Pacific Railway Company surrenders and cancellations of the following leasehold interests, reported by the master as offered for sale and not sold, to wit: The leasehold interest in the Council Bluffs and St. Louis Railroad; the leasehold interest in the Attica, Covington and Southern Railway; the leasehold interest in the Clarinda and St. Louis Railroad; the leasehold interest in the Des Moines and St. Louis Railroad; the leasehold interest in the St. Louis, Jerseyville and Springfield Railroad; the leasehold interest in the Champaign and Southeastern Railroad; and shall also procure the consent of the Wabash, St. Louis and Pacific Railway Company, defendant, and of the said several lessors to the surrender and cancellation of each of said several leases which shall also be entered of record in this cause. And any deficit or loss incurred by the receivers herein from the operation of any of said railroads, as also of the Eel River Railway, from the first day of June, 1886, shall, as a further condition of the confirmation of

said sale, be charged upon the interest of said purchasers in the property acquired by them at said sale.

And it is further ordered, adjudged and decreed that the said commissioner be, and he hereby is, ordered and directed, upon compliance by said purchasers with the conditions above set forth, to execute and deliver a proper deed or deeds of conveyance of all and singular the said premises, franchises and property so, as aforesaid, sold, to the said purchasers or their assigns, and also to said William F. Nesbitt.

And it is further ordered, adjudged and decreed that this decree of confirmation of the sale of the premises and property, rights and franchises as aforesaid, and the deeds hereinbefore ordered to be made, shall be subject to the terms and provisions of the decree of sale hereinbefore entered in this cause, whereby it is provided, in addition to the sums required by said decree of sale, and by this order to be paid into court in cash, that there should be paid such further sums as may be needed and as this court may direct,
1387 in order to meet claims which this court may adjudge in this case to be prior in equity to the mortgages foreclosed by said decree, and whereby the court directed that the railroads, property or interests sold thereunder should remain in the custody of the receivers until such time as the court should on motion direct said property, in whole, or, from time to time, in part, to be released to said purchasers, and should afterwards be subject to be retaken, and, if necessary, resold, if the sums so charged, or to be charged, against said property, or any part thereof, or said receivers, as therein provided, should not be paid within a reasonable time after being required by order of the court, and that the conveyance and transfer of said property should be subject to the power and jurisdiction of the court, and the purchasers of any part of said property should thereby become and remain subject to said jurisdiction as far as necessary to the enforcement of said decree and such jurisdiction should continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said receivers by order of the court be fully paid and discharged, and that the provisions aforesaid should apply to the purchase at said sale and to all persons taking said property through or under them, and shall be further subject to all the terms and conditions of said decree of sale.

(Signed) DAVID J. BREWER,
Circuit Judge.

(Signed) SAMUEL TREAT,
District Judge.

1388 Paragraph No. 35.

EXHIBIT 50.

In the Circuit Court of the United States for the Eastern District of Missouri. In Equity.
Nos. 2357 and 2464, Consolidated Cause.

THE CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL., Defendants.

Order on Master to Make Deed.

SEPTEMBER 21, 1886.

This cause came on to be heard upon the report of Edmund T. Allen, commissioner, heretofore filed as to compliance with the order confirming the sale, and also from the deeds to be by him executed to the purchasers, in compliance with the original decree of sale in this cause, which report, being seen and understood by the court, is in all things confirmed, and Edmund T. Allen, commissioner, is hereby ordered and directed to execute and deliver to the purchasing committee named in said report the three several deeds to the property purchased as in said report recommended, except that, as to the form of the first deed, the same be changed so as to include after the word "appurtenances" in the third line from the top
1389 of the eighth page of the printed report as filed, the following words, "not required to be used by the receivers, according to the terms of the decrees heretofore entered in this cause."

And it is further ordered that the Central Trust Company of New York and James Cheney, as trustees of said general mortgage, and also the Mercantile Trust Company, as trustee of the collateral trust mortgage, and the Wabash, St. Louis and Pacific Railway Company, and Solon Humphreys and James F. How, trustees, shall severally and in due form convey to said purchasers all their interests as trustees and as mortgagors in and to the property sold by said commissioner to said purchasers or any of them.

Paragraph No. 25.

EXHIBIT 52.

Circular Showing Origin of the Funded Debt Bonds and Scrip Certificates.

WABASH RAILWAY COMPANY,
NEW YORK, *Jan. 24th*, 1877.

To the holders of the bonds secured by the Toledo, Wabash and Western Railroad:

The bonds on this property consist of the following:

1390

FIRST MORTGAGES.

a	Toledo and Illinois Rd. in Ohio	75½ mls.	
	Coupons unpaid since Feb, 1875		$900,000
	Lake Erie, Wab. and St. L. Rd. in Ind.	166$\frac{1}{10}$ mls.	
	Coupons unpaid since Feb., 1875		2,500,000
			$6,200,000
	Great Western Rd. in Illinois	180$\frac{7}{10}$ mls.	
	Coupons unpaid since Feb., 1875		2,500,000
	Illinois and Southern Iowa Rd. in Ills.	29$\frac{1}{10}$ mls.	
	Coupons unpaid since Feb., 1875		300,000
	Decatur and E. St. Louis Rd. in Ills.	108½ mls.	
	Coupons unpaid since Feb., 1875		2,700,000
	Quincy and Toledo Rd in Ills.	33$\frac{6}{10}$ mls.	
	Coupons unpaid since May, 1875		500,000
		593$\frac{5}{10}$	$9,400,000

SECOND MORTGAGES.

b	Toledo and Wabash Rd. in Ohio	75½ mls.	
	Coupons unpaid since May, 1875		$1,000,000
	Wabash and Western Rd., Indiana	166$\frac{1}{10}$ mls.	
	Coupons unpaid since May, 1875		1,500,000
	Great Western Rd. in Illinois	180$\frac{7}{10}$ mls.	
	Coupons unpaid since May, 1875		2,500,000
		422$\frac{8}{10}$	$5,000,000

a. For coupons of these bonds were issued 7 per cent. Scrip Certificates.
b. For coupons of these bonds were issued Graduated Scrip Certificates.

1391 CONSOLIDATED MORTGAGE.

Toledo, Wabash & Western R'd	490$\frac{4}{10}$ m'l's	
Coupons unpaid since February, 1875		$2,600,000
Total		$17,000,000

The above mortgages were created by nine different companies, none of which have been in existence since 1870, when the old Toledo, Wabash and Western Company and the Decatur and East St. Louis Company were consolidated into a new company, which new company created the gold mortgage for $5,000,000, under which

the entire road was sold. The Wabash Railway Company, having become the owners of the property, now appeals to the holders of the above securities, and asks their co-operation and assistance in their efforts to restore this property and place it on a substantial and interest paying basis. To that end they ask the holders of the

Toledo and Illinois First Mortgage,
Lake Erie, Wabash and St. Louis First Mortgage,
Great Western First Mortgage,
Illinois and Southern Iowa First Mortgage,

to deposit four past due coupons, payment to be made of the coupon falling due February 1st, 1877, and of all coupons thereafter as they mature.

Decatur and East St. Louis First Mortgage

to deposit five coupons, payment to be made of the coupon falling due August 1st, 1887, and of all coupons thereafter, as they mature.

Quincy and Toledo First Mortgage,

to deposit four past due coupons, and one maturing November 1st, 1877, payment to be made on August 1st, 1877, of the cou-
1392 pon falling due May 1st, 1877, and of all after November, 1887, as they mature.

Toledo and Wabash Second Mortgage,
Wabash and Western Second Mortgage,
Great Western Second Mortgage,

to deposit four past due coupons and one maturing November 1st, 1877, payment to be made of the coupons falling due May 1st, 1877, on August 1st, and all after November, 1877, as they mature. The holders of the Toledo and Wabash, and of the Wabash and Western bonds to assent to an extension of the time of payment of these bonds, on receiving additional coupons, to 1893, the time of the maturity of the Great Western issues.

Toledo, Wabash and Western Consolidated Mortgage.

Payment to be made of the quarterly coupon falling due 1st August, 1877, and 1st November, 1878, and to deposit all coupons unpaid previous to latter date, after which payment to be made in full as the coupons mature.

The said coupons to be deposited in trust in the Metropolitan National Bank, by the holders of the bonds, who shall receive a scrip certificate of such deposit; said scrip certificate to run until the maturity of the bonds, from which the coupons were detached, bearing interest at seven per cent. per annum, payable annually, and to be endorsed on the certificate when paid. Said scrip certificate shall recite the number of coupons deposited, the numbers of the bonds to which the coupons belong, that the said coupons are held in trust to be surrendered to the holder of the certificate on maturity of the bonds, or whenever there shall be any default in payment of the

interest on the certificates. Such deposit in no way to impair the liens on the portions of the road by which the respective bonds and coupons are secured.

1393 *Funded Debt Bonds.*

The holders of the said scrip certificates to have the option of funding the same into bonds of $500 or $1,000 each, with coupons at seven per cent., semi-annual, maturing in 1907, when the consolidated bonds mature; to be called Funded Debt Bonds. Said bonds to be numbered and arranged so that each class of scrip certificates can be apportioned to a specific series of numbers, and in case of default in the payment of the interest on said bonds, or of any default in the interest or principal of any of the aforesaid mortgage debt, the holders shall be entitled to their respective coupons, held in trust for the certificates on which the said funded bonds were issued. The issuing of the bonds in no way to impair the lien or mortgage securing the coupons so held in trust.

For the purpose of providing for the extinguishment of the said funded bonds and certificates of deposit, the Wabash Railway Company will set apart from its earnings, after the year 1882, annually the sum of $100,000, to be invested in the purchase and cancellation of the said scrip certificates, or of the funded bonds, at not exceeding the par value thereof; those pertaining to the first mortgages to be retired first, and second mortgages second, and consolidated mortgage last. The directors of the Wabash Railway Company, having in mind the fact that all the bonds cover only portions of the road, none being secured by the entire property, have endeavored to give due consideration to each class, and to treat each with the utmost liberality that the prospective earnings of the road will admit of, and at the same time keep it in a condition to enable it to earn sufficient revenue to accomplish the result proposed.

1394 *Board of Directors.*

James A. Roosevelt, President.

Solon Humphreys,	John W. Ellis,
Cyrus W. Field,	John T. Martin,
Morris K. Jesup,	Geo. I. Seney,
Henry Crawford,	W. E. Isham,
Elisha Coray,	H. A. V. Post,
John S. Kennedy,	E. H. R. Lyman.

Notice to Bondholders.

The following modification of the circular of January 24th has been found necessary:

The coupons of the Decatur and East St. Louis first mortgage, due August 1st, 1877, and the coupons of the Quincy and Toledo first mortgage, due May 1st, 1877, will be paid on the first of September next instead of the first of August, as heretofore announced.

The coupons of the Toledo and Wabash, Wabash and Western, and Great Western second mortgages, due May 1st, 1877, will be paid on the first of October next.

The quarterly coupons of the Toledo, Wabash and Western consolidated mortgage, due August 1st, 1877, will be paid on the first of November next.

As a condition of, and prior to these payments, the coupons in default with the others, as specified in the circular of January 24th must be deposited in trust in the Metropolitan National Bank as heretofore announced, the holder receiving scrip therefor, bearing a graduated interest at the rate of three per cent. in 1878, four per cent. in 1879, five per cent. in 1880, and six per cent. in 1881, and thereafter. The holders of the Toledo and Wabash, and the Wabash and Western bonds must also assent to an extension of the time of payment of the principal of these bonds on receiving additional coupons to 1893, the time of the maturity of the Great Western issue.

1395 Full information in regard to these modifications of the original funding plan, and as to the financial condition of the company, can be obtained of the committee of the Wabash Railway Company at No. 52 William street, room No. 10, where the coupons to be funded will be received and the scrip delivered.

J. A. ROOSEVELT,
President Wabash Railway Company.

New York, July 20th, 1877.

Wabash Railway Company,

NEW YORK, *July 18th*, 1877.

To the Mortgage Bondholders of the Wabash Railway Company:

On the 24th of January last, after consultation with a large number of bondholders, and a careful examination of the financial resources of the company, a plan of funding the overdue coupons of the various mortgages was prepared and announced. In accordance therewith, payment of the coupons due February 1st last, on $6,200,000 of the divisional first mortgages was commenced, and the holders of those bonds were required, as a condition of payment, to fund the coupons prior to that date in interest bearing certificates or bonds. The plan met with general approval, and under it bonds to the amount of $5,700,000, or about ninety-two per cent. of the total $6,200,000, have received the money for the February coupon.

During this period holders of first mortgage bonds to the amount of $500,000, who claimed that the funding plan of January 24th failed to give the older mortgages the priority to which they were entitled over the junior mortgages, declined to assent to the plan, and commenced foreclosure proceedings against the company. These suits were resisted and the court denied their application for a receiver.

1396 In accordance with the demand of junior bondholders and stockholders, the directors of the company, although confi-

dent of their ability to defend the suits successfully, felt it incumbent upon them to make an adjustment with the dissatisfied bondholders, and they accordingly effected a settlement under which the coupons have been funded.

It has consequently become necessary to modify the funding plan, so far as it applies to the junior mortgages, for the benefit and safety of which the foreclosure suits of first mortgage bondholders were removed.

The modification will be as follows:

The coupons due August 1, 1877, of the Decatur and East St. Louis first mortgage, and the coupons due May 1, 1877, of the Quincy and Toledo first mortgage, will be paid September 1st next instead of August 1st, as heretofore announced.

The coupon due May 1, 1877, of the Toledo and Wabash, Wabash and Western, and Great Western second mortgages, will be paid October 1st next instead of August 1st.

The quarterly coupon, due August 1, 1877, of the Toledo, Wabash and Western consolidated mortgage, will be paid November 1st next instead of August 1st.

The overdue coupons of these mortgages, those due November 1, 1877, of the second mortgages, and those of the consolidated, maturing between August 1st, 1877, and November 1st, 1878, to be funded into scrip-bearing interest as follows: For first year, 3 per cent.; for second year, 4 per cent.; third year, 5 per cent.; fourth year and thereafter, 6 per cent. per annum; in other respects the plan is, as stated by circular, January 4th, 1877, to remain unchanged.

In making these modifications, the directors have endeavored to consult the best interests of the bondholders, having in view their permanent safety and security, and at the same time trying to avoid future embarrassment. The payment of interest on the mortgages is provided for as nearly in the order of rank and priority as can be arranged. At the same time, earnest efforts are being made to
1397 increase the business and net income of the line, in order to insure regular coupon payment on the entire debt.

Holders of bonds designated in this circular are requested to present the coupons to be funded to the committee of the Wabash Railway Company, No. 52 William street, Room No. 10, where further information can be obtained.

The holders of the Toledo and Wabash and Wabash and Western second mortgages should present their bonds also, in order to assent to the extension of time on the principal of these mortgages, and to receive additional coupons to 1893, the date of maturity of the Great Western issue.

By order of the directors of the Wabash Railway Company.

O. D. ASHLEY,
For the Committee.

NOTE.—The holders of Scrip Certificates have the option of funding the same into bonds called Fund Debt Bonds. The amount of scrip authorized, issued, exchanged for Funded Debt Bonds and outstanding, is as follows:

Graduated Scrip, authorized		$1,957,865 00
Graduated Scrip, issued		$1,953,975 00
Graduated Scrip, exchanged for Funded Debt Bonds, Graduated		1,401,000 00
Outstanding		$552,975 50

Recapitulation.

Graduated Scrip outstanding	$552,975 50	
Funded Debt Bonds, graduated, issued and outstanding	1,401,000 00	
		$1,953,975 50
Seven per cent. Scrip authorized		1,060,535 00
Seven per cent. Scrip, issued		$1,058,233 99
Seven per cent. Scrip, exchanged for Funded Debt Bonds, seven per cent.	$565,500 00	
Seven per cent. Scrip redeemed	2,534 12	
		568,034 12
Outstanding		$490,199 87

1398 *Recapitulation.*

Seven per cent. Scrip outstanding	$490,199 87	
Seven per cent. Funded Debt Bonds issued and outstanding	565,500 00	
Seven per cent. Script redeemed	2,534 12	
		$1,058,233 99

EXHIBIT 53.

Exhibit 53 is a bond of the Wabash Company, of the issue known as funded debt bonds. See Exhibit 38.

Paragraph No. 25.

EXHIBIT 54.

Certificate of Deposit of Coupons.

Decatur & East St. Louis Railroad.

No. 275. $175.00.

First Mortgage Due August 1st, 1889.

Metropolitan National Bank.

NEW YORK, *August 1st*, 1877.

This is to certify that Charles A. Dewey has deposited in the Metropolitan National Bank, New York, the following coupons which have been detached from the first mortgage bonds of the Toledo and Illinois Railroad, viz.:

Belonging to Bonds Nos. 1,256.

1 Coupons, due Feb. 1, 1875.
1 " " Aug. 1, "
1 " " Feb. 1, 1876.
1 " " Aug. 1, "
1 " " Feb. 1, 1877.

1399 5 coupons of $35 each, amounting to one hundred and seventy-five dollars. Said coupons have been deposited and are to be held in trust by this bank until the maturity of said bonds, August 1st, 1889, and are then to be surrendered to the holder of this certificate on return of the same, or whenever there shall be any default in the payment of the interest on this certificate.

METROPOLITAN NATIONAL BANK, *Trustee*,
By G. J. McGOURKEY.

The Wabash Railway Company, a corporation of Indiana, will pay to the holder of this certificate at the Metropolitan National Bank, New York interest from September 1st, 1877, on one hundred and seventy-five dollars, being the principal of the above certificate at the rate of three per cent. payable September 1st, 1878; four per cent. September 1st, 1879; five per cent. September 1st, 1880, and six per cent. September 1st, 1881, and thereafter.

The holder of this certificate has the option of converting the same into funded debt bonds of the Wabash Railway Company, with semi-annual coupons, when presented in sums of $500 or $1,000.

It is agreed between this company and the holder of this certificate that no recourse shall be had for its payment to the individual liability of any stockholder of said company.

New York, August 1st, 1877.

WABASH RAILWAY COMPANY,
By J. A. ROOSEVELT, *President*.

On the back of the certificate is the following:

5.25 Interest paid to Sept. 1st, 1878. C. L. H.
7. Interest paid to Sept. 1st, 1879. C. L. H.
8.75 Interest paid to Sept. 1st, 1880. C. L. H.
10.50 Interest paid to Sept. 1st, 1881. C. L. H.

1400

10.50 Interest paid to Sept. 1st, 1882. C. L. H.
10.50 Interest paid to Sept. 1st, 1883. C. L. H.
10.50 Interest paid to Sept. 1st, 1884. H. C. Jr.
9.62 11 mos. interest paid to Aug. 1, 1885, under orders of Oct. 11 and 13, 1887, by John McNulta, receiver C.
5.25 Interest paid to Feb. 1st, 1886, per order John McNulta, receiver. P. R.

Exhibits 55 to 61, both inclusive, are contained in the Laws of the State of Illinois.

Paragraph No. 48.

EXHIBIT 74 (*a*).

Board of Directors, in Session.

TOLEDO, *October 6th*, 1863

The board of directors of the Toledo and Wabash Railway Company convened at the office of the company in the city of Toledo, October 6th, 1863, and no quorum being present, on motion it was resolved that this meeting adjourn to meet at the same place on Wednesday morning, the 7th day of October, at 8½ o'clock A. M.

The board convened at the office of the company this October 7th, pursuant to adjournment.

Present: Messrs. A. Boody, Wm. Kidd, I. H. Knox, R. Brackenridge, J. Spears, G. Cecil, W. Kent, W. Baker, W. Colburn and J. Ross.

The minutes of the last meeting were read and on motion approved.

1401 Mr. Spears offered the following, which was adopted:

Resolved, that holders of the first mortgage bonds of the Lake Erie, Wabash and St. Louis and the Toledo and Illinois R. R. Companies due 1st August, 1865, have the privilege of extending the date of maturity of said bonds to the 1st August, 1890, if presented at the office of this company in the city of New York by the 1st day of January, 1864, to have the extension endorsed thereon and the coupons for the extended period attached.

Resolved, that the resolutions of the executive committee adopted at their last meeting, Sept. 8th, 1863, in regard to closing the transfer books of this company and the sale of old iron be ratified and approved.

Adopted.

The board then adjourned.

J. N. DRUMMOND, *Secretary.*

1402 Paragraph No. 61.

First Mortgages.

	Amount mortgage.	Amount interest.	Interest to Feb. 1, 1889.	Total.
Tol. & Illinois	$900,000 00			$900,000 00
Coup. due Feb., 1887		$31,500 00	$3,780 00	35,280 00
" Aug., "		31,500 00	2,835 00	34,335 00
" Feb., 1888		31,500 00	1,890 00	33,390 00
" Aug., "		31,500 00	945 00	32,445 00
" Feb., 1889		31,500 00		31,500 00
	$900,000 00	$157,500 00	$9,450 00	$1,066,950 00
L. E., W. & St. L.	$2,500,000 00			$2,500,000 00
Coup. due Feb., 1887		$87,500 00	$10,500 00	98,000 00
" Aug., "		87,500 00	7,875 00	95,375 00
" Feb., 1888		87,500 00	5,250 00	92,750 00
" Aug., "		87,500 00	2,625 00	90,125 00
" Feb., 1889		87,500 00		87,500 00
	$2,500,000 00	$437,500 00	$26,250 00	$2,963,750 00
Tol. & Illinois 7% F. debt bonds	$72,000 00			$72,000 00
Coup. due Feb., 1887		$2,520 00	$302 40	2,822 40
" Aug., "		2,520 00	226 80	2,746 80
" Feb., 1888		2,520 00	151 20	2,671 20
" Aug., "		2,520 00	75 60	2,595 60
" Feb., "		2,520 00		2,520 00
	$72,000 00	$12,600 00	$756 00	$85,356 00
L. E., Wab. & St. L. 7 % F. debt bonds	$200,000 00			$200,000 00
Coup. due Feb., 1887		$7,000 00	$840 00	7,840 00
" Aug., "		7,000 00	630 00	7,630 00
" Feb., 1888		7,000 00	420 00	7,420 00
" Aug., "		7,000 00	210 00	7,210 00
" Feb., 1889		7,000 00		7,000 00
	$200,000 00	$35,000 00	$2,100 00	$237,100 00
Tol. & Illinois 7% scrip	$64,830 39			$64,830 39
Int. due Feb., 1887		$2,269 06	$272 29	2,541 35
" " 1888		4,538 13	272 29	4,810 42
" " 1889		4,538 13		4,538 13
	$64,830 39	$11,345 32	$544 58	$76,720 29
L. E., W. & St. L. 7 % scrip	$180,362 83			$180,362 83
Int. due Feb., 1887		$6,312 70	$757 52	7,070 22
" " 1888		12,625 40	757 52	13,382 92
" " 1889		12,625 40		12,625 40
	$180,362 83	$31,563 50	$1,515 04	$213,441 37

1403 *Recapitulation.*

First Mortgage Bonds, Funded Debt and Scrip.

(Except Detroit Division.)

	Amount.	Interest and interest upon interest to Feb. 1, 1889.	Total.
Toledo & Ill. Mortgage	$900,000 00	$166,950 00	$1,066,950 00
Funded Debt	72,000 00	13,356 00	85,356 00
Scrip	64,830 39	11,889 90	76,720 29
	$1,036,830 39	$192,195 90	$1,229,026 29
L. E., W. & St. L Mortgage	$2,500,000 00	$463,750 00	$2,963,750 00
Funded Debt	200,000 00	37,100 00	237,100 00
Scrip	180,362 83	33,078 54	213,441 37
	$2,880,362 83	$533,928 54	$3,414,291 37

Second Mortgages.

Including T., W. & W. Con. Con. and 7s. of 1879.

	Amount mortgage.	Amount interest.	Int. to Feb. 1, 1889.	Total.
Toledo & Wabash	$1,000,000 00			$1,000,000 00
Coup. due May, 1885		$35,000 00	$7,875 00	42,875 00
" Nov., "		35,000 00	6,825 00	41,825 00
" May, 1886		35,000 00	5,775 00	40,775 00
" Nov., "		35,000 00	4,725 00	39,725 00
" May, 1887		35,000 00	3,675 00	38,675 00
" Nov., "		35,000 00	2,625 00	37,625 00
" May, 1888		35,000 00	1,575 00	36,575 00
" Nov., "		35,000 00	525 00	35,525 00
Accrd. to Feb., 1889		17,500 00		17,500 00
	$1,000,000 00	$297,500 00	$33,600 00	$1,331,100 00
Wabash Western	$1,500,000 00			$1,500,000 00
Coup. due May, 1885		$52,500 00	$11,812 50	64,312 50
" Nov., "		52,500 00	10,237 50	62,737 50
" May, 1886		52,500 00	8,662 50	61,162 50
" Nov., "		52,500 00	7,087 50	59,587 50
" May, 1887		52,500 00	5,512 50	58,012 50
" Nov., "		52,500 00	3,937 50	56,437 50
" May, 1888		52,500 00	2,362 50	54,862 50
" Nov., "		52,500 00	787 50	53,287 50
Accrd. to Feb., 1889		26,250 00		26,250 00
	$1,500,000 00	$446,250 00	$50,400 00	$1,996,650 00

Second Mortgages—Continued.

	Amount mortgage.	Amount interest.	Int. to Feb. 1, 1889.	Total.
1404				
Wabash Western 6% F. Debt. Bds.	$164 500 00			$164,500 00
Coup. due Feb., 1885		$4,935 00	$1,184 40	6,119 40
" Aug., "		4,935 00	1,036 35	5,971 35
" Feb., 1886		4,935 00	888 30	5,823 30
" Aug., "		4,935 00	740 25	5,675 00
" Feb., 1887		4,935 00	592 20	5,527 20
" Aug., "		4,935 00	444 15	5,379 15
" Feb., 1888		4,935 00	296 10	5,231 10
" Aug., "		4,935 00	148 05	5,083 05
" Feb., 1889		4,935 00		4,935 00
	$164,500 00	$44,415 00	$5,329 80	$214,244 80
Tol. & Wabash 6% Scrip.	$70,052 00			$70,052 50
Int. due Oct., 1885		$4,203 15	$840 63	5,043 78
" " 1886		4,203 15	588 44	4,791 59
" " 1887		4,203 15	336 25	4,539 40
" " 1888		4,203 15	84 06	4,287 21
Acc'd to Feb., 1889		1,401 05		1,401 05
	$70,052 50	$18,213 65	$1,849 38	$90,115 53
Wabash West. 6% Scrip.	$97,853 00			$97,853 00
Int. due Oct., 1885		$5,871 18	$1,174 24	7,045 42
" " 1886		5,871 18	821 97	6,693 15
" " 1887		5,871 18	469 69	6,340 87
" " 1888		5,871 18	117 42	5,988 60
Acc'd to Feb., 1889		1,957 06		1,957 06
	$97,853 00	$25,441 78	$2,583 32	$125,878 10

Recapitulation.

Second Mortgage Bonds, Consolidated, Funded Debt, Scrip and 7s of 1879.

	Amount.	Int. & int. upon int. Feb. 1, '89.	Total.
Toledo & Wab. Mortgage.	$1,000,000 00	$331,100 00	$1,331,100 00
Funded Debt.	105,000 00	31,752 00	136,752 00
Scrip.	70,052 50	28,063 03	90,115 53
	$1,175,052 50	$382,915 03	$1,557,967 53
Wabash Western. Mortgage.	$1,500,000 00	$496,650 00	$1,996,650 00
Funded Debt.	164,500 00	49,744 80	214,244 80
Scrip.	97,853 00	23,025 10	125,878 10
	$1,762,353 00	$574,419 90	$2,336,772 90

1405 *Grand Totals.*

Toledo & Illinois.	First Mortgage.....	$1,229,026 29	
Lake Erie, W. & St. L.	do.	3,414,291 37	
Great Western.	do.	3,414,065 70	
Illinois & So. I.	do.	398,752 21	
Dec. & E. St. L.	do.	3,743,265 33	
Quincy & Tol.	do.	684,709 64	
Chicago Div.	do.	5,117,812 50	
Han. & Naples.	do.	599,458 33	
			18,601,381 37
Toledo & Wab.	Second Mortgage.....	1,557,967 53	
Wabash West'n.	do.	2,336,772 90	
Great West'n,	do	3,897,405 79	
Tol., Wab. & W.	Consolidated Mtge.....	4,311,489 19	
Wabash 7s, 1879.....		2,676,666 66	14,780,302 07
			$33,381,683 44

—— ——, *Dep.*

1406 *Plaintiff's and Cross-Petitioner's Exhibit B to the Bill of Exceptions.*

The Court of Common Pleas, Lucas County, Ohio.

THE STATE OF OHIO, *Lucas County:*

At a term of the above-named Court, begun and held before the Hon. David H. Commager, Hon. Reuben C. Lemmon, Hon. Isaac P. Pugsley, Presiding Judges, on the 24th day of September, A. D. 1888, among other proceedings had by and before said Court on the 31st day of December, A. D. 1888, being the 83rd day of said term, as appears by its Journal of that day, were the following, viz.:

James Compton, 19,484 *vs.* Mo. 151, The Toledo, Wabash & Western Railway Co. *et al.*

Now comes Israel M. Simon and presents his answer and cross-petition verified absolutely, and using the same as an affidavit upon the same, moves the Court to be made a party defendant in the above-entitled cause with leave to file his said answer and cross-petition which is submitted as aforesaid with the said motion, and to cause mesne process to be issued thereon, and the said motion having been heard and duly considered by the Court is by said Court now here overruled, and leave is not given to the said Simons to file the said answer and cross-petition to which said action of the Court in overruling the said motion, and in refusing leave to file said answer and cross petition, and in refusing to make the said Simons a party defendant to this cause, and to each and every other part thereof, the said Simons now here in open Court excepts.

On this 31st day of December, 1888, being the 83rd day of September Term, 1888, an order in said cause was made, an entry of which appears upon the Journal of said Court in the words and figures as follows, to wit:

1407 James Compton, 19,484 *vs.* Mo. 153, The Toledo, Wabash and Western Railway Co. *et al.*

This cause coming on to be heard on the motion of Defendant to redocket cause, and for leave to Isaac M. Simons, John B. Manning, William F. Redmond, Edward Popper and Edward H. Litchfield to file answer and cross-petition—the Court on consideration overrules the same—to all of which orders and rulings of the Court Simon and others except.

On the 31st day of December, 1888, being the 83rd day of September Term, 1888, an order in said cause was made, an entry of which appears upon the Journal of said Court in the words and figures as follows, to wit:

James Compton, 19,484, *vs.* Mo. 534, The Toledo, Wabash and Western Railway Company *et al.*

Now come William F. Redmond, John B. Manning, David Kohn, William M. Kohn and Edward Popper, partners under the firm name of Kohn, Popper and Co.; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles E. Thorne, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins and Co.; Eugene E. Bishop, Frederick Hubbard, William G. Creamer, George B. Mead; George B. Mead and Walter M. Aikinson, executors, and Eliza Mead, executrix of H. R. Mead, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfet, James Walker, Vassar Brothers Hospital, a corporation of the State of New York; Josephine L. Cadmus, Preston Wing and Mary L. Oliviera, and present their answer and cross-petition verified absolutely and using the same as an affidavit upon the same move, the Court to be made parties defendants in the above-entitled cause with leave to file their said answer and cross-petition which is submitted as aforesaid with the said motion, and to cause mesne process to be issued thereon, and the said motion having been heard and duly considered by the Court is by said Court now here overruled, and leave is not given to the said William F. Redmond, John B. Manning

1408 and others as aforesaid to file the said answer and cross-petition, to which said action of the said Court in overruling the said motion and in refusing leave to file the said answer and cross petition, and in refusing to make the said William F. Redmond, John B. Manning and others as aforesaid parties defendants in this cause, and to each and every part thereof they, the said William F. Redmond, John B. Manning and others, named as above now here in open Court except.

In testimony whereof I have hereunto subscribed my name and affixed the Seal of said Court at Toledo, Ohio, this 17th day of February, A. D. 1896.

[SEAL.]

L. E. CLARK, *Clerk*,
By J. C. TENNEY, *Deputy*.

Plaintiff and Cross-Petitioner's Exhibit C to Bill of Exceptions.

TOLEDO & WABASH R. R. Co.
vs.
R. C. DANIELS ET AL.

Record of the proceedings had by and before the Probate Court of Lucas County, State of Ohio, in relation to the appropriation of Real Estate by the Toledo and Wabash Rail Road Company, against Russell C. Daniels, George S. Douglas, Samuel R. Daniels and Asa W. Douglas, and unknown owners, begun on the 10th day of June, A. D. 1863, on which day came John R. Osborn, Atty. for said Toledo & Wabash Rail Way Company, and filed in said Court specifications and discriptions of the lands and premises situate in said County of Lucas, by said Company, designed to be
1409 appropriated for the use of said Company, and it was ordered by the Court that the hearing of said application be set for the 11th day of July, and that notice as required by statute be given the parties defendant.

The statement of appropriation of lands in the foregoing application is in the words and figures following, to wit:

To the Hon. the Probate Judge, within and for the County of Lucas and State of Ohio:

The Toledo and Wabash Railway Company, a corporation existing within the State of Ohio, for the purpose of constructing and maintaining a Rail Road, and operating the same, and duly organized as such Company under the laws of the State of Ohio, passed May 1", 1852, acts amendatory thereto, and authorized to make appropriations of land for right of way, and for necessary depots and side "tracts," makes this statement and represents:

That Russell C. Daniels, of the city of Toledo, and George S. Douglass, Samuel R. Daniels and Asa W. Douglass, all of the State of New York, and sundry other persons, whose names and residences are unknown to said Company, are the owners in fee simple, or claim some interest, title or equity in the lands and property which is described as follows, that is to say:

A certain tract of land lying and being within the township of Port Lawrence and County of Lucas aforesaid, and within the limits of the City of Toledo, and a part of the peninsula or island in the Maumee river, known as the middle ground, being more particularly described and bounded as follows, that is to say: a certain part thereof lying on the easterly side of the Cleveland and Toledo Rail Road—the boundary thereof commencing at the point on the easterly line of the said Cleveland and Toledo Rail Road track, where the same intersects the southerly line of land now in the possession of & use of said Toledo & Wabash Railway Company—thence easterly along said southern boundary line about five hundred & eighty-seven feet to the angle made by the
1410 same with the western boundary line of said Toledo & Wabash Railway Co. land, two hundred and fifteen feet;

thence on a line parallel with the easterly line of Grassy Point, and the same course as the southerly line of said company lands, if the same were extended along the water line of the river dockage from what is known as the oak-tree line, one hundred and fifty feet; thence westerly on a line parallel or nearly parallel with the first-named course about five hundred and eighty-eight feet, so as to strike the Cleveland and Toledo track, three hundred feet from the place of beginning; thence along said Cleveland and Toledo track to the place of beginning, containing four 38/100 acres, and also on the westerly side of said Cleveland and Toledo Rail Road, beginning at the point where the westerly line thereof intersects the southerly line of the Toledo & Wabash Railway Company land and track; thence westerly along said southerly line of the Toledo and Wabash Railway Co. land & track eight hundred feet; thence southerly in such a course as at a distance of seven hundred and sixty-five feet, the line shall be two hundred feet south of the aforesaid south line of the Toledo and Wabash Railway Co. rail, land and track; thence southerly about two hundred and eighty feet on such course, so that the line shall strike the Cleveland & Toledo Rail Road track four hundred & fifty feet from the place of beginning; thence along the said Cleveland and Toledo Rail Road track to the place of beginning, containing two and 25/100 acres of land, all of which will appear by a map of said land which is hereto attached, and marked "A." The whole containing six 63/100 acres.

The said Toledo and Wabash Railway Company further represent that it has constructed and is now operating a line of Rail Road from the State of Indiana to the City of Toledo, which is the western terminus thereof. That said Company has erected freight houses and depots at the said terminus for the business of said road, and for the purpose of using its road, and reaching said freight houses and depots with its cars, it has become,
1411 and is necessary, to build one or more side tracks, and connect from the Miami line of the track and route of its road to said freight house and depot.

That the land above described lies adjoining the main track of the road of said Company, that the same is necessary for the purpose of passing the cars of the company to the freight house and depots erected by said company, and that the company intends to construct thereon a side track, or side tracks, and switches, through the whole length thereof, from its main line or track of said road to its freight house and depots.

The said Toledo and Wabash Railway Company further represents that it has been willing and is ready to purchase of the owners the land aforesaid and the right of way for said side tracks across and through the same as above set forth, but that it is unable to agree with the owners above named as to the amount of the compensation to be paid therefor.

That the property which is hereinbefore described by metes and bounds is the specific property, and lying in the County of Lucas, which the company seeks to appropriate; that the work to be constructed thereon is a side track or tracks leading from the main

road of the company to its freight house at the terminus, and that the names which are hereinbefore described are the owners of said parcels or tracts of land; and other persons unknown to this company pretended to have some title, interest & equity therein, but the nature of such claim or pretense is also unknown to the Company.

Wherefore, the Toledo and Wabash Railway Company ask that such proceedings be had by this honorable Court for the appropriation to them of the lands described in this statement, and particularly bounded & described as above, and to determine the amount of the compensation which shall be paid therefor to the parties interested therein as owners or otherwise as may be by the statute in such cases made and provided.

By JOHN R. OSBORN,
Att'y for the Toledo & Wabash Railway Company.

1412 Probate Court, Lucas County, Ohio.

THE TOLEDO AND WABASH RAILWAY COMPANY
vs.
RUSSELL C. DANIELS ET AL.

Proceedings to Appropriate Property and Determine Compensation to be Paid to the Owners.

The Probate Judge will issue a service for a Jury to appear and determine the compensation to be paid to the owners named in the foregoing statement for the right of way in the property which is particularly described and for the use thereof, as the same is set forth in the statement of the company herewith filed, and give proper notice to the Clerk and sheriff of said county. Also, with said service, issue notice to said Russell C. Daniels of the time when said Jury will meet at the office of the Judge of Probate Court.

JOHN R. OSBORN,
Att'y for Toledo & Wabash Rail Road Co.

Stamp five cents.
Toledo, June 8th, 1863.

STATE OF OHIO, *Lucas County, ss:*

John R. Osborn makes oath that he is the attorney of the Toledo and Wabash Railway Company; that said company herewith files its statement seeking to appropriate certain property lying in said county and particularly set forth and described therein; that Russell C. Daniels, George S. Douglas, — Daniels and Asa W. Douglas,
1413 of whom Russell C. Daniels resides in Toledo, and the others in the state of New York are the owners or claim to have the title & interest to the property which is described in said statement.

Affiant further states that he is informed and believes that other parties have or pretend to have some kind of claim to the same land; that he has made diligent search for the same among the Records of said county and elsewhere, but that said company does not know the names of said owners or claimants, nor the character of the title or interest claimed or owned by them.

JOHN R. OSBORN.

Sworn to and subscribed before me this 8th day of June, 1863.

F. A. JONES,
Probate Judge.

And afterwards, to wit, on the 8th day of July, 1863, a notice was issued to the Clerk and Sheriff of Lucas Co., in the words and figures following:

STATE OF OHIO, *Lucas County, ss:*

To the Sheriff N. W. Landis and P. T. Clark, Clerk of said County:

You are hereby notified that the Toledo & Wabash Railway Company filed a statement in the Probate Court on the 10th day of June, 1863, describing property of Russell C. Daniels *et al.*, which they wish to appropriate. You are therefore directed, within one day after service of this notice, to proceed to select from the names returned to serve as Jurors a Jury of twelve men in the same manner that Jurors are selected for the trial of any cause in the Court of Common Pleas for the purpose of estimating the compensation the owners shall be entitled to by reason of such appropriation.

1414 And the said clerk is hereby directed to make immediate return of the Jurors so drawn to the Probate Judge of said County.

Witness my hand and official seal this 8" day of July, A. D. 1863.

[SEAL.]

F. A. JONES,
Probate Judge.

On the back of said notice was the following indorsement:

We, the undersigned, hereby acknowledge service of the within notice by copy this 8th day of July, A. D. 1863.

PELEG T. CLARK, *I. C. P.*
N. M. LANDIS,
Sheriff, Lucas Co., Ohio.

And on the same day was returned to the Probate Court the following list of Jurors:

In pursuance of a notice this day served on me by the Probate Judge, the Sheriff and myself proceeded to draw a Jury according to law to try the case of the Toledo & Wabash Railway Company *vs.* Russell C. Daniels *et al.*

The following is a list of the names drawn:
Benjamin Joy, Sylvania.
Wm. M. White, "
Edward Pratt, Waynesfield.
H. H. Forsyth, "
Joel M. Kelsey, Washington.
S. B. Scott, Port Lawrence.
Geo. Stebbins, " "
Michael Hannon, " "
Thomas Carr, " "

1415

David B. Scott, Port Lawrence.
C. A. Rowsey " "
Sewell Whittlesey " "

PELEG T. CLARK, *Clerk,*
Per J. W. CLARK, *Dept.*

Toledo, July 8", 1863.

And on the same day the following service was issued to the Sheriff of said County:

STATE OF OHIO, *Lucas County:*

To the Sheriff of said County, Greeting:

We command you that, without delay, you summons Benjamin Joy, of Sylvania, Tp.; William M. White, of Sylvania, Tp.; Edward Pratt and H. H. Forsyth, of Waynesfield, Tp.; Joel W. Kelsey, of Washington, Tp., and S. B. Scott, Geo. Stebbins, Michael Hannon, Thomas Carr, David B. Scott, C. A. Rowsey and Sewell Whittlesey, of Port Lawrence, Tp., to be and appear before the Probate Court of said County, at the Court House, in Toledo, on the 11th day of July, A. D. 1863, at 9 o'clock A. M., to serve as Jurors, in the matter of the Toledo-Wabash Railway Compensation against Russell C. Daniels *et al.*, in the estimating of compensation to the defendants for property appropriated by said Company.

And, *now*, you shall execute this writ, make, appear, to this Court on or before the 11th day of July, at 9 o'clock A. M., A. D. 1863.

And have you then and there this writ.

Witness my hand and official seal this 8th day of July, A. D. 1863.

[SEAL.]

F. A. JONES,
Probate Judge.

1416 On the back of the foregoing writ was the following endorsement: Served this writ by "reading" to each of the within-named Jurors.

Toledo, July 11th, 1863.
Fees, $4.00.

N. M. LANDIS, *Sheriff.*

And on the same 8" day of July, 1863, was issued the following notice to Russell C. Daniels:

STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of said County, Greeting:

You are hereby commanded to notify Russell C. Daniels, of the City of Toledo, that on the 11th day of July, A. D. 1863, at 9 o'clock A. M., a Jury will meet at the office of the Probate Judge, of said County, for the purpose of estimating the compensation to owners of property which the Toledo & Wabash Railroad Company seek to appropriate—a statement and description of the property sought to be appropriated having been filed in the office of said Court as required by law.

You will make due service & return of this notice on or before the 11th day of July aforesaid.

Witness my hand and official seal this 8" day of July, A. D. 1863.

[SEAL.] F. A. JONES,
Probate Judge.

And, afterwards, on the 10" day of July, said notice was returned endorsed as follows:

Service accepted July 9", 1863. M. R. & R. Waite, Pr. R. C. Daniels.

Service accepted on the within writ by M. R. & R. Waite, attorney- for defendant. N. M. Landis, Sheriff. By M. C. O'Connor, Dept.

Service, .35; Lau, .10; Ret., 10. .55. July 10", 1863.

1417 And, afterwards, on the 11" day of July, A. D. 1863, came the plaintiffs, by their attorney, John R. Osborn, and filed in Court the proof of notice to non-residents in the words and figures following:

Advertisement.

Russell C. Daniels, of Toledo; George S. Douglas, Samuel R. Daniels and Asa W. Douglas, of the State of New York, and all other claimants to the property and lands hereinafter described, the same being unknown, will take notice that the Toledo & Wabash Railway Company, a corporation existing within the State of Ohio, and having power to appropriate property for its road, side track and depot & other purposes, did, on the 10" day of June, 1863, file in the office of the Probate Judge, of the County of Lucas and State of Ohio, a statement setting forth that said company seeks to appropriate certain parcels of land therein described for a side track and switches from its main road to its freight depot, and that the following is a description of the property sought to be appropriated thereby, viz.:

A certain tract of land lying and being within the township of Port Lawrence and County of Lucas aforesaid, and within its

limits of the City of Toledo, and a part of the peninsula, or island in the Maumee river, known as the middle ground, more particularly described and bounded as follows, that is to say: a certain part thereof lying on the easterly side of the Cleveland & Toledo Rail Road, the boundary thereof commencing at the point on the easterly line of the Cleveland and Toledo Railroad track where the same intersects the southerly line of land now in the possession and use of said Toledo and Wabash Railroad Company; thence easterly along said southern boundary line five hundred & eighty-seven feet to the angle made by the same, with the western boundary line of said Toledo and Wabash Railroad Co. lands, two hundred and fifteen feet; thence on a line parallel with the southerly line of
Grassy Point and the same "cause" as the southerly line of
1418 said company's lands, if the same were extended along the
water line of the river dockage, from what is known as the oak-tree line, one hundred and fifty feet; thence westerly on a line parallel, or nearly parallel, with the first-named "cause," about five hundred and eighty-eight feet, so as to strike the Cleveland and Toledo track three hundred feet from the place of beginning; thence along the Cleveland & Toledo track to the place of beginning, containing four and 38/100 acres.

And also on the westerly — of the Cleveland & Toledo Railroad, beginning at the point where the westerly line thereof intersects the southerly line of the Toledo and Wabash Railway Co.'s land and track; thence westerly along said southerly line of the Toledo and Wabash Railway land and track, eight hundred feet; thence southwesterly on such course as at the distance of seven hundred and sixty-five feet, the line shall be two hundred feet south of the aforesaid south line of the Toledo and Wabash Railway Co.'s land and track; thence southerly about two hundred & eighty feet, on such course so that the line shall strike the Cleveland and Toledo Railroad track four hundred and fifty feet from the place of beginning; thence along said Cleveland and Toledo Railroad track to the place of beginning, containing two and 25/100 acres of land, the whole containing six and 63/100 acres.

The persons above named and unknown owners will further take notice that a Jury will be summoned to meet at the office of the Probate Judge in Lucas County on Saturday, the 11th day of July next, at 9 o'clock A. M., to determine the amount of compensation to be paid by the said Toledo and Wabash Railway Company for the land which is above described and for the right of way through the same for the side track and switches to be constructed thereon and through the same.

June 8", 1863.

JOHN R. OSBORN,
Atty. for the Toledo and Wabash Railway Co.

1419 STATE OF OHIO, *Lucas County, ss:*

I, R. H. Waggoner, Clerk of the "Toledo Blade," a newspaper printed in Toledo, in the County aforesaid, do solemnly swear that

the annexed advertisement was published in said newspaper on the 11th day of June, A. D. 1863. And in the papers for 4 weeks successively commencing with that date.

R. H. WAGGONER.

Sworn to and subscribed before me this 20th day of July A. D. 1863.

A. W. GLEASON,
Notary Public.

Printers' Fees	$10.00
Affidavit & Stamp	.30
	$10.30

And afterwards, on the same 11th day of July, A. D. 1863, came the defendants, by their attorneys, and the said Russell C. Daniels filed in writing his notice to dismiss the proceedings herein, which said notice is in the words and figures following:

TOLEDO AND WABASH RAILWAY CO.
vs.
RUSSELL C. DANIELS ET AL.

And now comes the said Russell C. Daniels and moves the court to dismiss the proceedings in this cause for the reason that, by the showing of the Toledo and Wabash Railway Company, it has no power or authority under the laws of the State of Ohio to
1420 appropriate said property to its use, in the manner and for the purposes in its statement of application mentioned.

M. R. & R. WAITE,
Att'ys for Daniels.

Which said motion the Court overruled, and the said Daniels excepted to the said rulings of the Court.

And thereupon came the following named Jurors, who were summoned by the sheriff, viz.: Benj. Joy, William M. White, Edward Pratt, H. H. Forsyth, S. B. Scott, Geo. Stebbins, Michael Hannon, Thomas Carr, David B. Scott, C. A. Rowsey; and Joel Kelsey and Sewell Whittlesey failed to attend. A. B. Waite and Cyrus H. Coy were called by the Sheriff as talesmen in the place of said absentees.

And the Jury being examined as to the interest of any one of them, in said Toledo and Wabash Railroad Company, and none of them appearing to have any interest therein, in any manner whatever, they were thereupon sworn according to the statute in such case made and provided.

And thereupon on motion, and by consent it was ordered that the Jury proceed on the 21st day of July inst. to make their assessment herein, to which time the proceedings are continued.

And afterwards on the 21st day of July, A. D. 1863, came the said defendant Russell C. Daniels, by his attorney, M. R. Waite, and filed an answer in the words & Figures following:

THE TOLEDO & WABASH RAILWAY COMPANY
vs.
RUSSELL C. DANIELS ET AL.

The defendant Russell C. Daniels for answer to the demand of the Toledo and Wabash Railway Company says that said Com-
1421 pany ought not to be permitted to make said appropriation, because he says that heretofore, to wit, on the — day of ——, A. D. 185-, said company solicited in due form of law the land for its depot in said city of Toledo and the approaches thereto, and in pursuance of the powers granted to it, by its charter, proceeded to appropriate and condemn, the same being the private property of the respondent and others; by proceedings for that purpose instituted and carried on in this Honorable Court, as by the records thereof will appear; and, that since that appropriation and condemnation said company has located and constructed on said lands so appropriated and condemned, its buildings for depot purposes, and freight houses, and track to approach the same; and so this respondent says that the power of said Company to condemn and appropriate the private property of individuals for the purposes in said statement of appropriation mentioned is exhausted.

M. R. & R. WAITE,
Att'ys for Daniels.

And upon the same day, and at the same time was the reply of the said Railway company, by R. Osborne, Atty. for said Company, said reply is in the words and figures following:

THE TOLEDO & WABASH RAILWAY COMPANY
vs.
RUSSELL C. DANIELS & Others.

The Toledo & Wabash Railway Company, for reply to the answer of said Daniels, says: That the appropriation of land heretofore
1422 made, by said Company, as set forth in the same answer, was made long before said road had been put into operation at its terminus in Toledo.

That since said appropriation, the business of said road, at the aforesaid terminus, has largely increased; and to such an extent as was not, and could not have been expected at the time of said appropriation.

That by reason of such increase of business it has become necessary to erect freight houses, and make other works, on said depot grounds at such points that the same cannot be reached from its main track, by side tracks, switches and turn outs to be built on the said land so appropriated and that in order to occupy and use the said freight houses, and provide for the increase and increasing

business of said road, at the aforesaid terminus & to reach the same with the cars of the company, from its main track and line of road, it is necessary to build and use the said tracks and switches which are proposed upon the land sought to be appropriated in these proceedings, and that the lands for said approaches, nor for any approach to said freight house, have ever been appropriated by said company.

By J. R. OSBORNE,
Att'y for T. & W. R. W. Co.

And afterwards, on the 21st day of July, A. D. 1863, came the parties, and said Jurors, and, upon motion of the Attorney for said Toledo and Wabash Railway Company, the following writ was issued to the Sheriff of said County:

STATE OF OHIO, *Lucas County, ss:*

To the Sheriff of Lucas County:

You are hereby commanded to conduct the twelve Jurors named in the "pannel" to this writ annexed to view the property or
1423 premises subject to be appropriated by the Toledo and Wabash Railway and owned by Russell C. Daniels *et al.*, on the 21st day of July, A. D. 1863, then and there to view the premises or property aforesaid, in the presence of D. A. Collins, on the part of the corporation aforesaid, and Russell C. Daniels, on the part of the owner & owners, appointed by this court, and you shall make return of the manner you have executed this writ to this Court on the 21st day of July, A. D. 1863, and have you then and there this writ.

Witness my hand and official seal this 21st day of July, A. D. 1863.

[SEAL.]

F. A. JONES,
Probate Judge.

On the back of the foregoing writ was made the following return, which was returned & filed in Court on the 21st July, 1863.

According to the command of this writ, I conducted the Jury "empannelled" in this case to the property sought to be appropriated, accompanied by the within-named D. A. Collins, Russell C. Daniels, and the said Jury made the view of said property according to the command of this writ.

N. M. LANDIS, *Sheriff.*

Service	$2.00
Travel	.30
Ret.	.10
	$2.40

And on the same day, and before the Jury returned to view the premises, the Court delivered to said Sheriff a description of each of said parcels of land and property sought to be appropriated by said

company, as filed in the statute in said court by said Railway Company.

1424 And the Jury having heard the testimony and proofs adduced before them and arguments of counsel, returned their verdict, which was as follows:

Probate Court, Lucas Co., O.

TOLEDO & WABASH RAILWAY CO.
vs.
RUSSELL C. DANIELS and Others.

The Jury find the amount of compensation to be paid, and which is due to Russell C. Daniels, Samuel R. Daniels, George S. Douglas and Asa W. Douglas and other owners by the Toledo and Wabash Railway Company for the appropriation of the tract of land first described in the instrument and statements of appropriation, containing four 38/100 acres of land, is and shall be thirteen hundred and fourteen dollars ($1,314), which is in full of all damage accruing to them by the appropriation of said tract of land. And the amount of compensation to be paid and is due to the same parties for the land secondly above described in said instrument and statement of appropriation, containing two 25/100 acres, is and shall be two hundred and twenty-five dollars ($225), the same being in full of all damage to the said parties by reason of the appropriation thereof, making on the whole for the compensation due, and damages accruing to said parties by reason of said appropriation, the sum of fifteen hundred and thirty-nine dollars ($1,539). And that the
1425 remaining part of the property of said parties is no less valuable on account of said appropriation.

Toledo, July 22d, 1863.

SAMUEL B. SCOTT, *Foreman.*
C. H. COY.
H. H. FORSYTH.
GEO. STEBBINS.
M. HANNON.
WILLIAM M. WHITE.
A. B. WAITE.
THOMAS CARR.
EDWARD PRATT.
C. A. ROWSEY.
BENJAMIN JOY.
D. B. SCOTT.

Whereupon the said Russell C. Daniels, by his attys. M. R. & R. Waite, filed his notice in writing, in arrest of judgment. Said notice was in the words and figures following:

TOLEDO & WABASH RAILWAY CO.
vs.
RUSSELL C. DANIELS ET AL.

And now comes the said Russell C. Daniels and moves the Court to arrest the judgment in this proceeding, for the reason that by the showing of said Toledo and Wabash Railway Company itself, it has no power or authority under the laws of this state to make the appropriation of the lands in said proceedings and statement of appropriation mentioned.

M. R. & R. WAITE,
Att'ys for Daniels.

1426 Which motion, upon consideration, the Court overruled, and the said Russell C. Daniels excepted to the ruling of the Court therein.

Thereupon, the Court being satisfied that said verdict of the Jury is in all respects in conformity with law, the Court does confirm the same, and does order and adjudge that the Toledo & Wabash Railway Company shall pay into Court the above-named sum of fifteen hundred and thirty-nine ($1,539) dollars, together with the costs of this proceeding, and upon the payment of the said sum, so found due and ordered to be paid, shall be entitled to hold the two pieces of and parcels of land, and real estate which are set forth in the statement which is herein filed.

And afterwards, on the 28th day of July, A. D. 1863, said Toledo and Wabash Railway Company having paid into the Court the full sum of fifteen hundred and thirty-nine dollars ($1,539), being the amount of the verdict of the Jury aforesaid, and the further sum of —— dollars ($——) being the costs of this proceedings, the court does therefore order, adjudge and decree that the Toledo and Wabash Railway Company have and hold the premises which are described as follows:

A certain tract of land lying and being within the Township of Port Lawrence and County of Lucas aforesaid and within the limits of the City of Toledo and a part of the peninsula or island in the Maumee river known as the middle ground, being more particularly described and bounded as follows, that is to say:

A certain part thereof lying on the easterly side of the Cleveland and Toledo Railroad, the boundary line thereof commencing at the point on the easterly line of the said Cleveland and Toledo Rail Road track where the same intersects the southerly line of land now in the possession and use of said Toledo and Wabash Company; thence easterly along said southern boundary line about five hundred and eight-seven feet to the angle made by the same with the western boundary line of said Toledo and Wabash Railway Co. lands; thence southerly and with said Toledo and Wabash Railway Co.
1427 land Two hundred and fifteen feet; thence on a line parallel with the southerly line of Grassy Point and the same course as the southerly line of said company's land if the same were extended along the water line of the river dockage from what is known as the oak tree line, one thousand and fifty feet; thence westerly on a

line parallel, or nearly parallel, with the first-named course about five hundred and eighty-eight feet, so far as to strike the Cleveland and Toledo track three hundred feet from the place of beginning; thence along said Cleveland and Toledo track to the place of beginning, containing four 38/100 acres, and also on the westerly side of said Cleveland and Toledo Railroad, beginning at the point where the westerly line thereof intersects the southerly line of the Toledo and Wabash Railway Company's land and track; thence westerly along said southerly line of the Toledo and Wabash Railway Co. land and track, eight hundred feet, thence southerly, on such a course as at the distance of seven hundred and sixty-five feet the line shall be two hundred feet south of the aforesaid south line of the Toledo & Wabash Railway Co. land and track, thence southerly about two hundred and eighty feet on such course, so that the line shall strike the Cleveland & Toledo Railroad track four hundred and fifty feet from the place of beginning, thence along said Cleveland & Toledo Railroad track to the place of beginning, containing two and 25/100 acres of land, all of which will appear by a map of said land, which is hereto attached and marked "A." The whole containing 63/100 acres of land. For the uses and purposes which are set forth in their statement and instrument of appropairtion above described and that they are entitled to the immediate possession of the same.

1428 THE TOLEDO AND WABASH RAILWAY CO.
vs.
RUSSELL C. DANIELS, GEORGE S. DOUGLASS, SAMUEL R. DANIELS, ASA W. DOUGLASS.

Proceedings for Appropriation of Property Before F. A. Jones, Probate Judge.

TOLEDO, *May* 16, 1866.

It is hereby agreed between the parties to this proceeding, in consideration of the payment of the foregoing named damages returned by the Jury, to wit, $1,539.00, which is this day received of F. A. Jones, Probate Judge Lucas Co., that the Judgment of the said Probate Judge be, and the same is hereby, affirmed and all errors in law or fact in said proceeding are declared to be waived, and the plaintiff entitled to the possession of the premises.

R. C. DANIELS.
S. R. DANIELS.
A. W. DOUGLAS,
By R. C. DANIEL.

THE TOLEDO & WABASH R. W. CO.
By J. R. OSBORN, *Att'y.*

1429 *Certificate.*

UNITED STATES OF AMERICA.

STATE OF OHIO, *Lucas County, ss:*

I, Irwin I. Millard, Clerk of the Probate Court of said County, and custodian of its Seal, the said Court being by the Constitution of Ohio a Court of Record, do hereby certify that the foregoing and attached papers are correctly copied from the original records of the proceedings and documents now in my possession, custody and control; that I have carefully compared said papers with said original records, and that said papers are a true, full and correct transcript of the said records, and the whole thereof of the several documents and proceedings referred to in said transcript.

In witness whereof, I do hereunto sign my name, and affix the seal of said Probate Court, at my office in said County, on this 23rd day of January, A. D. 1894.

[SEAL.] IRWIN I. MILLARD,
Clerk of the Probate Court of said County.

THE STATE — OHIO, *Lucas County, ss:*

I, I. I. Millard, Probate Judge of the County of Lucas and State of Ohio, and sole and Presiding Judge of the Probate Court of said County, do hereby certify that Irwin I. Millard, whose signature appears to the foregoing exemplification and attestation, is Clerk of the Probate Court of said County, and has the custody of the Records and Files of said Court, and that the said attestation made by him is
in due form of law, and by the proper officer; and that the
1430 seal thereto attached is the seal of said Probate Court, and that his signature to said Certificate is genuine.

In witness whereof, I have hereunto affixed my name and the seal of my office, at the City of Toledo, in said County, this 23rd day of January, A. D. 1894.

[L. S.] IRWIN I. MILLARD,
Probate Judge.

Plaintiffs' and Cross-Petitioners' Exhibits D and E to the Bill of Exceptions.

Lake Shore & Mich. Sou. R. R. Co. to The Toledo and Wabash R. W. Co.

This indenture made this 9th day of December, A. D. 1859, by and between The Michigan Southern and Northern Indiana Railroad Company, of the first part, and the Toledo and Wabash Railway Company, of the second part: Witnesseth, that, whereas, the party of the first part claims to have procured title to certain lands and privileges, on the middle ground so called, in the City of Toledo

and State of Ohio, by appropriation, under process of law and otherwise, and have established their depot thereon, and have secured or are about to secure to the Cleveland and Toledo Railroad Company certain privileges and rights thereon, in anticipation of which, the said last-named Company have taken possession of parts of said grounds and erected buildings and laid tracks thereon. And, whereas, the party of the second part are desirous of having secured to them suitable depot accommodations on parts of the same grounds, and have erected buildings and laid tracks thereon. Now, therefore, be it known that the party of the first part, in consideration of the premises, and of fifty-four thousand dollars paid, or agreed to be
1431 paid, by the party of the second part and of their other covenants and agreements hereinafter contained, do, by these presents, lease and demise to the said party of the second part all the lands and privileges described as follows, viz.: The right and privilege of using for all the purposes of their passenger business, in common with the party of the first part, and the said Cleveland and Toledo Railroad Company, and such other Railroad Companies as the party of the first part shall admit to the premises, the lower story of the passenger house erected upon the premises, and the land on which it stands, with the water closets in and appurtenant to the same, and all the approaches thereto, with the furniture now in said lower story, with the exclusive use of one-half of the ticket office now occupied by the party of the second part, and the said Cleveland and Toledo Railroad Company excepting and reserving herefrom the saloon and the barber shops, the lower rooms in the west tower and the office occupied by the tenant and keeper of the upper stories of said house; the said keeper or any other party, who may occupy said upper stories, to have the general supervision of said lower story, and its appurtenances, excepting the said ticket office, and to use and occupy the same jointly with the other parties, so far as may be necessary for such supervision, and for carrying on the business of a hotel and dining-room in the stories above, it being understood that the dining-room in the second story is to be occupied and used for the benefit of the passengers of all the companies using said lower story, and for the guests of the hotel and transient visitors, for the benefit of said keeper. But the part so to be used as a hotel may be discontinued as such and the dining-room maintained for the benefit of passengers and transient visitors. And the person providing the same shall have such supervision and control of the lower story as is herein provided for the keeper of the hotel. And reserving, also, to the party of the first part, the exclusive use of their own ticket office, with the right to have, in said lower story, ticket offices for
1432 the exclusive use of any other Companies which may be admitted to the said depot premises by them, the same not to interfere with or incommode the ticket office of the party of the second part. Also, the right to have left open for common use the area northerly of the passenger house, bounded easterly by the east line of the passenger car shed extended northerly; northerly by a line parallel to and nine feet south of the south side of the general Office building of the party of the first part; westerly by the easterly

dockage line of the bayou, and southerly by the north line of said car shed and the same extended westerly; excepting and reserving the said passenger house, the storehouse adjoining the northeast corner of the car shed, and the lands occupied by the coal house and yard attached—being a lot of sixty feet front on the bayou and seventy-five feet deep adjoining the bayou drawbridge platform—with the liberty to remove said storehouse westerly to or near said dockage line and occupy a space southerly of it of the same size for a wood and coal yard. Also, the free and common use of the bridge across said bayou. The said area to remain open as a carriage way and for walks for the convenience of the parties hereto and the occupants of the passenger house and such other Companies as may be admitted to the depot premises by the party of the first part, provided that the said area and bayou drawbridge shall not be considered as dedicated to the public use, but shall remain under the joint control of the parties using said depot premises, and be subject to such rules and police regulations as shall be established by them from time to time. Also, a tract of land lying between the car shed and the bayou, bounded southerly by a line corresponding with the south end of the car shed and extending northerly one hundred and fifty feet, on which to erect a one-story City freight house of brick, with metal roof covering, and not exceeding forty feet wide, the same to be used for local freight purposes only, and to be placed not less than twenty-
two feet from the car shed, and leaving not less than forty
1433 feet between said freight house and the dockage line of the
bayou for an unincumbered carriage way. Also, the westerly two-fifths in width, of the westerly half of said car-shed, through its entire length, as now erected, extending from the water-closets to the south end of the shed—the same not to be used for freight purposes—with the right to two tracks through the same, and the right to alter or relay said tracks, so as not to interfere with the use of three tracks in and through the easterly three-fifths of said westerly half of the car-shed, leaving convenient space for a platform easterly of said two tracks, and the right to maintain and use said two tracks during the continuance of this lease, and any renewals thereof or any other tracks in the same places upon and across a tract of land bounded westerly on the bayou and leased by the party of the first part to the said Cleveland and Toledo Railroad Company, and thence upon and across land of the party of the first part, lying between said tract and said car-shed with the right and privilege of taking out from the most westerly of said two tracks, at a convenient point, and laying down, using, repairing or replacing a third track, extending in a convenient course, so as to pass along westerly of said car-shed; the eastern rail to be not less than twelve feet from the car-shed, and not to extend further than to a point one hundred feet southerly of the north end of said car-shed. Also the right and privilege of taking out from said third track, at a convenient point, and laying down, using, repairing or replacing a fourth track in a general direction, so as to pass into and through the easterly part of said city freight house to the northern end thereof, and to extend thence northerly for the purpose only of switching into said third track a

sufficient distance therefor, not exceeding one hundred and eighty feet; none of the tracks so laid by the party of the second part to interfere with the city freight house of the Cleveland and Toledo Railroad Company, or the track used for access to the same. The space between said third track and the car shed to be left open and
1434 unincumbered by either party; subject, however, to the right of the party of the second part to have cars on said third track. Also the right and privilege to the said party of the second part of using, repairing and replacing the track now laid down and used by them, from the southerly line of the aforesaid track of land, on the bayou, leased by the party of the first part to the said Cleveland and Toledo Railroad Company, southerly across the passenger tracks of the party of the first part, at the general crossing, and thence across land south of said crossing, leased by the party of the first part to the said Cleveland and Toledo Railroad Company and lands of the party of the first part to the south line of appropriation, as the said track is now laid and used. Also the following described track of land upon a part of which the party of the second part have erected grain and freight houses; bounded southerly by the south line of said appropriation, and measuring thereon about four hundred and eighty feet; easterly by the dockage line upon the Maumee River, and measuring thereon about fifteen hundred and forty feet; westerly by a line drawn parallel to the Union Freight house, and thirty feet distant therefrom, and measuring thereon about thirteen hundred and thirty-eight feet; and northerly by a line drawn from a point on the dockage line of the Maumee River, five hundred feet distant; southerly from the south line of the grain warehouse of the party of the first part, westerly at right angles with the said dockage line. Also, the rights and privileges of a carriage way, beginning near the coal house before mentioned, on the true dockage line of the bayou, and passing southerly along and adjoining said dockage line to the southerly line of the tract of land herein leased by the party of the first part to the party of the second part, for a city freight house, the same to be forty feet wide easterly of and adjoining said dockage line, to be kept open and unincumbered for its whole length the same to be built and used in common by the said Cleveland and Toledo Railroad Company, and the party of the second part, the cost
1435 of the same, and of its repairs and renewals, to be borne equally between them, or in such proportions as they may agree upon. And the said party of the second part is to unite with the said Cleveland and Toledo Railroad Company, in building said carriage way, within a reasonable time, not exceeding two years from the date hereof. And both said parties, and the party of the first part, are to have the privilege of an open channel in said bayou, from its intersection with Swan Creek—subject to the bayou drawbridge and between the line of appropriation and the said dockage line, with the right of using said dock, so as not, unnecessarily, to obstruct said carriage way. To have and to hold all the said lands, privileges and right, as a railway station, only upon the conditions, limitations and restrictions aforenamed, unto the said party of the second part, and their successors, for and during the term of ninety-

nine years from the date of these presents. And the party of the first part hereby covenant and agree with the said party of the second part that at the expiration of said term they will, on demand, make and execute to the party of the second part, a renewal of this lease upon the terms and conditions therein set forth, for a further term of ninety-nine years. And will further thereafter renew the same, from time to time, as the same shall expire, without impeachment of waste or liability to forfeiture, except as herein provided, so long as they shall occupy the same as a railway station, in accordance with the provisions and conditions herein set forth. Provided, that the party of the second part shall not have the power to lease the said premises and rights, or any part thereof, to any other railroad company, or to admit any such other company to occupy or use the same, or any part thereof, without the assent of the party of the first part first thereto "hand" and obtained in writing. And the said party of the second part hereby covenants and agrees with the party of the first part that they will pay to them or their assigns, in the City of New York, as a rent for all the lands and privileges before mentioned, the annual sum of five thousand and four hundred
1436 dollars, from the first day of October, A. D. 1858, until the first day of October, 1859, and thereafter, at that rate, monthly the sum of four hundred and fifty dollars, in the City of Toledo; and if hereafter the party of the first part shall be required to pay, or shall pay, any additional sums to secure or confirm the title to said Middle Grounds and its appurtenances, or for preparing the grounds or erecting any building to be held or used in common, the party of the second part will, on demand, pay their fair proportion of such additional sums according as the lands and privileges herein leased and secured to them bear to those reserved to and occupied by the party of the first part and their assigns; the rents aforesaid to be paid during the continuance of this lease, or any renewal thereof. But if the party of the second part shall at any time hereafter choose to capitalize the said rents, and pay the sum of fifty-four thousand dollars, they shall be at liberty so to do, and thereafter be released from all liability for the payment of rents. And the said party of the second part further covenants and agrees, during all the time aforesaid, to pay all the *the* taxes levied, or assessed upon, all the said property and privileges exclusively used and occupied by them, two-fifths of one-quarter of all taxes upon said passenger house, and the land under and used with the same; and two-fifths of one-half of all taxes upon the furniture in the lower story thereof, and upon said car shed, and the land under and used with the same; and upon all the other property and privileges to be held jointly, under the provisions of this instrument, including the area in front of and adjoining the said passenger house and one-half of the taxes assessed upon the said carriage way, and that during all the time aforesaid they will pay two-fifths of one-half of all the repairs of the lower story of said passenger house, and of the repairs and renewals or additions to the furniture thereof, and of the repairs of said car shed, and of the bayou bridge and its approaches, and of the cost of rebuilding said bridge when necessary, and one-half of the repairs of the said

carriage way and the docking adjoining the same. Also, two-
1437 fifths of one-half of any repairs, or cost of rebuilding of the draw-bridge over Swan Creek, if the party of the first part shall hereafter be held liable to repair or rebuild the same. And the party of the second part further covenants and agrees that during all the time aforesaid they will pay two-fifths of one-half of all the current expenses of fire, lights and proper attendance of the lower story of said passenger house and its appurtenances, and of the police at any time necessary therein, or upon the parts of the grounds used and occupied in common, and of the lights upon such parts of the grounds, or upon the bridges between them and the City of Toledo, and of the expenses of tending the draws of said bridges so long as the party of the first part shall pay the expenses of tending said draws, or either of them. Also, of the expenses of the repairs of said general crossing and of the tending the signals there. And it is understood and agreed between the parties hereto that in case of loss or damage by fire of any of the buildings to be used jointly under the provisions hereof, each party shall and will unite with the other in rebuilding or repairing the same, and will pay the cost and expenses thereof, in the proportions specified for the payment of the repairs of the same severally; Provided, however, and this lease is upon the condition, that if the said party of the second part shall neglect to pay the said monthly rents, for sixty days after they fall due, according to the terms hereof, this instrument shall be void, and the party of the first part, or their assigns, shall have a right to re-enter and possess themselves of the premises, rights and privileges so leased, without suit or other legal process therefor. And it is further understood and agreed by the parties that, at the general crossing of the tracks of the three companies, a space of fifty feet wide on each side shall be reserved, free from obstructions over which one track, and no more, of the party of the second part may pass—the party of the first part reserving the right to lay down and use one additional track southerly and southeasterly of their present tracks at the same crossing. And, also, the right to lay down and use other
1438 tracks further south, crossing, if need be, the track of the party of the second part within the same appropriation, and maintaining the crossings and frogs at such other places. And it is also understood and agreed by the parties that in case the road of any companies other than the parties hereto, or the Cleveland and Toledo Railroad Company shall, at any time hereafter, be, by the party of the first part, admitted to the use or occupancy of a part of the depot premises used and occupied by the party of the first part exclusively or jointly with the party of the second part and the said Cleveland and Toledo Railroad Company, such other Company or companies so admitted, shall have the right and privilege to cross the tracks of the party of the second part, so far as may be necessary for the convenience, enjoyment and use of the privileges to which they may be so admitted, the said crossing to be at a place not unnecessarily incommoding the party of the second part; and the said crossings and the frogs at the same to be kept in repair by such other company or companies.

And it is further mutually agreed that in the use and occupancy of their respective lands and privileges neither party shall use or occupy their adjoining lands or privileges in such a way as unnecessarily to impair the rights or privileges of the other party. The said parties further mutually agree to form and maintain during all the time aforesaid business connections as between the road of the party of the second part and the Detroit, Monroe and Toledo Railroad, owned and operated by the party of the first part, by which passengers and freight may be sent and ticketed or waybilled by each over the road of the other. But the party of the second part covenants and agrees not to form business connections with any other party or railroad Company now or hereafter having a road terminating at Toledo by which passengers or freight destined to or from any part of the road of such other company, or destined to, from or through Toledo, to or from any point upon the roads of the party of the first part, or to or from Chicago or to any points westerly, north-
1439 westerly or northerly of Chicago, or to any point upon the Chicago and Rock Island Railroad except the City of La Salle, shall directly or indirectly be sent or ticketed or waybilled over the road of the party of the second part, or partly over the same and partly over any other railroad; and that said party of the second part will not so send or ticket or waybill any such passengers or freight to or from Toledo, over their own road, or partly over the same, and partly over any other railroad. And further, that said party of the second part will not send or ticket or way-bill any passengers or freight from their own road to any part of the Detroit, Monroe and Toledo Railroad, or to Detroit, or through Detroit to any place beyond Detroit, by any route or means of conveyance, other than the Detroit, Monroe and Toledo Railroad, the party of the first part agreeing to transport the same, at a *pro rata* rate per mile upon the rates of both roads, but the party of the first part shall not be bound to transport the same at less than four cents per one hundred pounds, between Toledo and Detroit or way stations. And it is further understood and agreed by the parties hereto, that the police of such portion of the grounds and buildings as shall belong to or be used exclusively and separately by either party, or by any other company admitted to the premises shall belong to and be controlled by such parties respectively. And for the police of the joint business and common grounds and privileges, the parties hereto and any such other company so admitted shall by their respective Presidents and Superintendents agree upon and draw up, from time to time, proper rules and regulations, and the execution and enforcement of the same shall belong to and devolve upon the party of the first part; and such rules and regulations, and the enforcement thereof shall be designed to accommodate all of said parties. And it is also understood and agreed, that in case any disagreement shall arise between the parties hereto in reference to the terms and conditions of this instrument, or in reference to any rights, privileges or
1440 obligations under the same, the Directors or Executive Committee of each party shall, from time to time, as may be necessary, on the request in writing of the other party, each choose one

person, who, together shall choose a third, all to be disinterested men, and they together, on proper notice to the parties, shall hear them, and determine all such matters in difference, with power to assess damages against either party, and the parties shall abide by and comply with all decisions so made. This instrument shall not be binding until it is approved by the Board of Directors of each party or by their Executive Committees severally, and such approval endorsed thereon by the proper certifying officer.

In witness whereof, the said parties have hereunto set their respective corporate seals, and the party of the first part has caused the same to be signed by George Bliss, their President, and the party of the second part have caused the same to be signed by Warren Colburn, their Vice-President, thereto duly authorized severally, the day and year first above written.

THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY,

(Signed) By GEORGE BLISS, *President.* [L. S.]

THE TOLEDO AND WABASH RAILWAY COMPANY,

(Signed) By WARREN COLEBURN, [L. S.]
Vice-President.

Signed, sealed and delivered in presence of
(Signed) JOHN B. FROTHINGHAM.

STATE OF NEW YORK,
City and County of New York, ss:

On the fourth day of January, one thousand eight hundred and sixty, before me personally came George Bliss, the President of the Michigan Southern and Northern Indiana Railroad Com-
1441 pany, to me known, and being by me duly sworn, did depose and say, that he resided in Springfield in the State of Massachusetts; that he was the President of said Company; that he knew the corporate seal of said Company; that the seal affixed to the foregoing instrument was such corporate seal; that he affixed said corporate seal and signed his name thereto as such President by the authority of said corporation, and by order of the Board of Directors thereof.

(Signed) J. LYMAN VAN BUREN, [L. S.]
Notary Public, New York.

The Lake Shore and Michigan Southern Railway Co.

NEW YORK, *June 6th,* 1876.

I Edwin D. Worcester, Sec't'y of the said Co., do hereby certify that the within is a true copy of the lease between the Michigan Southern and Northern Indiana R. R. Co. and the Toledo and Wabash R. R. Co.

Dated Dec. 9th, 1859, and now held by this Co.

[SEAL.] E. D. WORCESTER,
Sec't'y L. S. and M. S. Ry. Co.

Received for record June 10th, 1876, and recorded June 12th, 1876.

JOHN S. KOUNTZ, *Recorder.*

I, A. F. Wendt, Recorder of Lucas Co., Ohio, do hereby certify that the within and foregoing is a true and correct copy of a certain Lease executed by The Michigan Southern and Northern Indiana Railroad Company to the Toledo and Wabash Railway Company bearing date December 9th, 1859, and duly recorded in my
1442 office June 10th, 1876, in Vol. C of Leases, Page 141, &c.

Witness my hand and official seal this 23d day of Jan'y, 1894.

[SEAL.]

A. F. WENDT,
Recorder, Lucas Co., Ohio.

The M. S. and N. I. R. R. Co.

Directors' Meeting.

NEW YORK, *30th Dec.*, 1859.

The within indenture being this day submitted to the Board of Directors and read, it was Resolved, That the same be approved by this Board, and the Secretary be instructed to endorse such approval on duplicate copies thereof.

Lease to Toledo and Wabash Railroad Company. This Indenture made this ninth day of December, A. D. 1859, by and between The Michigan Southern and Northern Indiana Railroad Company of the first part and the Toledo and Wabash Railroad Company of the second part. Witnesseth, that Whereas the party of the first part claims to have procured title to certain lands and privileges on the Middle ground so called in the City of Toledo and State of Ohio, by appropriation under process of law, and otherwise, and have established their depot thereon and have secured or are about to secure to The Cleveland & Toledo Railroad Company certain privileges & rights thereon, in anticipation of which the said last named Company have taken possession of parts of said ground & erected buildings & laid tracks thereon, And whereas the party of the second part are desirous of having secured to them suitable depot accommodations on parts of the same grounds, and have erected build-
1443 ings and laid tracks thereon, Now Therefore, be it known That the party of the first part, in consideration of the premises and of Fifty-four Thousand dollars paid or agreed to be paid by the party of the second part, and of their other covenants and agreements hereinafter contained, do by these presents lease and demise to the said party of the second part all the lands and privileges described as follows, viz.: The right and privilege of using for all the purposes of their passenger business in common with the party of the first part and the said Cleveland and Toledo Railroad Company and such other Railroad Company as the party of the first part shall

admit to the premises the lower story of the passenger house erected upon the premises and the land on which it stands with the water closets in and appurtenant to the same and all the approaches thereto with the furniture now in said lower story with the exclusive use of one-half of the ticket office now occupied by the party of the second part and the said Cleveland & Toledo Railroad Company, excepting and reserving herefrom the saloon and the barber shop, the lower rooms in the west tower and the office occupied by the tenant and keeper of the upper stories of said house, the said keeper or any other party who may occupy said upper stories to have general supervision of said lower story and its appurtenances, excepting the said ticket office, and to use and occupy the same jointly with the other parties so far as may be necessary for such supervision and for carrying on the business of a hotel and dining room in the stories above, it being understood that the dining room in the second story is to be occupied and used for the benefit of the passengers of all the companies using said lower story, and for the guests of the hotel and transient visitors for the benefit of said keeper, but the part so to be used as a hotel may be discontinued as such, and the dining room maintained for the benefit of passengers and transient visitors and the person providing the same shall have such supervision and control of the lower story as is herein provided for the keeper of the hotel and reserving also to the party of the first part the exclusive
1444 use of their own ticket office with the right to have in said lower story ticket offices for the exclusive use of any other companies which may be admitted to the said depot premises by them, the same not to interfere with or incommode the ticket office of the party of the second part. Also the right to have left open for common use the area northerly of the passenger house bounded easterly by the east line of the passenger car shed extended northerly, northerly by a line parallel to, and nine feet south of, the south side of the General Office building of the party of the first part, Westerly by the easterly dockage line of the Bayou and southerly by the north line of said car shed, and the same extended westerly, excepting and reserving the said passenger house, the store house adjoining the northeast corner of the car shed and the lands occupied by the coal house and yard attached, being a lot of sixty feet front on the Bayou and 75 feet deep, adjoining the bayou draw-bridge platform, with liberty to remove said storehouse westerly to or near said dockage line, and occupy a space southerly of it and of the same size for a wood and coal yard. Also free and common use of the bridge "across" said bayou, the said area to remain open as a carriage way and for walks for the convenience of the parties hereto & the occupants of the passenger house & such other companies as may be admitted to the depot premises by the party of the first part. Provided, that the said area and Bayou draw-bridge shall not be considered as dedicated to public use, but shall remain under the joint control of the parties using said depot premises and be subject to such rules and police regulations as shall be established by them from time to time. Also a tract of land lying between the car shed & the bayou, bounded southerly by a line corresponding with the

south end of the car shed and extending northerly 150 feet, on which to erect a one-story City freight house of brick, with Metal roof covering, and not exceeding 40 ft. wide, the same to be used for local freight purposes only, and to be placed not less than 22
1445 feet from the car shed, and leaving not less than 40 feet between said freight house and the dockage line of the bayou for an unincumbered carriage way. Also the westerly 2/5 in width of the westerly half of said car shed through its entire length as now erected, extending from the water closets to the south end of the shed, the same not to be used for freight purposes, with the right to 2 tracks through the same, and the right to alter or relay said tracks, so as not to interfere with the use of three tracks in & through the easterly 3/5 of said westerly half of the car shed, leaving convenient space for a platform easterly of said two tracks, and the right to maintain and use said tracks during the continuance of this lease and any removals thereof or any other tracks in the same places upon and "across" a track of land bounded westerly on the bayou and leased by the party of the first part to the said Cleveland & Toledo R. R. Co., and thence upon and across land of the party of the first part lying between said tract and said car shed, with the right and privilege of taking out from the most westerly of said two tracks at a convenient point and laying down — using, repairing or replacing a third track, extending in a convenient course so as to pass along westerly of said car shed the "eastern" rail to be not less than 12 ft. from the car "shop" and not to extend further than to a point 100 ft. southerly of the north end of said car shed. Also the right and privilege of taking out of said 3rd track at a convenient point and laying down, using, repairing or replacing a 4th track in a general direction so as to pass into and through the easterly part of said city freight house to the northerly end thereof, and to extend thence northerly for the purpose only of switching into said third track at a sufficient distance therefor not exceeding 180 feet, none of the tracks so laid by the party of the second part to interfere with the City freight house of the Cleveland & Toledo R. R. Co., or the track used for access to the same, the space between said third track and the car shed to be left open and unincumbered
1446 by either party, subject, however, to the right of the party of the second part to have cars on said third track. Also the right and privilege to the said party of the second part of using, repairing and replacing the track now laid down and used by them from the southerly line of the aforesaid tract of land, on the bayou, leased by the party of the first part to the said Cleveland and Toledo R. R. Co., southerly "Accross" the passenger tracks of the party of the first part at the general crossing, and thence "accross" land, south of said crossing, leased by the party of the first part to the said Cleveland & Toledo R. R. Co., and the lands of the party of the first part of the south line of appropriation, as the said track is now laid and used. Also the following described tract of land, upon a part of which the party of the second part have erect-d grain and freight houses, bounded southerly by the south line of said appropriation, and measuring thereon about 480 ft.; easterly by the dockage line

upon the Maumee River, and measuring thereon about 1,540 feet; westerly by a line drawn parallel to the union freight house, and 30 feet distant therefrom, and measuring thereon about 1,338 ft., and northerly by a line drawn from a point on the dockage line of the Maumee River, 500 ft. distant southerly from the south line of the grain warehouse of the party of the first part, westerly at right angles with the said dockage line. Also the right and privilege of a carriage way, beginning near the coal house before mentioned on the true dockage line of the bayou, and passing southerly along and adjoining said dockage line to the southerly line of the tract of land herein leased by the party of the first part to the party of the second part of a City freight house, the same to be 40 ft. wide easterly of and adjoining said dockage line, to be kept open and unincumbered for its whole length the same to be built and used in common by the said Cleveland & Toledo R. R. Co. and the party of the second part, the cost of the same and of its repairs and removals to be borne equally between them or in such proportions as they may agree upon.

And the said party of the second part is to unite with the said
1447 Cleveland and Toledo R. R. Co. in building said carriage way within a reasonable time, not exceeding two years from the date hereof. And both said parties and the parties of the first part are to have the privilege of an open channel in said bayou from its intersection with Swan Creek subject to the bayou drawbridge, and between the line of appropriation and the said dockage line with the right of using said dock so as not unnecessarily to obstruct the said carriage way. To have and to hold all the said lands, privileges and rights as a railway station only upon the conditions, limitations and restrictions aforenamed unto the said party of the second part and their successors for and during the term of ninety-nine years from the date of these presents. And the party of the first part hereby covenant and agree with said party of the second part that at the expiration of said term they will on demand make and execute to the party of the second part a renewal of this lease upon the terms and conditions therein set forth, for a further term of ninety-nine years and will thereafter further renew the same from time to time as the same shall expire, without impeachment of waste or liability to forfeiture except as herein provided as long as they shall occupy the same as a railroad station in accordance with the provisions and conditions herein set forth. Provided that the party of the second part shall not have the power to lease the said premises and rights or any part thereof to any other railroad company or to admit of any such other to use or occupy the same or any part thereof without the assent of the party of the first part first thereto had and obtained in writing, and the said party of the second part hereby covenants and agrees with the party of the first part that they will pay to them or their assigns in the City of New York as rent for all the lands and privileges before mentioned the annual sum of five thousand and four hundred dollars ($5,400) from the first day of October, A. D. 1858, until the first day of October, 1859, and thereafter at that rate monthly the sum of four hundred and fifty

dollars in the City of Toledo, and, if hereafter the party of
1448 the first part shall be required to pay or shall pay any additional sums to secure or confirm the title to said Middle Grounds and its appurtenances or for preparing the grounds or erecting any buildings to be held or used in common the party of the second part will on demand pay their fair proportion of such additional sums according as the lands and privileges herein leased and secured to them bear to those reserved to and occupied by the party of the first part and their assigns, the rents aforesaid to be paid during the continuance of this lease or any renewal thereof, but if the party of the second part shall at any time hereafter choose to capitalize the said rents and pay the sum of fifty-four thousand dollars they shall be at liberty so to do, and thereafter be released from all liability for the payment of rents. And the said party of the second part further covenants and agrees during all the time aforesaid to pay all the taxes levied or assessed upon all the said property and privileges exclusively used and occupied by them two-fifths of one-quarter of all taxes upon said passenger house and the land under and used with the same, and two-fifths of one-half of all taxes upon the furniture in the lower story thereof, and upon said car shed and the land under and used with the same, and upon all the other property and privileges to be held jointly under the provisions of this instrument, including the area in front of and adjoining the said passenger house and one-half of the taxes assessed upon the said carriage way, and that during all the term aforesaid they will pay two-fifths (2/5) of one-half (½) of all the repairs of the lower story of said passenger house and one-half of all the taxes assessed upon the said carriage way, and that during all the time aforesaid they will pay two-fifths of one-half of all the repairs of the lower story of said passenger house and of the repairs and renewals or additions to the furniture thereof and of the repairs of said car shed and of the Bayou bridge and its approaches, and of the cost of rebuilding said bridge, when necessary, and one-half the repairs of the said carriage way and the docking adjoining the same. Also two-fifths of one-half of any repairs
1449 or cost of rebuilding of the draw-bridge over Swan Creek if the party of the first part shall hereafter be liable to repair or rebuild the same, and the party of the second part further covenants and agrees that during all the time aforesaid they will pay two-fifths of one-half of all the current expenses of fire lights and proper attendance of the lower story of said passenger house and its appurtenances, and of the police at any time necessary therein or upon the parts of the grounds used and occupied in common, and of the lights upon such parts of the grounds or upon the bridges between them and the city of Toledo, and of the expenses of tending the draws of said bridges so long as the party of the first part shall pay the expenses of the repairs of said general crossing and of the tending of said draws or either of them. Also of expenses of the repairs of said general crossing and of the tending of the signals there. And it is understood and agreed between the parties hereto that in case of loss or damage by fire or any of the buildings to be

used jointly under the provisions hereof each party shall and will unite with the other in rebuilding or repairing the same, and will pay the cost and expenses thereof in the proportion specified for the payment of the repairs of the same severally. Provided, however, and this Lease is upon the condition, that if the said party of the second part shall neglect to pay the said monthly rents for 60 days after they fall due, according to the terms hereof, this instrument shall be void, and the party of the first part, or their assigns, shall have a right to re-enter and possess themselves of the premises, rights and privileges so leased without suit or other legal process therefor. And it is further understood and agreed by the parties that at the general crossing of the tracks of the three companies a space of fifty feet wide on each side shall be reserved free from obstructions, over which one track and no more of the party of the second part may pass, the party of the first part reserving the right to lay down and use one additional track southerly and southeasterly of their present tracks at the same crossing. And also the right to lay down and use other tracks further south, crossing, if need be, the track of the party of the second part within the same appropriation and maintaining the crossings and frogs at such other places, and it is also understood and agreed by the parties that in case the road of any companies other than the parties hereto or the Cleveland and Toledo R. R. Co. shall at any time hereafter be by the party of the first part admitted to the use or occupancy of a part of the depot premises used and occupied by the party of the first part, exclusively or jointly, with the party of the second part and the said Cleveland & Toledo R. R. Co., such other company or companies so admitted shall have the right and privilege to cross the tracks of the party of the second part so far as it may be necessary for the convenient enjoyment and use of the privileges to which they may be so admitted, the said crossing to be at a place not unnecessarily incommoding the party of the second part, and the said crossings and the frogs at the same to be kept in repair by such other company or companies. And it is further mutually agreed that in the use and occupancy of their respective lands and privileges neither party shall use or occupy the adjoining lands or privileges in such a way as unnecessarily to impair the rights or privileges of the other party; the said parties further mutually agree to form and maintain during all the times aforesaid business connections as between the road of the party of the second part and the Detroit, Monroe and Toledo R. R., owned and operated by the party of the first part, by which passengers and freight may be sent and ticketed or waybilled by each over the road of the other, but the party of the second part covenants and agrees not to form business connections with any other party or R. R. Co. now or hereafter having a road terminating at Toledo, by which passengers or freight destined to or from any part of the road of such other company, or destined to, from or through Toledo to or from any point upon the roads of the party of the first part,

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or to or from Chicago, or to any points westerly, northwesterly
1451 or northerly of Chicago, or any point upon the Chicago and Rock Island Railroad, except the city of Laselle, shall directly or indirectly be sent or ticketed or waybilled over the road of the party of the second part, or partly over the same and partly over any other railroad, and that said party of the second part will not so send or ticket or waybill any such passengers or freight to or from Toledo over their own road, or partly over the same and partly over any other railroad. And, further, that said party of the second part will not send or ticket or waybill any passengers or freight from their own road to any part of the Detroit, Monroe & Toledo Railroad or to Detroit or through Detroit to any place beyond Detroit or by any route or means or conveyance other than the Detroit, Monroe and Toledo R. R., the party of the first part agreeing to transport the same at a *pro rata* per mile upon the rates of both roads. But the party of the first part shall not be bound to transport the same at less than four cents per one hundred pounds between Toledo & Detroit or way stations. And it is further understood and agreed by the parties hereto that the police of such portions of the grounds and buildings as shall belong to or be "used" exclusively and separately by either party or by any other company admitted to the premises shall belong to and be controlled by such parties respectively. And for the police of the joint business and common grounds and privileges the parties hereto and any such other companies so admitted shall by their respective Presidents and superintendents agree upon and draw up from time to time proper rules and regulations, and the execution and enforcement of the same shall belong to and devolve upon the party of the first part, and such rules and regulations and the enforcement thereof shall be designed to accommodate all of said parties. And it is also understood and agreed that, in case any disagreement shall arise between the parties hereto in reference to the terms and conditions of this instrument or in reference to any rights, privileges or obligations under the same, the directors or executive
1452 committee of each party shall from time to time, as it may be necessary, on the request in writing of the other party, each choose one person, who together shall choose a third, all to be disinterested men, and they together, on proper notice to the parties, shall hear them and determine all such matters in difference, with power to assess damages against either party, and the parties shall abide by and comply with all "decisions" so made. This instrument shall not be binding until it is approved by the Board of Directors of each party or by their executive committees severally and such approval endorsed thereon by the proper certifying officer.

In witness whereof, the said parties have hereunto set their respective Corporate seals and the party of the first part has caused the name to be signed by George Bliss, their President, and the party of the second part have caused the same to be signed by War-

ren Colburn, their Vice-President, thereto duly authorized severally the day and year first above written.

THE MICHIGAN SOUTHERN & NORTHERN INDIANA RAILROAD COMPANY,

(Signed) By GEORGE BLISS, *President.* [L. S.]

THE TOLEDO & WABASH RAILWAY COMPANY,

(Signed) By WARREN COLBURN, [L. S.]
Vice-President.

Signed, sealed and delivered in the presence of
(Signed) JOHN B. FROTHINGHAM.

STATE OF NEW YORK, *City & County of New York, ss:*

On the 4th day of Jan., 1860, before me personally came George Bliss, the president of the M. S. & N. I. R. R. Co., to me known, and being by me duly sworn, did depose and say that he resided in Springfield, in the State of Mass.,—; that he was the president of said Company; that he knew the corporate seal of said Company; that the seal affixed to the foregoing instrument was such
1453 corporate seal; that he affixed said corporate seal and signed his name thereto as such president by the authority of said corporation & by order of the Board of Directors thereof.

(Signed) J. LYMAN VAN BUREN, [L. S.]
Notary Public, New York.

Received for record Jan. 17″, 1877, and recorded Jan. 18″, 1877.
JOHN S. KOUNTZ, *Recorder.*

Receipts, &c.—Received February 1″, 1876, of the Toledo, Wabash and Western Railway Company, per J. D. Cox, Receiver, fifty-four thousand ($54,000.00) dollars, being the full amount stipulated by the Toledo and Wabash Railroad Company by the terms of the lease of date December 9″, A. D. 1859, to be paid to the Michigan Southern and Northern Indiana Railroad Company in money, as the consideration for the lands, privileges and rights thereby leased by said Michigan Southern and Northern Indiana Railroad Company to said Toledo and Wabash Railroad Company, and for which a rent amounting to the sum of fifty-four hundred ($5,400) dollars per annum, was by the terms of said lease provided, until said Toledo and Wabash Railroad Company should choose to capitalize the said rent by the payment of said sum of fifty-four thousand ($54,00-.00) dollars.

Received, also, from said Toledo, Wabash and Western Railway Company per J. D. Cox, Receiver, the sum of twenty-five hundred ($2,500.00) dollars, being the full amount stipulated by said Toledo and Wabash Railroad Company by the terms of a further lease amendatory to the said first-mentioned lease, and which bears date July 6th, 1867, and executed between the same parties, by which the said Toledo and Wabash Railroad Company agreed to pay to

said Michigan Southern and Northern Indiana Railroad Company for the additional lands and privileges therein described as a
1454 rent, the annual sum of two hundred and fifty ($250) dollars, with a stipulation that said lessee should at any time choose to capitalize the same, should have the right to do so by payment to the lessor of this sum of twenty-five hundred ($2,500) dollars, and thereafter be released from all liability for the payment of the rent thereby reserved in accordance with the terms and conditions of said leases respectively, by which the lessee is entitled to capitalize said rents, the said sums amounting in the aggregate to the sum of fifty-six thousand five hundred ($56,500) dollars, are received by the Lake Shore and Michigan Southern Railway Company, into which the said Michigan Southern and Northern Indiana Railroad Company has been consolidated from the Toledo, Wabash and Western Railway Company into which the said Toledo and Wabash Railroad Company has been consolidated. But the said Toledo, Wabash and Western Railway Company is not hereby released from any of the covenants on its part in said leases, or either of them, contained except the covenant to pay the said annual rent of fifty-four hundred dollars ($5,400) and the covenant to pay the said annual rent of two hundred and fifty dollars ($250.00).

In witness whereof, and under the authority of a resolution of the Board of Directors of the said The Lake Shore and Michigan Southern Railway Company, adopted April 20th, 1876, the corporate seal of the said company has been hereunto affixed and these presents have been signed on its behalf by its Vice-President this tenth day of May, 1876.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
By AUGUSTUS SCHELL, *Vice-President.*

[Corporate Seal L. S. and M. S. Ry.]

Attest:
E. D. WORCHESTER, *Secty.*

Received for Record Jan. 17", 1877, and Recorded Jan. 18", '77.
JOHN S. KOUNTZ, *Recorder.*

1455 I, A. F. Wendt, Recorder of Lucas County, Ohio, do hereby certify that the within and foregoing is a true and correct copy of a certain Lease executed by the M. S. & N. I. R. R. Co. to The Toledo & Wabash R. R. Co., bearing date of Dec. 9", A. D. 1859, and also of certain receipts, &c., bearing date of February 1", A. D. 1876, & May 10th, A. D. 1876, and duly recorded in my office Jan. 17th, 1877, in Vol. C of Leases, Page 184, &c.

Witness my hand and official seal this 23d day of Jan'y, A. D. 1894.

A. F. WENDT,
Recorder of Lucas Co., O.

[SEAL.]

Amended Lease (Dated July 6th, 1867,) of December 9th, 1859.

This indenture made this sixth day of July, in the year 1867 between the Michigan Southern & Northern Indiana Railroad Company, of the first part, and the Toledo, Wabash & Western Railroad Company, of the second part; witnesseth that whereas by an indenture bearing date the 9th day of December, 1859, executed by and between the party of the first part hereto, and The Toledo & Wabash Railroad Company, the party of the second part thereto, certain lands and privileges on the middle ground so called, in Toledo, Ohio, were leased and granted to said last-named Company, and mongst others certain lands and privileges in the words following, viz.: Also a tract of land between the car shed and the bayou, bounded southerly by a line corresponding with the south end of the car shed, and extending northerly one hundred and fifty feet, on which to erect a one-story City freight house of brick with metal covering, and not exceeding forty — feet wide, the same to be used for local freight purposes only, and to be placed not less than twenty-two feet from the car shed and having not less than forty feet between said freight house and the dockage line of the bayou
1456 for an unincumbered carriage way. And by another clause in said lease, the said party of the first part granted to the party of the second part thereto, the right and privilege of a third track to be laid outside and westerly of the car shed in the words following, viz.: with the right and privilege of taking out from the most westerly of said two tracks at a convenient point and laying down, using, repairing and replacing a third track extending in a convenient course so as to pass along westerly of said car shed, the eastern rail to be not less than twelve feet from the car shed, and not to extend further than to a point one hundred feet southerly of the north end of said car shed. And whereas said Toledo & Wabash Railroad Company is now consolidated with the Western Railroad Company, and is now "known" and called by the name of the Toledo, Wabash & Western Railroad Company, the party of the second part hereto, and the parties hereto have agreed to increase the length (in a northerly direction) of the tract of land leased for a city freight house one hundred feet, and have also agreed to extend the track lying on the outside of the car shed as far north as the north end of said car shed, for which said party of the second part is to pay to said party of the first part an increase of rent. Now, therefore, be it known that the said party of the first part, in consideration of the premises and of the rents and covenants hereinafter contained, doth by the presents lease and demise to the said party of the second part a tract of land between the car shed of the party of the first part and the bayou on the middle ground, so called, in the city of Toledo, bounded as follows: Commencing at the north end of the one hundred and fifty feet, described in said first above-recited portion of said lease, and extending northerly one hundred feet (making the whole length of lot for said City freight house two hundred and fifty feet in all), on which to erect a one-story city freight house of brick with metallic roof, covering and not exceeding

forty-seven feet wide, the same to be used for local freight
1457 purposes only, and to be placed not less than twenty-two feet from the car shed and leaving not less than forty feet between said freight house and the dockage line of the bayou for an unincumbered carriage way. No windows or doors shall be put in the east wall of said freight house. Also, the right and privilege of extending said third track, described in the portion of said lease, last above recited, in a convenient course northerly, so as to pass along westerly of said car shed as far north as the north end of said car shed; the eastern rail of said track to be not less than twelve feet from the car shed, with the right of laying down and using, repairing and replacing said third track so to be extended as aforesaid. The said party of the second part yielding and paying for the land and privileges herein specified and provided the annual rent of two hundred and fifty dollars. To have and to hold all the said lands, privileges and rights as a railway station only, upon the conditions, limitations and restrictions aforesaid, unto the said party of the second part and their successors for and during the term of ninety-nine years from the 9th day of December, A. D. 1859, and the said party of the second part hereby covenants and agrees with the said party of the first, "that they will pay to them or their assigns in the City of Toledo, as a rent for all the additional lands and privileges herein granted as before mentioned, the annual sum of two hundred and fifty dollars in monthly instalments of twenty dollars and eighty-three cents, to be paid at the same time as the monthly rent reserved in said lease of 1859 & is therein required to be paid. But if the said party of the second part shall at any time hereafter "chose" to capitalize their said rent hereby reserved, and pay the sum of twenty-five hundred dollars in addition to and with the sum provided for capitalizing the rents reserved in said lease of 1859 for the lands and privileges hereby leased, they shall have the right so to do and thereafter be released from all liability for the payment of the rent hereby reserved. It is hereby understood and agreed between the parties hereto that all the covenants and conditions in said
1458 lease of 1859 applicable to said lands and privileges described in the two portions of said lease herein above recited, or the rent reserved or the taxes thereon, shall be applicable to and binding upon the parties to this lease, in reference to the addition and extension of lands and privileges hereby made as fully in all respects as if said addition and extension and the rent to be paid for the same, were incorporated into said lease, except so far as the provisions of said lease may be modified by this lease.

In witness whereof the said parties have hereunto set their respective Corporate seals, and the party of the first part has caused the same to be signed by E. B. Phillips, their President, and the party of the second part have caused the same to be signed by Warren Colburn, their Vice-President, thereto duly authorized severally the day and year first above written.

[SEAL.] THE TOLEDO, WABASH & WESTERN RAILWAY COMPANY,

(Signed) By WARREN COLBURN, *Vice-President.*

[SEAL.] THE MICHIGAN SOUTHERN & NORTHERN INDIANA R. R.,

(Signed) By E. B. PHILLIPS, *President.*

(Copy.)

I certify that the foregoing is a correct copy of Amendment of lease between the Michigan Southern & Northern Indiana R. R. Co. and The Toledo, Wabash & Western R. Rd. Co.

[Michigan Southern & Northern Indiana R. R. Co. Seal.]

GEO. B. ELY, *Secretary.*

Received for record June 9th, 1876, and Recorded June 14th, 1876.

JOHN S. KOUNTZ, *Recorder.*

1459 I, A. F. Wendt, Recorder of Lucas County, Ohio, do hereby certify that the within and foregoing is a true and correct copy of a certain Amended Lease executed by the Michigan Southern and Northern Indiana Railroad Company to The Toledo, Wabash and Western Railroad Company bearing date of July 6th, 1867, and duly recorded in my office June 9", 1876, in Vol. C, of Leases, page 149, &c.

Witness my hand and official seal this 23d day of Jan'y, A. D. 1894.

[SEAL.]

A. F. WENDT,
Recorder of Lucas Co., Ohio.

WABASH RAILROAD COMPANY'S EXHIBIT No. 1.

No. 166. $5,000.

Wabash, St. Louis & Pacific Railway Company.

[Cut.]

Solon Humphreys and Thomas E. Tutt, Receivers.

OFFICE OF THE RECEIVERS, ST. LOUIS, MO.

— — after date, for value received, we, Solon Humphreys and Thomas E. Tutt, as receivers of all property of the Wabash, St. Louis and Pacific Railway Company in Missouri, Iowa, Illinois, Indiana, Ohio and Michigan, do, under and by virtue of the power and authority in us vested by an order of the Circuit Court of the United States in and for the Eastern District of Missouri made on the Sixth day of June, 1884, in a certain cause wherein the said Wabash, St. Louis and Pacific Railway Company is complainant and the Central Trust Company of New York and others are
1460 defendants, hereby promise to pay, at the National Bank of Commerce, in the City of New York, to the bearer hereof, Five Thousand Dollars, with interest thereon from date until paid at the rate of — per cent. per annum.

This obligation is one of a series, amounting to two million dollars, authorized by said Court to be made by us as receivers,

and is, together with all others of the same series, made and declared to be a first lien on the property of said Railway Company of every nature and description, wheresoever situated, and also a first lien upon whatever residue of the earnings, incomes and profits of said property there may be after deducting the operating expenses, the cost of needed repairs and the expenses of the receivership.

SOLON HUMPHREYS,
—— ——, *Receivers.*

1461 In the Circuit Court of the United States for the Eastern District of Missouri, March Term, A. D. 1884. In Chancery.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK and Others, Defendants.

AT CHAMBERS, *June 6th, A. D.* 1884.

Solon Humphreys and Thomas E. Tutt, Receivers.

Now comes Solon Humphreys and Thomas E. Tutt, Receivers of all the property of the Wabash, St. Louis & Pacific Railway Company situated in Missouri, Iowa, Illinois, Indiana, Ohio and Michigan, and present their petition and affidavits praying for an order of this Court authorizing them to raise, by means of receivers' certificates, the sum of two million dollars upon the pledge and faith of the railway property in their possession as such receivers under a former order of the Court.

And the Court, having seen and heard the petition and affidavits, and fully considered the same, find that when said receivers took such possession there was, and now is, due to employees of the road for services and labor in the various departments thereof, such as trackmen, engineers, firemen, machinists, trainmen, station and yard laborers, bridge builders and mechanics, and on account of salaries due to officers, all of which has accrued during the six months prior to the appointment of said receivers, an amount in ex-
1462 cess of one million dollars; for supplies furnished within said six months, a sum in excess of seven hundred and fifty thousand dollars; for taxes on the various lines of said road in this and other States, the sum of one hundred and seventy-four thousand dollars, and on account of certain judgment for the enforcement of a mechanic's lien against a portion of said railroad in the State of Iowa, a sum in excess of thirty thousand dollars.

And it appearing to the Court that there are not now, and that there is not likely to be for some time to come, sufficient funds in the possession of the receivers with which to meet the above and other pressing and essential needs for preservation of the property

and the economical and safe management of the road, it is therefore ordered that said receivers be, and they are hereby empowered to issue receivers' certificates or debentures in the sum not exceeding two million dollars, bearing a rate of interest not exceeding seven per cent. per annum, to fall due in not less than one, or more than two, years from the date of their issue, and that, until the further order of this Court, the proceeds thereof be applied to the purposes hereinbefore mentioned, and that said certificates or debentures, unless otherwise ordered, be not sold or disposed of at less than their par value. And when issued such certificates and obligations shall become, and they are hereby declared to be, a first lien upon all the property of said Railway Company of every nature, kind and description whatsoever, including the net earnings thereof after deducting the expenses of this receivership and the operation of the road.

It is further ordered by the Court that the said receivers make once in three months to this Court, as heretofore ordered, a report showing in addition thereto a detail of the amount of such certificates by them sold, the amount then outstanding, the date when issued, the denominations thereof, the rate of interest, length of time they are to run, and such further information as the Court may require; that such receivers take vouchers for all expenditures by them made under this order as far as practicable in duplicate.

1463 And it is further ordered that said certificates or debentures be substantially in the form following—to wit:

Office of the Receivers of the Wabash, St. Louis & Pacific Railway Company.

Solon Humphreys and Thomas E. Tutt, Receivers.

ST. LOUIS, Mo., —— ——, 188–.

—— after date, for value received, we, Solon Humphreys and Thomas E. Tutt, as receivers of all property of the Wabash, St. Louis & Pacific Railway Company in Missouri, Iowa, Illinois, Indiana, Ohio and Michigan, do, under and by virtue of the power and authority in us vested by an order of the Circuit Court of the United States in and for the Eastern District of Missouri made on the sixth day of June, 1884, in a certain cause wherein the said Wabash, St. Louis & Pacific Railway Company is complainant and the Central Trust Company of New York and others are defendants, hereby promise to pay, at the National Bank of Commerce, in the City of New York, to the bearer hereof, — thousand dollars, with interest thereon from date until paid at the rate of — per cent. per annum.

This obligation is one of a series, amounting to two million dollars, authorized by said Court to be made by us as receivers, and is, together with all others of the same series, made and declared to be a first lien on the property of said Railway Company of every nature and description, wheresoever situated, and also a first lien upon whatever residue of the earnings, incomes and profits of said

property there may be after deducting the operating expenses, the cost of needed repairs and the expenses of the receivership.

——— ———,
——— ———,
Receivers.

Let the foregoing order be entered.
June 6th, 1884. SAMUEL TREAT, *Judge.*

1464 [Endorsed.]

No. 166.
Receivers' Certificate.
Wabash, St. Louis & Pacific Railway Co.
Solon Humphreys and Thos. E. Tutt, Receivers.

WABASH RAILROAD COMPANY'S EXHIBIT No. 2.

Statement of Receivers' Account with the Purchasing Committee, Showing Amounts Received from E. T. Allen, Special Master, and from Sundry Sources.

FIRST. Amounts received from E. T. Allen, Special Master:

1886.				
June 29.	Cash		47,500 00	
1887.				
April 2.	do.		100,000 00	
June 24.	do.		100,000 00	
June 24.	do.		8,130 01	
Dec'r 28.	do.		25,000 00	
1888.				
Febr'y 14.	do.		7,581 35	
				288,211 36

SECOND. Amount received from proceeds of sale of property in St. Joseph, Mo., sold by the Purchasing Committee to the St. Joseph and St. Louis R. R. Co. 25,000 00

313,211 36

Statement of Receivers' Account with the Purchasing Committee, Showing Payments Made by the Purchasing Committee and Placed to Their Credit in Account.

FIRST. Payments on account of the One Million Dollars:

Receivers' Certificates and Interest on same paid into the Registry of the U. S. Circuit Court	893,202 16	
Cash paid into the Registry of the Court, and turned over to the Receivers to be used in paying their liabilities...	106,932 26	
		1,000,134 42

1465 SECOND. Payments made on their Bond:

1887.				
April 5.	Payment of Missouri Pacific Ry. Co. Account, Principal and Interest.....		190,871 12	
April 27.	Cash...		185,000 00	
May 11.	do.		200,000 00	
June 28.	do.		100,000 00	
August 27.	do.		74,118 88	
				750,000 00

THIRD. Cash deposited with the National Bank of Commerce, New York, to be used in paying Receivers' Certificates..... 250,000 00

2,000,134 42

At a Stated Term of the Circuit Court of the United States for the Eastern District of Missouri, held at the Court House in the City of St. Louis on the 31st day of December, 1886.

Present—The Honorable David J. Brewer and the Honorable Samuel Treat, Judges.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY,
Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

Order of Court Concerning Possession of Property Under Decree of January 6th, 1886.

December 31st, 1886.

And now come James F. Joy, Ossian D. Ashley, Thomas
1466 H. Hubbard and Edgar P. Wells, and submit their petition, praying that the Court will direct that all the property purchased by them, as a committee representing certain bondholders, be turned over and be delivered to them, and submit also an order proposed in connection with said petition, and the Court, having considered the same, does refuse to make the order so submitted, and thereupon the Court of its own motion does order, adjudge and decree that the said purchasers, as a committee, as aforesaid, shall, within sixty days from the entry of this order, pay into the registry of this Court the sum of one million dollars in cash, or in certificates now outstanding of Solon Humphreys and Thomas E. Tutt, Receivers, and shall also, within the same period, as such committee, give bond or security to be approved by this Court in the sum of one million dollars, conditioned to pay the full amount of the said Receivers' indebtedness and other demands stated in the final decree herein, and to comply with all the further orders of this Court; that such payment shall be made and security given by said purchasers in their capacity as a committee and as agents, and not as individuals, and shall be made and given by the use of the moneys or means in their possession or control as such committee.

And the Court doth further order and decree, upon making the payment and giving the security hereinbefore ordered, the said purchasers, as such committee, shall take, and the said Receivers shall deliver to them, possession of the entire property purchased by them under the decree of foreclosure entered in this cause January 6th, 1886, and that such possession shall be subject to the right of this Court to retake possession of said property, or any part thereof, on failure of said purchasers, or their successors, to comply with any further order of this Court, and shall also be subject to all the terms and provisions of the said decree and of the order of this

Court heretofore made confirming the sale of said property under said decree.

DAVID J. BREWER,
Circuit Judge.
SAMUEL TREAT,
U. S. District Judge.

1467 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Order in re Petition of Purchasing Committee for Surrender and Cancellation of Certain Bond of $750,000, *&c.*

June 8th, 1888.

The report of the Master, heretofore filed herein, having been considered by the Court, and the Court being fully advised thereof, it is ordered that said report be, and it is hereby, in all things confirmed.

And thereupon it is ordered, that James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the Purchasing Committee, purchasers of the property of the Wabash, St. Louis & Pacific Railway Company, sold under the decree of foreclosure herein, be released and discharged from all obligations incurred by them in executing and filing herein, as such Purchasing Committee, the bond required of them, by the order of March 30th, 1887.

Nothing in this order contained is intended to modify or shall be construed as modifying or revoking anything contained in said decree of foreclosure, or in the order entered herein on the fifteenth day of June, 1886, confirming the sale under said decree.

1468 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, T. L. Crawford, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto attached to be a true copy of Order of Court concerning possession of property under decree of January 6, 1886, filed December 31st, 1886, & Order filed June 8, 1888, *in re* Petition of Purchasing Committee for surrender & cancellation of certain Bond of $750,000, &c., in case Nos. 2357 and 2464 of Central Trust Co. of New York *et al.*, Complainant, against Wabash, St. Louis & Pacific Railway Co. *et al.*, Defendants,

as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the City of St. Louis, in said Eastern Division of said District this 12th day of February, A. D. 1896.

[SEAL.] T. L. CRAWFORD,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, David J. Brewer, Judge of the Circuit Court of the United States for the Eastern Judicial District of Missouri, hereby certify that A. P. Selby, whose signature appears to the above certificate, is and was at the date thereof the Clerk of said Circuit Court, and that said certificate is in due form.

In witness whereof, I have hereunto subscribed my name at office in the City of St. Louis, in said District, this — day of ——, A. D. 18—.

1469 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, Elmer B. Adams, United States District Judge for the Eastern Judicial District of Missouri, hereby certify that T. L. Crawford, whose signature appears to the above certificate, is and was at the date thereof the Clerk of said Circuit Court, and that said certificate is in due form.

In witness whereof, I have hereunto subscribed my name at office in the City of St. Louis, in said District, this 12th day of February, A. D. 1896.

ELMER B. ADAMS.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, T. L. Crawford, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, hereby certify that Elmer B. Adams, whose signature appears to the above certificate, is and was at the date thereof one of the Judges of said Court, that said signature is in his own proper handwriting, and that said certificate is in due form.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Court, at office in the City of St. Louis, in said District, this 12" day of February, A. D. 1896.

[SEAL.] T. L. CRAWFORD,
Clerk of said Court.

1470 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In Chancery. No. 2357. No. 2464. (Consolidated.) Master's No. 355. Clerk's No. 1657.

THE CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

Petition of Purchasing Committee for Surrender and Cancellation of Certain Bonds of $750,000, *etc.*

To the Honorable Judges of the United States Circuit Court for the Eastern Judicial District of Missouri, Eastern Division:

In pursuance of an order of reference to me, as Special Master, of this petition, which was filed on September 17th, 1887, I was present at the Witness Room, in the Custom House Building, in the City of St. Louis, at 11 A. M., on October 3rd, 1887, to hear the evidence, if any, relating to said petition, and the hearing was continued from time to time and evidence introduced, as will appear from the record of proceedings herewith filed.

At the earlier hearings before me it was satisfactorily shown that the Purchasing Committee had paid to the Receivers the full sum of $750,000, after April 1st, 1887, but it further appeared that $61,261.40 of the amount so paid to the Receivers by the
1471 Purchasing Committee had been applied by the Receivers, on and after April 1st, 1887, to the payment of matured interest coupons upon bonds (the payment of which bonds and interest the Purchasing Committee assumed as a condition of their purchase), and to the payment of commissions to the National Bank of Commerce in New York, for making such interest disbursements.

Under the circumstances, it did not appear to me that the Purchasers of the property turned over by the Receivers on the first day of April, 1887, under the order of March 30th, 1887, were entitled to the surrender and cancellation of the bond therein provided for, as prayed in their petition, until the money so applied by the Receivers had been reimbursed to them.

I therefore withheld my report upon said petition until further payments had been made by the Purchasing Committee.

From the evidence before me, I am now able to report that the Purchasing Committee have paid to the Receivers the full sum of $750,000, from moneys in their hands, on the 30th day of March, 1887, as such Purchasing Committee (and not from the earnings of the railroads purchased by them), which sum of money has been used by said Receivers to pay their own obligations, or such obligation of the Wabash, St. Louis & Pacific Railway Company as said Receivers have been ordered by the Court to pay.

I therefore respectfully recommend that it be

Ordered, that James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the Purchasing Committee, purchasers of the property of the Wabash, St. Louis & Pacific Railway Company, sold under the decree of foreclosure herein, be released and discharged from all obligations incurred by them in executing and filing herein, as such Purchasing Committee, the bond required of them, by the order of March 30th, 1887.

Nothing in this order contained is intended to modify, or shall be construed as modifying or revoking, anything contained in said decree of foreclosure, or in the order entered herein on the
1472 fifteenth day of June, 1886, confirming the sale under said decree.

Lodged in the Clerk's Office March 19th, 1888.

No Exceptions.

EDMUND T. ALLEN,
Special Master.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, T. L. Crawford, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto attached to be a true copy of Master's Report on Petition of Purchasing Committee for surrender & cancellation of bond for $750,000, &c., in case Nos. 2357 & 2464 of Central Trust Company of New York *et al.* Complainants, against Wabash, St. Louis & Pacific Railway Company *et al.*, Defendants, as fully as the same remains on file in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court, at office in the City of St. Louis, in said Eastern Division of said District this 12th day of February, A. D. 1896.

[SEAL.] T. L. CRAWFORD,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, David J. Brewer, Judge of the Circuit Court of the United States for the Eastern Judicial District of Missouri, hereby certify
1473 that A. P. Selby, whose signature appears to the above certificate, is and was at the date thereof the Clerk of said Circuit Court, and that said certificate is in due form.

In witness whereof, I have hereunto subscribed my name at office in the City of St. Louis, in said District, this — day of —— A. D. 18—.

—— ——.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, Elmer B. Adams, United States District Judge for the Eastern Judicial District of Missouri, hereby certify that T. L. Crawford, whose signature appears to the above certificate, is and was at the date thereof the Clerk of said Circuit Court, and that said certificate is in due form.

In witness whereof, I have hereunto subscribed my name at office in the City of St. Louis, in said District, this 12th day of February, A. D. 1896.

ELMER B. ADAMS.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, T. L. Crawford, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, hereby certify that Elmer B. Adams, whose signature appears to the above certificate, is and was at the date thereof one of the Judges of said Court, that said signature is in his own proper handwriting, and that said certificate is in due form.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Court, at office in the City of St. Louis, in said District, this 12" day of February, A. D. 1896.

[SEAL.] T. L. CRAWFORD,
Clerk of said Court.

1474 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Nos. 2357 and 2464. Consolidated Cause. In Equity.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL., Defendants.

Order on Receivers to Turn Property Over to Purchasing Committee.

MARCH 30TH, 1887.

Now, on the 30th day of March, 1887, this cause coming on for further hearing, and the Receivers herein appearing by their counsel, and the Purchasing Committee, hereinafter mentioned, appearing by their counsel, and applying to the court for possession of the property heretofore purchased by them, and it appearing to the court from a report of the Special Master, filed herein on the 5th day of March, 1887, that said Purchasing Committee, composed of the parties mentioned in the order entered in this cause, by the court

of its own motion on the 31st day of December, 1886, did, within sixty days from the date of said order, and in pursuance thereof, pay into the registry of this court the sum of one million dollars in cash, and the certificates of Solon Humphreys and Thomas E. Tutt, receivers; and the court having on the 28th day of February, 1887, by an order duly entered herein, among other things, directed
1475 that the giving of a bond or security by said committee, as required by said order of December 31st, 1886, be postponed without prejudice to the rights of said purchasers, and it further appearing to the court that said Purchasing Committee did, on the 27th of March, 1887, deposit to the credit of said receivers, Humphreys and Tutt, in the National Bank of Commerce, in the City of New York, a further sum of two hundred and fifty thousand dollars in cash, to be used by said receivers in paying their certificates due prior to April 1st, 1887, at par and accrued interest; now, in consideration of the premises, it is ordered, adjudged and decreed by the Court:

First. That said Purchasing Committee, as such, file their bond herein conditioned, that they will from moneys now in their hands as such Committee (and not from the earnings of the railroads purchased by them) pay into the registry of this court, or place to the credit of said receivers in some bank to be designated by said receivers, the further sum of seven hundred and fifty thousand dollars ($750,000), to be used as the same may from time to time be required by said receivers, to pay their own obligations, or such obligations of said Wabash, St. Louis and Pacific Railway Company as said receivers have been heretofore ordered, or may be hereafter ordered, to pay by the Court.

Second. And in order to carry into effect the provisions of the foreclosure decree entered herein on or about January 6th, 1886, and of the order or decree entered herein on or about June 15th, 1886, confirming the report of sale of certain property therein described to said Purchasing Committee, in which decrees it was among other things provided, that said Purchasing Committee should, as a condition of their said purchase, pay such sums of money as might be needed, and as this Court, or the other Courts exercising ancillary jurisdiction in this cause, might direct them to pay in order to meet claims which this Court, or said other Courts might adjudge
1476 to be prior in equity to the mortgage foreclosed.

It is further ordered, adjudged and decreed that said Purchasing Committee, or their successors or assigns, from time to time pay into the registry of this Court, or deposit in some bank in the city of St. Louis to the credit of said receivers, such other and further sums of money, in addition to said seven hundred and fifty thousand dollars, as may be required, and as the same may be required, to pay all debts and liabilities of every kind contracted or incurred by said receivers in preserving, maintaining, improving or operating the railroads and properties in their charge, or incurred by said Wabash, St. Louis and Pacific Railway Company in maintaining and operating said railroads, and which debts and liabilities

said receivers have been heretofore ordered, or may be hereafter ordered to pay, by this Court or any of the other Courts exercising ancillary jurisdiction in this cause.

Third. It is further ordered, adjudged and decreed that on the first day of April, 1887, said Purchasing Committee take possession of all the railroads and other property purchased by them under said foreclosure decree, wheresoever situated; and said receivers are hereby ordered and directed to deliver to said Purchasing Committee, or its assigns, on the day last aforesaid, all the railroads and other property of said Wabash, St. Louis and Pacific Railway Company, wheresoever situated, purchased by said Committee, whereof they took possession as Receivers and which now remains in their possession or under their control.

Fourth. And it further appearing to the Court from the record of proceedings in this cause that the "General Mortgage" of the Wabash, St. Louis and Pacific Railway Company, or other mortgages given by corporations, parties to this suit, to the Central Trust Company of New York and James Cheney, Trustees, to secure said General Mortgage bonds, are the only mortgage liens on certain
1477 railroads and their appurtenances, hereinafter described, and which are now in the possession of said receivers, or under the control of this Court, or the other Courts exercising ancillary jurisdiction in this cause; and it further appearing from the record and proceedings in this cause, that the title and interests of said Wabash, St. Louis and Pacific Railway Company in said Railroads were offered for sale under the foreclosure decree herein, but that the same were not sold for want of bidders, to wit, the St. Louis, Jerseyville & Springfield Railroad, extending from Bates to Grafton, in the State of Illinois; the Champaign & Southeastern Railroad, extending from Champaign to Sidney in the State of Illinois; the Attica, Covington & Southern Railroad, extending from Attica to Covington in the State of Indiana; the Des Moines & St. Louis Railroad, extending from Albia to Des Moines in the State of Iowa; and it further appearing to the Court from the record and proceedings in said cause, that there is also in the possession of said receivers a line of railroad known as the Des Moines Northwestern Railroad, extending from Des Moines, Iowa, to Fonda in said State, and that the only mortgage lien thereon is a mortgage executed on or about the 28th day of February, 1881, by the Des Moines Northwestern Railway Company to the Central Trust Company of New York and James Cheney, trustees, to secure such of said General Mortgage bonds of the Wabash, St. Louis and Pacific Railway Company as might be actually issued for the construction of such railroad, but that no title or interest of said Wabash, St. Louis and Pacific Railway Company in or to said railroad was sold or offered for sale under said foreclosure decree; and it further appearing to the court from the agreement under which said Purchasing Committee was formed, as said agreement is set forth in the report of Special Master Edmund T. Allen filed herein on or about the 29th day of December, 1885, being the same agreement referred to in said foreclosure

decree, that said Purchasing Committee are the representa-
1478 tives and agents of all the owners and holders of said General Mortgage bonds.

It is, therefore, further ordered, adjudged and decreed, that said committee on the day aforesaid take possession of all the aforesaid lines of railroad, on which mortgages given to secure said General Mortgage bonds are a first lien, to wit, the St. Louis, Jerseyville and Springfield Railroad; the Champaign and Southeastern Railroad, the Attica, Covington and Southern Railroad, the Des Moines and St. Louis Railroad and the Des Moines Northwestern Railroad, and said receivers are hereby ordered and directed to deliver to said Purchasing Committee on said day all the railroads last aforesaid and their appurtenances, but the delivery of said railroads and their appurtenances to said Purchasing Committee is made subject to the right hereby reserved to this court, and to the other courts exercising ancillary jurisdiction in this cause, to retake, and, if necessary, to resell them, as is provided in said foreclosure decree with respect to retaking and reselling the railroads and property purchased thereunder in case said committee or their assigns shall fail or refuse to pay the debts and liabilities of said receivers, or of said Wabash, St. Louis and Pacific Railway Company, which said Courts, or either of them, have adjudged or may adjudge to be liens or charges upon said properties, or any of them, superior to the mortgages given to secure said General Mortgage bonds.

Fifth. And it further appearing to the Court from the record and proceedings in this cause; that said receivers are now in possession of the Eel River Railroad, extending from Logansport to Butler, in the State of Indiana, and that said railroad was held by said Wabash, St. Louis & Pacific Railway Company under a lease executed by the Eel River Railroad Company to the Wabash Railway Company, on or about the 26th day of August, 1879; and it further appearing to the Court that the leasehold interest of the Wabash, St. Louis and Pacific Railway Company in said Eel River Railroad was of-
1479 fered for sale under the foreclosure decree aforesaid, and that the same was not sold for want of bidders;

It is therefore further ordered, adjudged and decreed that the possession of said Eel River Railroad and its appurtenances be tendered to said Purchasing Company on said first day of April, 1887, and that in case said Committee declines to accept possession thereof, then that said receivers forthwith surrender the same to said Eel River Railroad Company.

Sixth. For the purpose of enabling said receivers to make final settlement of their accounts and doings in the management of said property, it is further ordered, adjudged and decreed that, until otherwise directed, they retain in their custody all books of account, papers and documents now in their possession which relate to the operation or management of the property in their charge, or the earnings or expenses thereof, or that pertain to the funds collected and disbursed by them, or which relate to the business of said Wabash, St. Louis and Pacific Railway Company prior to said receivership, and which books, accounts, papers and documents it

may be necessary or convenient for them to have, in order to adjust and settle their own accounts, or accounts and claims against said company or its property, which said receivers have been ordered, or may be hereafter ordered, to pay by this court, or any other court exercising ancillary jurisdiction in this cause, and said receivers will until their final settlement and discharge, continue as heretofore, to adjust their said accounts and the aforesaid accounts of said company, and they will, from funds which may come into their possession under the provisions of this or any other order or decree, pay said accounts and claims as they severally become due and payable.

It is further ordered, adjudged and decreed, that all the revenues of said property earned prior to said first day of April, 1887, be as far as practicable collected by said purchasers or their as-
1480 signs, and paid over to said receivers, and that all such funds, as well as all funds in the hands of said receivers, or subject to their control on said first day of April, 1887, be used by said receivers in paying said indebtedness; and

It is further ordered, adjudged and decreed, that all funds and receivers' certificates now in the registry of this court be forthwith delivered to said receivers, and that said funds be also used by them for the purposes last aforesaid.

Seventh. It is further ordered, adjudged and decreed that if any claim shall be made or presented against said receivers which they may deem unauthorized, illegal or unjust, they shall forthwith notify said Purchasing Committee, or its assigns thereof and thereupon said Committee, or its assigns, may without any further order or authority from this Court, litigate and defend against such claims, but all the expenses of said litigation shall be paid by said Committee or its assigns, and in case any claims shall be presented against said receivers with respect to the legality or justice of which they are in doubt, they may pay the same with the approval of said Committee or its assigns.

Eighth. This Court reserves unto itself the right to make all such other and further orders, concerning the custody of the property taken possession of by said Purchasing Committee under this order, and with respect to the payment of such other and further sums of money by said Committee, or its assigns, as may be deemed necessary to carry into effect the provisions of said foreclosure decree, and said receivers may from time to time apply to this court for such other and further orders and instructions as they may deem necessary.

Ninth. Nothing in this order contained is intended to modify, or shall be construed as modifying or revoking, anything contained in the decree of foreclosure entered herein on or about January 6th, 1886, or as modifying or revoking anything con-
1481 tained in the order entered herein on or about the 15th day of June, 1886, confirming the sale to said Purchasing Committee of portions of the property described in said foreclosure decree, but the provisions of this order and of the bond herein mentioned and required of said Purchasing Committee are intended to

be in addition to the several matters and things contained in the decrees and orders aforesaid.

Tenth. On presentation of a copy of this order to the Mercantile Trust Company, of New York, with an indorsement thereon under the hand of Clerk and the seal of this Court, to the effect that the bond of said Purchasing Committee as herein required has been filed and approved, said Mercantile Trust Company, of New York, shall deliver to said Purchasing Committee all the property purchased by them under said foreclosure decree now in possession of said Trust Company.

Eleventh. For the purpose of enabling said receivers to make final settlement of their accounts at an early day, it is further ordered, adjudged and decreed that they cause to be printed for thirty days in at least one newspaper published in some town or city on the line of the railroad in each of the States in which the railroads taken possession of them as receivers are situated a notice addressed to all persons having claims against them as receivers, or against said Wabash, St. Louis and Pacific Railway Company, of a class which they as receivers have been ordered to pay, setting forth that all such claims not presented to and approved by said receivers, or presented to this Court for adjudication or allowance within four months after the first publication of said notices, will be forever barred as claims against them and the funds of said receivership, and that such parties will thenceforth stand remitted to such rights as they may have against the property described in said foreclosure decree.

(Signed) DAVID J. BREWER,
Circuit Judge.

1482 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, T. L. Crawford, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto attached to be a true copy of Order on Receivers to turn property over to Purchasing Committee in case Nos. 2357 & 2464 of Central Trust Company of New York *et al.*, Complainants, against Wabash, St. Louis & Pacific Railway Company *et al.*, Defendants, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court, at office in the City of St. Louis, in said Eastern Division of said District this 12th day of February, A. D. 1896.

[SEAL.] T. L. CRAWFORD,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, David J. Brewer, Judge of the Circuit Court of the United States for the Eastern Judicial District of Missouri, hereby certify that A. P. Selby, whose signature appears to the above certificate, is

and was at the date thereof the Clerk of said Circuit Court, and that said certificate is in due form.

In witness whereof, I have hereunto subscribed my name at office in the City of St. Louis, in said District this — day of ——, A. D. 18—.

1483 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, Elmer B. Adams, United States District Judge for the Eastern Judicial District of Missouri, hereby certify that T. L. Crawford, whose signature appears to the above certificate, is and was at the date thereof the Clerk of said Circuit Court, and that said certificate is in due form.

In witness whereof, I have hereunto subscribed my name at office in the City of St. Louis, in said District, this 12th day of February, A. D. 1896.

ELMER B. ADAMS.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, T. L. Crawford, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, hereby certify that Elmer B. Adams, whose signature appears to the above certificate, is and was at the date thereof one of the Judges of said Court; that said signature is in his own proper handwriting, and that said certificate is in due form.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court, at office in the City of St. Louis, in said District, this 12" day of February, A. D. 1896.

[SEAL.] T. L. CRAWFORD,
Clerk of said Court.

1484 In the United States Circuit Court for the Northern District of Ohio, Western Division.

No. 552. Chancery.

JAMES R. JESUP ET AL.
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY ET AL.

It is ordered by the Court that the present outstanding first mortgage bonds and first mortgage funded debt bonds and scrip on the Ohio, Indiana & Gt. Western and Decatur and East St. Louis Divisions on presentation to the Central Trust Company under the offer made by it under the order of the purchasers shall be entitled to receive interest upon their said bonds, coupons, funded debt bonds and scrip up to the date of presentation, provided such presentation shall be made on or before July 1, 1889.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

I, Irvin Belford, Clerk of the Circuit Court of the United States within and for the said District and Division, do hereby certify that the foregoing contains a true and complete copy of an Entry made in the therein-entitled cause on June 18th, A. D. 1889.

Witness my official signature and the seal of said Court at Toledo, in said District, this 17th day, February, A. D. 1896.

IRVIN BELFORD, *Clerk.*
By J. W. WILSON,
Deputy Clerk.

1485 STATE OF OHIO:

Lucas County Common Pleas.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

Opinion of Hon. Isaac P. Pugsley.

George Hoadly, John C. F. Gardner and R. R. Kinkade, Attorneys for Plaintiff and Cross-Petitioners.

Rush Taggart and Henry Crawford, Attorneys for Defendants.

Filed Supreme Court of Ohio, Apr. 14, 1906.
L. E. EMERSON, *Clerk.*

1486 No. 22624.

In the Court of Common Pleas of Lucas County, Ohio.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY
vs.
THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY.

Opinion of Court, July 16, 1894.

PUGSLEY, *J.:*

On the 1st day of November, 1862, The Toledo & Wabash Railway Company issued and sold its equipment bonds to the amount of $600,000, payable on May 1st, 1883, with interest at 7 per cent. per annum, payable on the 1st day of May and the 1st day of November in each year as per coupons attached. The plaintiff and the several cross-petitioners are the holders and owners of these bonds to the amount of $243,500, and they seek in this action to enforce a lien which they claim to have on the property of said company for the payment of said bonds and the unpaid interest thereon.

The Supreme Court held, in the case of Compton *vs.* Railway Company, 45 O. S. 592, that under the statute in force in 1865, when the Toledo & Wabash Railway Company was consolidated with certain other railroad companies, thereby forming The Toledo, Wabash & Western Railway Company, and under the stipulations contained in the consolidated agreement then executed by the constituent companies, the holders of these equipment bonds acquired a lien upon the property of The Toledo & Wabash
1487 Railway Company, and the right to have said property applied to the payment of said bonds and interest. It must be conceded that this decision is conclusive upon this Court as to the right of the plaintiff and cross-petitioners to the relief which they ask, unless by reason of certain facts which were not involved in the Compton case it is shown that the present defendant, The Wabash Railroad Company, has a good and valid defense.

1. It is contended that the final decree of the U. S. Circuit Court for the District of Indiana in what is known as the Ham suit (which is pleaded in this case, but was not pleaded in the Compton case), is a bar to the prosecution of this action. The history of the Ham suit, so far as it is necessary to state it, is as follows: In July, 1880, in that suit, Benjamin F. Ham and seven other persons filed their amended and supplemental bill of complaint against The Wabash, St. Louis & Pacific Railway Company and others, alleging that it is filed "in their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit," and alleging the ownership by them of certain of these equipment bonds, and a default in the payment of the interest. The bonds held by complainants amounted to the sum of $113,500, or less than one-fifth of the entire series. The prayer of the bill is that the Court may adjudge and decree that the equipment bonds held by complainants shall be exchangeable for the like amount of the bonds secured by the consolidated mortgage, and that the defendant, The Wabash, St. Louis & Pacific Railway Company pay to complainants the interest due on their bonds since November 1st, 1874, and for all other and proper relief. Such proceedings were had in that suit that in May, 1884, a final decree was rendered, finding the total amount due, both principal and interest, on the entire series of bonds, and finding that said amount is a lien upon all the property which, on the 29th day of May, 1865, was in the possession of The Toledo & Wabash Railway Company, situated in the States of Ohio and Indiana, subject to the liens of four certain mortgages, and ordering the said property to be sold subject to said mortgages; and that the proceeds of the sale after paying the costs, be brought into Court. The defendant, The Wabash, St. Louis & Pacific Railway Company, at once appealed said
1488 cause to the Supreme Court of the United States, and in May, 1885, the Supreme Court reversed the said decree, and ordered the cause to be remanded to the Circuit Court, with directions to disallow the lien claimed by the holders of the equipment bonds. Railway Company *vs.* Ham, 114 U. S. 587. Subsequently,

in May, 1888, the Circuit Court vacated the said final decree, and disallowed the claim of lien set up in said suit by the holders of equipment bonds, and dismissed the bill for want of equity. (Record of Ham suit, Exhibit P, pages 130, 161, 205, 220, 221 and 232.)

The claim is that the Ham suit was a representative or class suit, and that all holders of the bonds are bound by the final judgment of dismissal. The plaintiff and cross-petitioners in this case were not any of them parties to that suit. None of them came into said suit nor appeared therein, either before or after decree. No pleading or claim setting up the bonds held by them was filed therein, and no notice was given to them by publication or otherwise to join in the prosecution of said action or to share in the fruits of the decree. The action was brought for the benefit of only such bondholders, other than the complainants, *as should join in the prosecution of the action and contribute to the expenses thereof.*

The rule which is fairly to be derived from the authorities is, that in such an action, the parties who are not named are not parties to the suit, and are not bound by the proceedings therein, unless they elect to come in and claim as such, and bear their proportion of the expenses; or unless, after having had notice and an opportunity to come in and make themselves parties, they refuse or neglect to do so.

Pomeroy's Remedies (2d ed.) secs. 395 to 399.
2 Black on Judgments, sec. 545.
O'Brien *vs.* Browning, 49 How. (N. Y.) 109.
Story's Equity Pleadings, sec. 99.
Thonron *vs.* R. R. Co., 38 Fed. Rep., 573.
Stevens *vs.* Brooks, 22 Wis. 672.
Jones *vs.* Lansing, 1 Paige, 583.
Coann *vs.* Atlanta Co., 14 Fed. Rep., 4.
Hubbell *vs.* Warren, 8 Allen, 173.
Powell *vs.* Wright, 7 Beavam 450.
No. 48 Equity Rules U. S. Courts.

1489 The usual practice in courts of equity, when a decree is rendered in favor of a class represented by the complainant, is to refer the cause to a master to ascertain who the other interested parties are, and to notify them to come in and set up their demands, and then if they decline to come in, it has been held, they will be excluded from the benefit of the decree. Johnson *vs.* Watters, 111 U. S. 640; Trustees *vs.* Beers, 2 Black, 48; Story's Equity Pleadings, sec. 99.

Some authorities were cited by counsel for the defendant which, it is claimed, sustain their position. All have been examined, but only those will be noticed which are principally relied upon.

In Willoughby *vs.* Chicago Junction Railway Company, 50 N. J. Eq. 656, a suit had been brought by a stockholder of a corporation in behalf of himself and all other stockholders, to enjoin the corporation from consummating an agreement made with certain parties. The Court held that the agreement was valid, and entered

a decree dismissing the bill. Subsequently this suit was brought by another stockholder in behalf of himself and all other stockholders to obtain the same relief. It was held that the decree in the first suit was a bar. The grounds for this decision are, in substance (pages 664 to 667) that a complainant in such a suit does not prosecute it in his own right. He has no standing in court as a party, except on the refusal, either express or implied, of the corporation itself to prosecute. The corporation is the real complainant, and the relief to be obtained is for the benefit of the corporation as such. There must be an unreasonable refusal on the part of the directors of the corporation to prosecute, before a stockholder can begin the action; and when there has been an adjudication at the suit of one stockholder, which is conclusive upon the corporation, the refusal of the directors to begin another suit for the same relief is not unreasonable, and hence such other suit cannot be brought by another stockholder. The principle of the decision is that when such an action is brought by a stockholder, whether individually or as a representative of a class, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder plaintiff. 3 Pomeroy's Eq. Jurs. sec. 1095.

1490 A similar principle is involved in the case of Harmon *vs.* Auditor, 123, Ill. 122. A bill was filed by the taxpayers of a town in behalf of themselves and the other taxpayers against a railway company and the town to enjoin the town from issuing its bonds to the company. The Court held that the town had power to issue the bonds, and dismissed the bill for want of equity. Subsequently this suit was brought by other taxpayers, praying that the bonds be declared to be null and void, and that the town officers be enjoined from collecting any taxes to pay the same from the property of the complainants and the other taxpayers. It was held that the decree in the first suit was a bar. That decree was conclusive against the town and every taxpayer that the bonds were valid. Every taxpayer is a real, though not a nominal, party to the judgment. The sixth paragraph of the syllabus shows the ground of the decision.

A judgment or decree against a county or township, or its legal representatives, is binding on all the citizens, though not parties to the suit. If the same is for a sum of money, it imposes an obligation against the citizens which they are compelled to discharge, and if for the purpose of the payment, the proper authorities levy and attempt to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or collection of the tax, dispute the validity of the judgment or relitigate any of the questions which were or could have been litigated in the original action.

Both of these cases proceed upon the ground that the parties bringing the suits represent the corporation, and the relief sought, if obtained, will belong to the corporation and not to themselves. Hence, if the relief is denied, the corporation cannot relitigate the same matter in another suit brought by other parties in its behalf to obtain the same relief.

In the Ham case the parties bringing the suit did not represent the corporation and sought for no relief in its behalf.

In the case of Dewey *vs.* St. Albans Trust Co., 60 Vt. 1, there were over 2400 depositors in an insolvent bank. Of these 1100, being minors and married women, claimed a preference under the statutes. The receiver of the bank filed a petition asking for the direction of the Court as to the distribution of the funds.
1491 Notice of the hearing on the petition was published for three weeks, and was served on the chairman of the depositors' committee. The receiver and the general creditors and those who claimed a preference were all represented at the hearing. It was decreed that there should be an equal distribution of the funds. From this decree an appeal was taken to the Supreme Court by twelve of the depositors who claimed a preference. The case was fully argued in that Court, and the decree was affirmed. Subsequently, a new petition to obtain the same relief was filed by certain of the depositors who claimed a preference, among whom were some of those who appeared in the first case. The Court held that although the general rule is that all persons interested in the litigation should be before the Court, this case is within the exception that where the parties are so numerous as to make it impracticable or greatly inconvenient or expensive, it is sufficient if such number be joined as will fairly represent the interest of all, and that, as both classes of depositors were fairly represented in the litigation, all of them were bound by the decree. In this case the Court was asked to make an order for the distribution of a certain fund in the hands of a receiver. The order would necessarily determine the rights of all parties interested in the fund. Notice by publication was given to all persons interested, and it was found that they were all fairly represented by those who appeared at the hearing. Where the question is one of a common or general interest of many persons, and suit is brought by one for the benefit of all without limitation, the Court will take care that sufficient persons are before it honestly, fairly and fully, to ascertain and try the general rights in contest. Story's Eq. Plead. sec. 120.

The Ham suit was not brought under that provision of the chancery practice now adopted in the codes of many of the States, that when the question is one of a common or general interest of many persons, or when the parties are very numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of all. The complainant did not profess to represent all the bondholders, but by express averments of the bill, the benefit of the litigation was offered only to such other bondholders as should elect to come in and make themselves parties, and share in the expenses of the litigation. The fact that by the
1492 final decree the Court found the amount due on the entire series of bonds and declared the same a lien and ordered the property sold, did not change the character of the suit nor affect the bondholders who were not parties. The proceeds of sale were ordered to be brought into Court but no further steps were taken. The other bondholders were not made parties. They never came

in and availed themselves of the benefits of the suit nor assumed its burdens or liabilities. For these reasons the first decree of the Circuit Court was not *res adjudicata* as between them and the defendants; and for the same reasons the final judgment of dismissal is not *res adjudicata*.

But even if the suit became a class or representative suit by the final decree, although the other bondholders were not brought in, still, the same result would follow. When the final decree was reversed and the cause remanded, the case stood in the Circuit Court as it did before trial or judgment. By the reversal the final decree became a nullity. Therefore the dismissal of the bill by the Circuit Court bound only the complainant, none of the other bondholders being parties, the same as if it had been the first and only judgment in the case. It is believed that none of the cases cited by defendant sustain a contrary conclusion.

2. It is contended that the decree in the Compton case is a bar to the prosecution of this action, and that the only remedy which the plaintiff and cross-petitioners have is under that decree, on the ground that the Compton suit is a class or representative suit.

The petition in the Compton case, which was filed in this Court on February 3d, 1880, sets out the bonds owned by Compton, and prays that the defendant, The Wabash, St. Louis & Pacific Railway Co. be decreed to pay the amount due to the plaintiff upon the said bonds which he holds and owns, and, in default thereof, that the property originally owned by The Toledo & Wabash Railway Co. be decreed to be sold for the payment of said bonds owned by said plaintiff. (Record of Compton suit, "Exhibit M," pages 2, 47 and 48.) In March, 1882, a final decree was rendered by this Court in favor of Compton, from which an appeal was taken to the District Court. While the cause was pending in the District Court, the Adelbert College, the plaintiff in this action, filed a motion
1493 for leave to be made a defendant and to file answer therein, which motion was overruled. (Exhibit M, pages 131-132.) The cause was reserved to the Supreme Court for decision, and at its January term, 1888, the Supreme Court rendered a final decree in favor of Compton and remanded the cause to this Court to carry the decree into execution. By such final decree the Court found the amount due to the plaintiff Compton upon the bonds owned by him for principal and interest on the 1st day of May, 1888, to be the sum of $339,920.40, and ordered "that the said defendants or any of them (Exhibit M, page 236), pay to said plaintiff the said sum of $339,920.40 now due on said bonds owned by the plaintiff as aforesaid, with interest thereon to the day of payment to the plaintiff, within ten days from the entry of this decree; and if default shall be made in such payment, then an order of sale issue for the sale as upon execution at law of all said railroad and real property together with the structures thereon, and the fixtures and appurtenances thereunto appertaining, upon which the lien of said bonds known as equipment bonds, is hereby declared to exist, which is situate in the State of Ohio and the jurisdiction of this Court, subject, however, and subject only, to the liens of the two mortgages

hereinbefore mentioned as executed by The Toledo & Illinois Railroad Co. to the Farmers' Loan & Trust Co. and the Toledo & Wabash Railroad Co. to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages; and that from the proceeds of such sale the costs of this action as taxed be paid, and the residue of such proceeds be brought into Court to abide the further order herein on the footing of this decree."

After said cause had been remanded to this Court, and on the 6th day of June, 1888, a motion was filed therein to make William F. Redmond and four other persons (who are bondholders and cross-petitioners in this action), parties defendant, with leave to answer, which motion was overruled on December 31st, 1888. (Common Pleas Journal 78, page 17.) On the 27th day of October, 1888, said Compton was made a party defendant in the consolidated cause of James R. Jesup, *et al., vs.* The Wabash, St. Louis & Pacific Railway Co., *et al.*, then pending in the Circuit Court of the United States for the Northern District of Ohio, and ordered to ap-
1494 pear therein and set up his lien. On March 28th, 1889, he filed his answer in said consolidated cause, contesting the jurisdiction of the Court, and setting up the decree in his favor of the Supreme Court of Ohio. Such proceedings were had in said cause that, on the 21st day of July, 1892, a decree was rendered, finding that the decree of the Supreme Court of Ohio is a conclusive adjudication as to the amount, validity and priority of said Compton's lien upon the property of The Toledo & Wabash Railway Co., and that said Compton is entitled to redeem the said property from certain prior mortgage liens thereon amounting to the sum of $8,540,058.09 and ordering, among other things, that if said Compton shall fail to redeem the said property within the time and upon the terms provided, he shall be taxed with all the costs of the proceedings had in and about his claim, and in default of payment of said costs, execution shall issue therefor. Compton appealed from said decree to the United States Circuit Court of Appeals for the Sixth Circuit where said cause is now pending. (Exhibit T, pages 149, 163 and 271.)

The question to be determined is, whether the Compton suit was a representative or class suit, and if it was, whether the final decree in that suit is a bar to this action. Both the District Court and this Court refused to allow the bondholders in this action to intervene in the Compton suit, presumably upon the ground that it was an individual suit. The refusal of the Courts to grant to these bondholders any remedy in the Compton case, is, it seems, sufficient reason why they should be permitted to maintain an independent suit; but assuming that they might properly have been made parties to the Compton case, or that upon the distribution of the proceeds of any sale made under the Compton decree they ought to be allowed to intervene upon terms or otherwise, is there any valid objection to this suit? In other words, is the Compton decree itself a bar to this suit? The pleadings and decree in the Compton suit show that *in form* it was an individual suit only. No relief was sought nor obtained in behalf of other bondholders. Compton was

in sole control of the case, and might have dismissed it at any time before decree and after decree. As the case now stands, if the amount found due him is paid, or his claim is discharged, no order of sale can issue. Under such circumstances, to hold that
1495 the Compton decree is itself a bar to this action would practically be a denial of all remedy to these bondholders. They have not as yet been able to come into the Compton suit. They may never be able to come into it. They ought at least to be allowed to have such an adjudication as will preserve their rights, whatever they may be.

It is said that Compton, as an individual bondholder, cannot enforce his rights under the lien separate and distinct from the rights of all the other bondholders secured by the same lien and belonging to the same class. This may be true, but the defendants in that case made no claim that other bondholders should be brought in. They, without objection, allowed the case to proceed as the individual suit of Compton, and all which Compton obtained was a decree finding the amount due to him on his bonds and ordering a sale. The proceeds of sale are to be brought into Court for distribution. It is yet to be determined, in case a sale is made, how the proceeds are to be distributed.

Cases are cited which hold that when a single bondholder brings suit to foreclose a mortgage that has been given to a trustee to secure payment of a large number of bonds, his action is for the benefit of all the bondholders. There the trustee represents all the bondholders in all matters of litigation respecting their common rights, and should bring the suit. The bondholder is allowed to bring suit for the enforcement of the mortgage only in case the trustee improperly refuses or neglects to sue; and in such case he should make the trustee a defendant, and the other bondholders may come in and prove before the master, without making themselves parties, and may not therefore bring a separate action. Here, there was no trustee. Compton represented and claimed to represent only the bonds owned by himself. He was not prohibited by the principle of these cases from bringing a separate action, and he was allowed to do so without objection by the owners of the property sought to be charged with the payment of his debt.

Other cases are cited which hold that one bondholder cannot, by bringing an action at law upon his bonds, and obtaining judgment and levying execution, obtain a preference over other bondholders. It is submitted that these cases are not controlling, because if such is the object or effect of the Compton suit,
1496 the objection should be made there and not here. If Compton wrongfully claims a preference under his decree, that is no answer to the claim of these bondholders to the relief to which they are entitled. They do not claim a preference over Compton, and do not admit that the Compton decree gives him a preference over them. Their rights are not fixed by the Compton decree, and they have not been allowed to come in under that decree and set up their rights. My conclusion is that the Compton decree is not a bar to the maintenance of this action.

3. It is contended that the rights of the plaintiff and cross-petitioners are barred by the statute of limitations. Default occurred in the payment of the semi-annual interest coupons which fell due on May 1, 1875, and no interest has since been paid. The bonds became due on May 1, 1883, and are wholly unpaid. The petition in this case was filed April 28, 1883, and the summons, issued on the same day, was served on The Wabash, St. Louis & Pacific Railway Company on May 5th, 1883. The plaintiff claimed as owner of two of the bonds of $500 each, and sought no relief in behalf of any other bondholder. On January 5, 1889, the cross-petitioners having been made defendants by leave of Court, filed their answer and cross-petition, setting up the bonds owned by them and asking for relief in their own behalf, and in behalf of all bondholders who may appear and unite in the action and contribute to the expenses thereof. Notice to answer said cross-petition was duly published for a large number of defendants, the first publication being on January 9th, 1889; and afterwards notice to answer said cross-petition was duly published for the remaining defendants, the first publication being on April 11th, 1889. These defendants so notified included all the corporations and individuals who were then interested in the railroad property as owners or otherwise.

The question to be determined is, whether this action is upon an agreement in writing, and so is barred in fifteen years under sec. 4980 R. S., or is upon a liability created by statute, and so is barred in six years, under sec. 4981 R. S., or is an action for relief, under sec. 4985 R. S., and so is barred in ten years. The right of the bondholders to a lien is placed by the Supreme Court upon
1497 two grounds: first, upon the ground that a lien results from the liability imposed by the statute upon the consolidated company to pay the debts of the constituent companies; and, second, independently of the statute, upon the stipulation of the consolidated agreement that the bonds should be protected by the new company; the principle being that when property is transferred upon condition that the transferee shall pay some third person a debt, the latter acquires an equitable lien on the property to the extent of the debt to be paid. If this was an action at law against the consolidated company to recover a personal judgment, it might well be claimed that it was both an action upon a liability created by statute and an action upon a written agreement. But it is not such an action. It is an action solely to enforce an equitable lien upon property in the possession of the successors of the consolidated company. An equitable lien for the payment of the bonds was acquired when the consolidated agreement was made, but it could not be enforced until there was a default in the payment of the bonds. The cause of action accrued when the default occurred. While the question is not free from difficulty, I am of the opinion that the action is not upon a liability created by statute, nor upon a written agreement, but is solely for equitable relief, and the rule is, that the period of limitation applicable to an action for equitable relief is ten years, when the statute does not

specially provide any other limitation. "An action for relief not hereinbefore provided for can only be brought within ten years after the cause of action accrues."—Sec. 4985 R. S. It is an action for relief, and it is "not hereinbefore provided for." The cases in which the limitation of ten years under sec. 4985 R. S. has been applied seem to sustain this view.

In Neal *vs.* Nash, 23 O. S. 483, a party in a judgment against him and his principal paid the judgment to the creditor, with the agreement that it should remain in force and be assigned to him; and having procured the assignment of the judgment, he brought an action to be subrogated to the rights of the creditors in the judgment. It was held that the statutory period of limitation applicable in such an action—it being for equitable relief only—is ten years.

In Nelson *vs.* Fry, 16 O. S. 558, it is said that an action for equitable relief is limited to ten years.

1498 In Hawkins *vs.* Lasby, 40 O. S. 37, an action was brought under the statute to charge the individual property of the partners with a payment of a judgment against the partnership. It was held that it was not an action upon a liability created by statute, but was an action for relief "not hereinbefore provided for," and was barred in ten years.

In Gray *vs.* Kerr, 46 O. S. 652, it is held that the cause of action in favor of one partner against his co-partner for an account accrues upon the dissolution of the partnership, and that such an action is governed by sec. 4985 R. S., and can only be brought within ten years after the cause of action accrues.

In Bryant *vs.* Swetland, 48 O. S. 194, it is held that an action to reform a written instrument on the ground of mistake comes within the class provided for by sec. 4985 R. S., which limits the time within which the same may be commenced to ten years after the cause of action accrues.

In Swan *vs.* Shohan, 1 O. C. C. R. 216, it is held that an action to enforce specific performance of a verbal contract for the transfer of real and personal property is for equitable relief, and properly comes within sec. 4985 R. S.

It is claimed that the right to enforce the equitable lien accrued as to the entire indebtedness on the 1st day of May, 1875, the date of the first default in the payment of interest, and that if the ten years' statute is applicable, such right was lost as to the whole indebtedness on the 1st day of May, 1885. No authorities were cited to support this claim, and I am unable to see on what principle the right to enforce the lien as to subsequently accruing instalments of interest or as to the principal of the bonds, can be said to have accrued prior to the time when such instalments and principal respectively matured. The cause of action as to each instalment accrued when the same matured, and was barred in ten years thereafter. Under this holding the eight semi-annual coupons which matured prior to May 1, 1879, on each of the bonds held by the cross-petitioners, must be excluded from any recovery in this action.

4. It is contended that the consolidation agreement of 1865, under

which the lien of the equipment bonds is claimed, was unauthorized by law, and that this question was not raised in the Compton
1499 case. The consolidation was effected under the statute of 1856, between The Toledo & Wabash Railway Company, which issued the bonds, and three railroad companies of Illinois, thereby forming The Toledo, Wabash & Western Railway Company. The Toledo & Wabash Railway Company was itself a consolidated company, formed in 1858 under the same statute by a consolidation of The Toledo & Wabash Railroad Company, an Ohio corporation, and The Wabash & Western Railway Company, an Indiana corporation, thereby acquiring a continuous line of railroad from Toledo to the west line of the State of Indiana. The statute referred to is the act of May 1, 1856. (1 S. & C. 327.) Sec. 1 is as follows:

"It shall be unlawful for any railroad company in this State, organized under the general or any special law, or which may hereafter be organized in this State, and whose line of road shall be made or in the process of construction, to the boundary line of the State, or to any point either in or out of this State, to consolidate its capital stock with the capital stock of any railroad in an adjoining State, the line of whose road has been made or is in process of construction to the same point; and when the several roads so unite as to form a continuous line for the passage of cars."

It is claimed that the Illinois companies were not "in an adjoining State" that is, they were not in a State adjoining the State of Ohio, and that therefore the consolidation of 1865 was illegal. The line of the road of The Toledo & Wabash Railway Company which was formed by consolidation under this statute, extended to "a point out of this State," namely, to a point in the State of Indiana, or to the boundary line between the States of Indiana and Illinois. The Toledo & Wabash Railway Company was therefore a railroad company in this State, whose line of road was partly in the State of Indiana, and the Illinois companies were railroad companies in the State of Illinois, a State adjoining the State of Indiana. Manifestly the object of the statute was to authorize the consolidation of railroad companies whose roads form a continuous line for the passage of cars, and to accomplish that object the words "adjoining State" may as properly be construed to mean the State adjoining the State in which the first company has its line of road as the State adjoining the State in which the first company is incorporated. I see no reason why the consolidation of 1865 was not a consolidation of a railroad
1500 company in this State, having a line of road in the State of Indiana with a railroad company in an adjoining State.

This question as to the validity of the consolidation seems to be raised now for the first time, although the matter of these equipment bonds has been before the Courts, both Federal and State, in numerous and various forms since 1878, and the claim that the consolidation was illegal nowhere appears in this case except in the argument of counsel. The answer of The Wabash Railroad Company (printed record, page 236), admits that on or about the 29th day of May, 1865, the said Toledo & Wabash Railway Company entered into an agreement of consolidation with the three Illinois railroad

companies (naming them) forming by such consolidation a new company known as The Toledo, Wabash & Western Railway Company. And it admits that said agreement for consolidation was consummated on or about the date named in said petition, but denies the effect claimed from said agreement of consolidation, that is, it denies that a lien was thereby created for the payment of the bonds. In the agreed statement of facts (paragraph 13, page 7), it is agreed that on or about the 29th day of May, 1865, The Toledo & Wabash Railway Company and the three Illinois railroad companies (naming them) entered into articles of consolidation and thereby formed The Toledo, Wabash & Western Railway Company. A copy of the articles of consolidation is attached. These were duly executed and filed, and recite a compliance with the laws of the several States of Ohio, Indiana and Illinois. Nowhere in the record is it intimated that The Toledo, Wabash & Western Railway Company was not a corporation duly formed by consolidation under the Ohio statute. If the question as to the validity of the consolidation is properly raised upon the record in this case, it might properly have been raised upon the record in the Compton case, because in this respect the records in the two cases are alike. Whether or not the Supreme Court considered the question in the Compton case we do not know, but we do know that the Court in its opinion treated the consolidation as legal and valid. Under such circumstances this Court would not hold the consolidation to be illegal unless clearly convinced of its illegality. It may be added that the consolidation proceedings were treated as valid by the consolidated com-
1501 pany and all its successors. It took all the property of the constituent companies, and managed and operated the consolidated railroad for a period of years. It executed mortgages upon the same, incurred obligations, and exercised all the powers of a corporation without question. It was itself consolidated with other railroad companies, and through such consolidation and subsequent sales and consolidations, the ownership and possession of the property in question have devolved upon the present Wabash Railroad Company, defendant in this case. It was at least a corporation *de facto,* entitled to all the rights and chargeable with all the liabilities of such a corporation. It recognized its liability upon the equipment bonds by regularly paying the interest thereon as it fell due for a period of nine years, until it became insolvent in 1874, and the various foreclosures, sales and consolidations which have since taken place in the Wabash Railroad system can only be sustained on the theory that the consolidation of 1865 was valid. The final decree in the consolidated cause of Jesup and others, under which the defendant claims title to the property, expressly found that the consolidation was lawfully effected.

In view of these considerations, it is submitted that the defendant is not now in a position to question its validity.

5. It is contended that under the facts in this case the Federal Courts of Ohio and Indiana had exclusive jurisdiction to ascertain and determine the liens upon the property and order its sale, and that this Court is now without jurisdiction. This claim has refer-

ence to the various suits and foreclosure proceedings in the Federal Courts begun on the 27th day of May, 1884, and terminated by the final decree in the consolidated cause of James R. Jesup, *et al., vs.* The Wabash, St. Louis & Pacific Railway Company, *et al.,* rendered on March 23d, 1889, and by the sale and delivery of the possession of the property to the purchasing committee on July 1st, 1889.

The defendant, the Wabash Railroad Company, became incorporated on August 1st, 1889, and by a conveyance from the purchasers, acquired and now holds the title to the property, and stands in the shoes of said purchasers—and in this case contests the jurisdiction of this Court. The authorities relied upon to support the claim of want of jurisdiction apply the familiar rule that the Court
1502 which first takes cognizance of a controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject matter of the investigation, to the exclusion of all interference by other Courts of co-ordinate jurisdiction. There is no doubt as to the rule, but does it apply to the facts of this case? This action was begun on April 28th, 1883, before the commencement of any of the said proceedings in the Federal Courts, and has remained pending in this Court ever since. During the pendency of those proceedings, no attempt was made by any of the parties to this action to interrupt or interfere with the possession of the receivers appointed by the Federal Courts. Neither the plaintiff nor any of the cross-petitioners, nor any one representing them, was a party to those proceedings, and their rights were in no manner adjudicated therein. The said purchasers, at the foreclosure sale, and their predecessors in title, were parties to the action, and appeared therein prior to said sale, and all had knowledge at and prior thereto of the specific demands and claims which the plaintiff and cross-petitioners assert in this action. Those proceedings are ended. The receivers are discharged and the property is now in the possession of its owner, and has been since August, 1889; and the owner, The Wabash Railroad Company, is a party to this action. Certainly the Federal Courts now have no jurisdiction over the subject matter of this suit, and why may not the plaintiff and cross-petitioners enforce their lien, which the Supreme Court held is available against all persons deriving title from the consolidated company of 1865? (45 O. S. 593.) It is believed that none of the authorities cited hold that this may not be done. On the contrary, in one of these cases this precise question arose, and was decided in favor of the right. I refer to the case of Factos Company *vs.* Murphy, 111 U. S. 738, which was on error to the Supreme Court of Louisiana. The property of a bankrupt covered by a mortgage was sold under an order of the District Court of the United States in bankruptcy, the order being to sell the bankrupt's property free from incumbrances. The mortgagee was not a party to the bankruptcy proceeding, and subsequently brought an action in the State Court to foreclose his mortgage. It was held that the sale of real estate of a bankrupt by order of the United States Court, free from the lien of a mortgage,
1503 is invalid as to the creditor, and as to the purpose of discharging the lien, unless he is made a party to the proceeding, and

that the mortgagee had the right to a decree of foreclosure. But it is claimed that a sale of the property by the State Court, even after the relinquishment of possession by the Federal Court, will give no title to the purchaser thereunder as against the holder of the title under the proceedings had in the Federal Court; and the case is cited of Heidrieter *vs.* Elizabeth Oil Cloth Company, 112 U. S. 294. That case was an action of ejectment brought by a purchaser at a sheriff's sale under a decree of a State Court, enforcing a mechanic's lien against a purchaser at a marshal's sale under a decree of the United States Court rendered in proceedings for a violation of the internal revenue laws. It was a controversy over the title. The premises were first seized by the officers of the United States, and while they were in the possession and custody of the marshal, proceedings in the State Court were begun and prosecuted to judgment. The premises were sold under a decree of the United States Court, and possession thereof delivered to the purchaser. Afterwards they were sold by the sheriff under the judgment of the State Court. It was held that when proceedings *in rem* are commenced in a State Court, and analogous proceedings *in rem* in a United States Court against the same property, exclusive jurisdiction for the purposes of its own suit is acquired by the Court which first takes possession of the *res*, and the acts of the other Court in assuming to proceed to judgment and to dispose of the property convey no title. Although the sale under the State Court judgment was not made until the property had passed from the possession of the United States District Court, yet the initial step on which the sheriff's proceedings depended—the commencement of the proceedings to enforce the mechanic's lien, asserting the jurisdiction and control of the State Court over the property sold—took place when the property was in the exclusive custody and control of the District Court. It was not decided whether the law applicable to the internal revenue proceedings authorized an absolute forfeiture of the *res*, including all interests and estates in it, so as to overreach antecedent liens and adverse claims, or only of the actual interest of the owner charged with the violation of law
1504 at the time of the alleged offenses. If there was an absolute forfeiture, the purchaser under the decree of the United States Court obtained a good title, as that Court first acquired jurisdiction. If there was a forfeiture of only the interest of the owner, the purchaser at the sale under the State Court judgment acquired no title which he could assert in an action of ejectment against the purchaser under the federal decree, because the State Court proceedings were begun while the property was in the exclusive jurisdiction of the Federal Courts; and the purchaser under the federal decree was not a party to said proceeding.

The case is distinguishable from the case at bar. Here the State Court first acquired jurisdiction. This is certainly true as to the bonds owned by the plaintiff, and although the cross-petition was not filed until after the proceedings in the Federal Courts had been commenced, yet no adverse action was taken by the State Court while those proceedings were pending, and neither the plaintiff nor cross-petitioners were parties to those proceedings; and furthermore, the

purchaser at the foreclosure sale and the lienholders were all parties to the suit in the State Court before the property passed out of the jurisdiction and control of the Federal Court. Under these circumstances, as the rights of the plaintiff and cross-petitioners were not adjudicated in the Federal Court, and that Court no longer has jurisdiction, there seems to be no valid objection to the power of this Court to proceed and hear and determine the matters in issue.

6. It is contended that the sole right of the plaintiff and cross-petitioners is the right to redeem, and that this redemption must be of the entire property in Ohio and Indiana covered by their lien, from the four mortgages thereon, which are conceded to be prior liens. Under this head many important and interesting questions were presented and ably discussed by counsel, with numerous citations of authorities. In the view which I take of the case it is not necessary to consider these questions. So far as this branch of the case is concerned the situation is not materially different from what it was when the decree of the Supreme Court of Ohio was rendered in the Compton case. It is true that the proceedings in the consolidated cause for the foreclosure of the mortgages and the sale of the property have since been taken; but, as already shown, the plain-
1505 tiff and cross-petitioners were not parties to those proceedings and are not bound thereby. If in 1888 Compton was entitled, as the Supreme Court found and decided, to an order for the sale of the property, the plaintiff and cross-petitioners are entitled to the same order now.

Having disposed of all of the matters of defense not set up nor involved in the Compton case, and having found that none of these matters constitute a defense, it is the duty of the Court to render the same decree which was rendered in the Compton case, and this is accordingly done.

A decree may be taken in favor of the plaintiff and cross-petitioners in accordance with this opinion, finding the amount due on the bonds and declaring the same a lien, and ordering a sale, in all respects as was found and ordered in the Compton case.

George Hoadly for Plaintiff and Cross-petitioners, Rush Taggart and Henry Crawford for The Wabash Railroad Co.

1506 In the Supreme Court of Ohio, January Term, A. D. 1906.

THE STATE OF OHIO, *City of Columbus, ss:*

Certified Transcript of Docket and Journal Entries.

In the Record and Proceedings then and there had and held, among other things, is the following, to-wit:

No. 5100.

THE WABASH RAILROAD CO., Plaintiff in Error,

vs.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, JAMES COMPTON, WILLIAM F. REDMOND, JOHN B. MANNING, DAVID KOHN, and EDWARD POPPER, Partners under the Firm Name of Kohn, Popper & Company; JAMES M. HAM and BENJAMIN F. HAM, Partners under the Firm Name of Ham Brothers, and Many Others, Defendants in Error.

Error to the Circuit Court of Lucas County.

July 27, 1896. Petition in error and Waiver of Summons filed.
" " " Circuit Court Transcript, Original Papers, Bill of Exceptions and Exhibits filed.
Aug. 8, " Printed Record filed.
Oct. 19, " Proofs of Service (2) of Printed Record filed.
" 20, " Proof of Service of Printed Record filed.
Nov. 6, " Proofs of Service (2) of Printed Record filed.
Dec. 7, " Proof of Service of Printed Record filed.
" 16, 1897. Plaintiff's printed brief and Proof of Service filed.
Feb. 9, 1898. Defendants' printed Briefs filed.
" 19, " Plaintiff's Printed Briefs (Rush Taggart) filed.
Dec. 21, " Defendants' Printed Reply Brief filed.
Mar. 30, 1906. " " Memo. on O. A. filed.
April 14, " Opinion of Hon. I. P. Pugsley filed.
" 24, " Judgment entry:

"This cause came on to be heard upon the transcript of the record of the Circuit Court of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Circuit Court be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, That a Special Mandate be sent the Circuit Court of Lucas County, to carry this judgment into execution."

Journal No. 21, Page 74.

May 1, 1906. Mandate Issued.
" " " Original Papers sent Clerk.

1507

May 16, 1906. Petition for Writ of Error filed.
" " " Assignment of Errors filed.
" " " Bond filed.
" " " Writ of Error filed.
" " " Citation on Writ of Error and Acknowledgment of Service filed.

1508 Supreme Court of the State of Ohio.

STATE OF OHIO, *City of Columbus:*

I, Lawson E. Emerson, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing Transcript of Docket and Journal Entries in the case of The Wabash Railroad Company, Plaintiff in Error, against The Adelbert College of the Western Reserve University *et al.*, Defendants in Error, is truly taken and correctly copied from the records of said Supreme Court, and that the printed copies of the Record, Volumes I and II, and of the Opinion of Hon. Isaac P. Pugsley, attached hereto are true and correct copies of the Printed Record and the Printed Opinion filed in said Supreme Court and used in the consideration of said Cause in said Court.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 17th day of May, A. D., 1906.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk, Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

1509 UNITED STATES OF AMERICA:

To the Honorable —— ——, one of the Justices of the Supreme Court of the United States:

The Wabash Railroad Company respectfully shows that on the 24th day of April 1906, the Supreme Court of the State of Ohio, rendered a judgment against your petitioner in a certain action wherein the Wabash Railroad Company was the plaintiff in error and the Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stevens, Executors of James A. Sullivan, deceased; Sheldon Wing and William H. Sheldon, Executors of Preston Wing, deceased, Ella

R. Johnson, Charles E. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade; George B. Meade and Walter Aikman, Executors and Eliza Meade, Executrix of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, Executors of Maria C. Henry, deceased, were the defendants in error; that said judgment of the Supreme Court affirmed a judgment theretofore rendered in the
1510 Circuit Court of Lucas County, Ohio, in a cause wherein the said defendants in error were plaintiffs, and that your petitioner the Wabash Railroad Company was the defendant. That in the said cause in the Circuit Court, the said plaintiffs sought to enforce a lien against a line of railroad owned by your petitioner, extending from Toledo to the Western boundary of the State of Ohio, and in the said action the said defendant set up as a defence to the claimed lien of the plaintiffs as owners of certain bonds known as equipment bonds, the final judgment and decree of the Circuit Court of the United States for the District of Indiana in a certain suit pending in said cause, wherein the said court finally adjudged that the said bonds were not a lien upon the said line of railroad, and thereby your petitioner presented for adjudication in said court, a federal question as to the force, meaning and effect of the said decree of the said Circuit Court of the United States, and the decision of the said Circuit Court of the County of Lucas and of the said Supreme Court of Ohio was adverse to the effect of said decree claimed by your petitioner, and thereby a federal question was presented for consideration by this Court; your petitioner further shows that in and by the judgment of said Circuit Court the said Circuit Court is undertaking to adjudicate as to the effect and propriety of certain mortgages upon said railroad of your petitioner, and that in and by the pleadings in said cause, your petitioner, or its predecessors in title raised the question at the time the said plaintiffs instituted the said action for the enforcement of their said lien, that the United States Circuit Court for the Northern District of Ohio, Western Division, had taken possession, custody and control of said Railroad Company by its receivers, under bills for foreclosure of all the mort-
1511 gages then existing upon the said property, and among others, being two mortgages prior in date to any liens claimed by these plaintiffs, and was undertaking to adjudicate and determine all the liens and claims against said property. That in the pleadings filed by said plaintiffs, while the said property was in the exclusive possession of said Federal Court, were claims, that these mortgages being foreclosed in the Federal Court were not valid liens upon said property or enforceable against it. That in the said suits in the Federal Court, decree was finally entered on the 23rd day of March, 1889, finding all the mortgages valid which were being foreclosed

in the said Federal Court and directing the sale of the said railroad property covered by said mortgage free and clear of all liens and incumbrances, and that said property was so sold by the Master appointed by the Circuit Court of the United States, on the 15th day of May, 1889, and said property was purchased by the predecessors of your petitioner, on or about August 1st, 1889. That thereafter the Circuit Court entered a decree herein finding a lien as against the said railroad property and thereby refused to give effect to the decree of foreclosure of said Federal Court and also claimed jurisdiction in the said action over the property, and your petitioner asserts that at the time the said proceedings were instituted and carried on in the said State Courts, the exclusive jurisdiction to determine the questions in this case, was in the United States Circuit Court for the Northern District of Ohio, and the decision of the said Supreme Court denied to your petitioner the rights to which it claims to be entitled under the decree of the Federal Court, and thereby a federal question is presented for consideration to the Supreme Court of the United States. Your petitioner further asserts that the judgment of the Supreme Court affirmed the decision and judgment of the Circuit Court, holding that the State Court acquired jurisdiction to proceed to hear and determine the liens, when in fact the ex-
1512 clusive jurisdiction to hear and determine all liens relating to said property was in the Federal Court which had possession of the said property.

Your petitioner further shows that in the decree of foreclosure, dated March 23rd, 1889, entered in the Circuit Court of the United States for the Northern District of Ohio, foreclosing all mortgages upon said railway property and directing the sale of said property free and clear of all liens and incumbrances, there was a provision in said decree, "that all other questions arising under any pleadings or proceedings herein, not hereby disposed of or determined, are hereby reserved for further adjudication," and that the said Court further reserved all questions respecting the claim of one James Compton, to a lien upon the said railway property, under and by virtue of a decree rendered in the Supreme Court of Ohio, and as to the right of said James Compton to a re-sale of such railway property in the enforcement of his said alleged lien, and that said Court further reserved the right to re-take possession of the said property in the hands of the purchaser, and that the same should be subject to the powers and jurisdiction of the said United States Circuit Court, so far as necessary to the enforcement of the foregoing provisions of said decree, and that such jurisdiction should continue until all the claims and demands that have been or may be allowed against said property by order of the said court, should be fully paid and discharged. That following such order the Circuit Court directed the execution of a deed by the Master making the sale, and also directed the turning of the property over to the purchaser, but explicitly provided that that order was made subject in all respects to the provisions of the said decree of March 23rd, 1889, and your petitioner says that immediately thereafter the questions arising upon the claim

of James Compton to a lien upon said railway property, and
1513 the right to sell were referred to the Master in Chancery in said Court, and the same have been and are pending and undetermined in said Court, and said Federal Court has at all times since the making of the said decree of March 23rd, 1889, retained jurisdiction of said property and still has such jurisdiction over the same, and that the Supreme Court of Ohio therefore erred in holding that the United States Circuit Court for the Northern District of Ohio had ceased to have jurisdiction over the said railway property, and that the said State Court by reason of such relinquishment of jurisdiction, had jurisdiction and power to determine the lien of said equipment bonds upon said property.

Your petitioner therefore shows that federal questions were made in said cause and that the decision of said questions was necessary to the judgment rendered therein.

Wherefore your petitioner presents herewith an exemplified transcript of the record of the said Supreme Court of Ohio in said cause, there being contained therein a full transcript of said judgment of the Circuit Court of Lucas County, and prays that a writ of error to said Supreme Court be allowed; that said citation be granted and signed; that the bond herewith presented be approved; that the same may operate as a supersedias, and that said bond and writ of error may operate as a supersedias; that the error and complaint be reviewed in the Supreme Court of the United States and the judgment of said Supreme Court of Ohio be refused.

RUSH TAGGART,
Attorney for Petitioner.

The Writ of Error as herein prayed is hereby allowed, this 4th day of April 1906, and to operate as a supersedias.

JOHN M. HARLAN,
Asso. Justice S. C. U. S.

1514 [Endorsed:] United States Supreme Court. The Wabash Railroad Company, Plaintiff in Error, against The Adelbert College of the Western Reserve University, *et al.*, Defendants in Error. (Original) Petition for Writ of Error. Rush Taggart, Attorney for Plaintiff in Error, Office & P. O. Address, No. 195 Broadway, Borough of Manhattan, City of New York. Filed May 16 1906 Supreme Court of Ohio. L. E. Emerson, Clerk.

1515 Supreme Court of the United States, October Term, 1906.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
against
THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, JAMES COMPTON, WILLIAM F. REDMOND, JOHN B. MANNING, DAVID KOHN, WILLIAM H. KOHN, and EDWARD POPPER, Partners under the Firm Name of Kohn, Popper & Company; JAMES M. HAM and BENJAMIN F. HAM, Partners under the Firm Name of Ham Brothers; ISRAEL M. SIMON, EDWARD H. LITCHFIELD, IRVING D. FERREY, JOHN S. A. WITTKE, JAMES M. HAM, HENRY W. SMITH, CHARLES S. WEBB, Dr. W. P. ROWE, and T. E. STEPHENS, Executors of James A. Sullivan, Deceased; ELLA R. JOHNSON, CHARLES E. THORN, JAMES MOIR, GUSTAVUS ROLLINS, and EDWARD A. ROLLINS, Partners under the Firm Name of Rollins & Co.; SHELDON WING and WILLIAM H. SHELDON, Executors of Preston Wing, Deceased; EUGENE E. BISHOP, FREDERICK HUBBARD, WILLIAM C. CREAMER, GEORGE B. MEADE; GEORGE B. MEADE and WALTER AIKMAN, Executors, and ELIZA MEADE, Executrix, of H. R. Meade, Deceased; JOHN W. ALLING, E. KELLOGG BEACH, CLARENCE MORFIT, JAMES WALKER, VASSAR BROTHERS HOSPITAL, a Corporation of New York; JOSEPHINE L. CADMUS, PRESTON WING, MARY L. OLIVERIA, CHARLES G. PETERS, HENRY F. JAMES, LEWIS G. HAMPTON, WILSON H. PIERCE, AMBROSE D. HENRY, HOWARD H. HENRY, and FRANK L. HENRY, Executors of Maria C. Henry, Deceased, Defendants in Error.

And now before the Justices of the Supreme Court of the United States at the capitol, in the City of Washington, comes the Wabash Railroad Company, the plaintiff in error in the above stated cause, by its counsel and says: that in the *the* record and proceedings aforesaid there is manifest error, to-wit:

1516 I. The Supreme Court of Ohio erred in holding that the defendants in error were entitled to a decree enforcing a lien on the railway property of plaintiff in error in the State of Ohio, whereas the Supreme Court should have held that the decree and determination of the Circuit Court of the United States for the District of Indiana, in the suit of Benjamin F. Ham and others, against the Wabash Railroad Company and others was a final adjudication that all equipment bond holders, save and except those in the suit of James Compton, had no lien upon the property of the said Railway Company in the states of Ohio or Indiana.

II. That the Supreme Court of Ohio erred in holding that the jurisdiction to ascertain and determine the liens, or any of them, upon the railway property now belonging to the Wabash Railroad Company in the State of Ohio in the years 1888 and 1889, was in the Common Pleas Court of Lucas County, or that the said Common Pleas Court of Lucas County, or the Circuit Court of that County acquired any jurisdiction over that property, whereas the Supreme Court of the State of Ohio should have held that the exclusive juris-

diction to ascertain and determine the liens upon said railway property in the years 1888 and 1889 was in the United States Circuit Court for the Northern District of Ohio, and that the said Supreme Court of Ohio should have decided that the State Courts acquired no jurisdiction in this case.

III. That the Supreme Court of the State of Ohio erred in holding that the decree of the Circuit Court of Lucas County was a valid decree, whereas the Supreme Court of the State of Ohio should have held that the same was invalid, in that the same did not give due credit and effect to the decree of the Circuit Court of the
1517 United States for the Northern District of Ohio, foreclosing mortgages, dated March 23rd, 1889, upon said property and marshalling the liens thereon.

IV. That the Supreme Court of the State of Ohio erred in holding that the said defendants in error were entitled to a decree affirming the judgment of the Circuit Court of Lucas County, Ohio; whereas, the Supreme Court of the State of Ohio should have held that the said decree and judgment should have been wholly reversed and set aside as null and void.

V. That the Supreme Court of the State of Ohio erred in not giving due force and effect to the decree of the United States Circuit Court of the District of Indiana, in the suit of Benjamin F. Ham against the Wabash Railroad Company *et al.*

VI. That the Supreme Court of the United States erred in not giving due effect and credit to the decree of the United States Circuit Court for the Northern District of Ohio, Western Division, dated March 23rd, 1889.

VII. That the Supreme Court of the State of Ohio erred in not giving due force, validity and effect to the title of the plaintiffs in error, acquired under and by virtue of the sale in foreclosure held on the 15th May, 1889, under the decree of foreclosure entered in the United States Circuit Court for the Northern District of Ohio, Western Division, dated March 23rd, 1889.

VIII. That the Supreme Court of the State of Ohio erred in its judgment affirming the Circuit Court of Lucas County, wherein the Circuit Court of Lucas County had held that the lien of the bonds of the defendants in error was prior upon the terminal property in Toledo and also attached to the equipment acquired on and after August 1st, 1865; whereas, the Supreme Court should have
1518 held that as determined by the United States Circuit Court for the Northern District of Ohio, Western Division, such prior mortgages upon the said line running to the state line, were prior also upon the terminal properties in Toledo, and also upon all equipment belonging to the said line of railway and acquired subsequent to August 1st, 1865.

IX. That the Supreme Court of Ohio erred in holding that the United States Circuit Court for the Northern District of Ohio, had ceased to have jurisdiction over the said railway property, and that the State Court had by reason of such relinquishment of jurisdiction, power to determine the liens of said equipment bonds upon said property, whereas, the said Supreme Court of the State of Ohio

should have held that the said United States Circuit Court for the Northern District of Ohio was in possession and control of the said property and had not relinquished the same, having retained possession for the purpose of adjudicating the claim of James Compton to a lien upon a portion of said line of railway, and the sale of the same for the satisfaction of said lien, and that said cause relating to the claim of said James Compton is still pending and undetermined in the said United States Circuit Court, the said jurisdiction for the determination of said cause having been reserved in the decree rendered in said United States Circuit Court for the Northern District of Ohio, dated March 23rd, 1889.

Wherefore the Wabash Railroad Company prays that the judgment and decision aforesaid may be reversed and annulled, and that it may be restored to all things which it has lost by reason of said judgment and decision.

RUSH TAGGART,
Attorney for Plaintiff in Error.

1519 [Endorsed:] Supreme Court of the United States. The Wabash Railroad Company, Plaintiff in Error, against The Adelbert College of the Western Reserve University, *et al.*, Defendants in Error. (Original.) Assignment of Error. Rush Taggart, Attorney for Plaintiff in Error, Office & P. O. Address, No. 195 Broadway, Borough of Manhattan, City of New York *City*. Filed May 16, 1906. Supreme Court of Ohio. L. E. Emerson, Clerk.

1520 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Wabash Railroad Company, plaintiff in error, and The Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn, and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferry, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, Executors of James A. Sullivan, deceased; Ella R. Johnson, Charles E. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Sheldon Wing and William H. Sheldon, Executors of Preston Wing, deceased; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade; George B. Meade and Walter Aikman, Executors, and Eliza Meade, Executrix of H. R.

Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, Executors of Maria C. Henry, deceased, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
1521 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Wabash Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOHN M. HARLAN,
Associate Justice Supreme Court of U. S.

1522 [Endorsed:] Filed May 16, 1906. Supreme Court of Ohio. L. E. Emerson, Clerk.

Service of copy of within writ of error acknowledged this 5th day of May 1906.

JOHN C. F. GARDNER,
Att'y for Defendants in Error.

1523 UNITED STATES OF AMERICA, *ss:*

To The Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, Executors of James A. Sullivan, deceased; Ella R. Johnson, Charles E. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Sheldon Wing and William H. Sheldon, Executors of Preston Wing, deceased; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade; George B. Meade and Walter Aikman, Executors, and Eliza Meade, Executrix, of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, Executors of Maria C. Henry, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Ohio wherein The Wabash Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this Fourth day of May, in the year of our Lord one thousand nine hundred and Six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

1524 [Endorsed:] Filed May 16 1906 Supreme Court of Ohio. L. E. Emerson, Clerk.

Service of copy of within citation acknowledged this 5th day of May 1906. JOHN C. F. GARDNER,
Att'y for Defendants in Error.

1525 Know all men by these presents, That we, The Wabash Railroad Company, as principal, and George J. Gould and Edwin Gould, as sureties, are held and firmly bound unto The Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward

H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, Executors of James A. Sullivan, deceased; Ella R. Johnson, Charles E. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Sheldon Wing and William H. Sheldon, Executors of Preston Wing, deceased; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade, George B. Meade and Walter Aikman, Executors, and Eliza Meade, Executrix of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, Executors of Maria C. Henry, deceased, in the full and just sum of Ten thousand dollars, to be paid to the said Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, Executors of James A. Sullivan, deceased; Ella R. Johnson, Charles E. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Sheldon Wing and William H. Sheldon, Executors of Preston Wing, deceased; Eugene E. Bishop,
1526 Frederick Hubbard, William C. Creamer, George B. Meade; George B. Meade and Walter Aikman, Executors, and Eliza Meade, Executrix, of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, Executors of Maria C. Henry, deceased, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of May, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the Supreme Court of Ohio in a suit depending in said court, between The Wabash Railroad Company, plaintiff in error, and The Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, Executors of James A. Sullivan, deceased; Ella R. Johnson, Charles E. Thorn,

James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Sheldon Wing and William H. Sheldon, Executors of Preston Wing, deceased; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade; George B. Meade and Walter Aikman, Executors, and Eliza Meade, Executrix, of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, Executors of Maria C. Henry, deceased, defendants in error, a judgment was rendered against the said
1527 Wabash Railroad Company, and the said Wabash Railroad Company having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Adelbert College of the Western Reserve University, James Compton, William F. Redmond, John B. Manning, David Kohn, William H. Kohn and Edward Popper, partners under the firm name of Kohn, Popper & Company; James M. Ham and Benjamin F. Ham, partners under the firm name of Ham Bros.; Israel M. Simon, Edward H. Litchfield, Irving D. Ferrey, John S. A. Wittke, James M. Ham, Henry W. Smith, Charles S. Webb, Dr. W. P. Rowe and T. E. Stephens, Executors of James A. Sullivan, deceased; Ella R. Johnson, Charles E. Thorn, James Moir, Gustavus Rollins and Edward A. Rollins, partners under the firm name of Rollins & Co.; Sheldon Wing and William H. Sheldon, Executors of Preston Wing, deceased; Eugene E. Bishop, Frederick Hubbard, William C. Creamer, George B. Meade; George B. Meade and Walter Aikman, Executors, and Eliza Meade, Executrix of H. R. Meade, deceased; John W. Alling, E. Kellogg Beach, Clarence Morfit, James Walker, Vassar Brothers Hospital, a corporation of New York; Josephine L. Cadmus, Preston Wing, Mary L. Oliveira, Charles G. Peters, Henry F. James, Lewis G. Hampton, Wilson H. Pierce, Ambrose D. Henry, Howard H. Henry and Frank L. Henry, Executors of Maria C. Henry, deceased, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Wabash Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE WABASH RAILROAD CO.,
[SEAL.] By EDGAR T. WELLS, *V. Pres.*
GEORGE J. GOULD.
EDWIN GOULD.

Sealed and delivered in presence of
J. C. OTTESON, *Secretary.*
W. S. MALLETT.
NATHANIEL C. CAMPBELL.
62—303

1528 Approved *by* and to operate as a supersedeas.
(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the U. S.

May 4th, 1906.

1529 STATE OF OHIO, *City of Columbus:*

Supreme Court of Ohio.

I, Lawson E. Emerson, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the original Bond now on file in the said Supreme Court of Ohio in the case of The Wabash Railroad Company, Plaintiff in Error, *vs.* The Adelbert College of the Western Reserve University *et al.*, Defendants in Error.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 1st day of June, A. D., 1906.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court.

1530 [Endorsed:] 303 20267 The Wabash Railroad Company, Plaintiff in Error, against The Adelbert College of The Western Reserve University and others, Defendants in Error, Certified Copy of Original Bond. Original Bond filed May 16, 1906, Supreme Court of Ohio. L. E. Emerson, Clerk.

1531 [Endorsed:] File No. 20,267. Supreme Court U. S., October Term, 1905. Term No. 303. The Wabash Railroad Co. P. E., *vs.* The Adelbert College of the Western Reserve University *et al.* Certified copy of Bond. Filed June 5", 1906.

Endorsed on cover: File No. 20,267. Ohio supreme court. Term No. 303. The Wabash Railroad Company, plaintiff in error, *vs.* The Adelbert College of the Western Reserve University *et al.* Filed May 25th, 1906. File No. 20,267.

Office Supreme Court, U. S.
FILED.
FEB 7 1907
JAMES H. McKENNEY,
Clerk.

40.

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

against

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL.,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

RUSH TAGGART,
Solicitor for The Wabash Railroad Company.

C. G. Burroughs, Walker and Centre Streets, New York.

Supreme Court of the United States.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL.,
Defendants in Error.

Brief of Plaintiff in Error.

This case comes into this court upon writ of error to a judgment of the Supreme Court of Ohio, affirming a prior judgment of the Circuit Court of Lucas County, Ohio. The judgment thus affirmed, it is claimed by the plaintiff in error, denied to it, rights under the Constitution and laws of the United States set up and claimed in the pleadings, and, therefore, is re-examinable in this Court.

In order that the Court should understand precisely the manner in which these questions arise, it will be necessary to present at length the history of the Wabash Railroad Company, and of the various litigations in the order in which they arose, in order that the Court may see the manner in which these questions have been presented upon the record for consideration by the Courts below. We will take up, and deal with these matters in their historical sequence.

History of the Wabash Railroad.

The first of the railway corporations now forming part of the Wabash System, with which we are concerned in this litigation, was organized in the year 1853, under the laws of the State of Ohio, as the Toledo and Illinois Railroad Company, for the construction of the line of Railway from Toledo to the west line of the State of Ohio. It began the construction of its road in that year and built its railroad from Toledo to a point in the West line of Paulding County, Ohio, on the State line between Ohio and Indiana. To secure funds to enable it to construct its railroad, upon the 8th day of September, 1853, it executed its mortgage to The Farmers' Loan and Trust Company of New York, to secure the issue of $900,000 of bonds. These bonds were issued and sold and constituted the first mortgage on the Ohio Division, as it is now cal ed (Record, pp. 222, 223).

In June, 1852, The Lake Erie, Wabash and St. Louis Railroad Company was organized as a corporation under the laws of the State of Indiana for the purpose of the construction of the line of Railroad across the State of Indiana, connecting at the Eastern boundary with the line of the Toledo and Illinois Railroad.

Upon the first day of August, 1853, this Indiana corporation executed and delivered its mortgage to The Farmers' Loan and Trust Company of New York, to secure the payment of $2,500,000 worth of bonds. These bonds were issued and sold and constituted the first mortgage upon the Indiana Division. In June, 1856, these two corporations consolidated and formed The Toledo and Wabash Railroad Company, which consolidated Company contracted large debts, and issued a consolidated mortgage upon the property, and in June, 1857, this property was sold under foreclosure proceedings, under the second mortgage, the first mortgages remaining undisturbed (Record, p. 223).

In July, 1858, an Ohio corporation, known as The Toledo and Wabash Railroad Company, was formed, which acquired from the purchaser at the foreclosure sale, that part of the Railroad sold in 1857, which was located in Ohio. About the same time The Wabash and Western Railroad Company was organized under the laws of the State of Indiana for the purpose of acquiring from the purchaser at the foreclosure sale held in 1857 that part of the Railroad which was situated in the State of Indiana. To these respective corporations, the purchasers at the foreclosure sales in the two states duly conveyed the properties acquired by them. As part payment of the purchase money in each State, the Railway Companies above named, purchasers, respectively executed a mortgage to Edwin D. Morgan to secure bonds to the amount of the first mortgage upon the property in each of the States, it being expressed to be a part of the consideration of the purchase of the railway properties, that the new Company in each state should assume and pay the outstanding first mortgage upon the property purchased. After such assumption as a part of the purchase price of the first mortgage in each State respectively, each Company delivered its mortgage to Edwin D. Morgan, Trustee, to secure an issue of bonds upon the second mortgage, the Ohio Company mortgaging the Ohio Division to the amount of $1,000,000, additional to the outstanding first mortgage, and the Indiana Company to the amount of $1,500,000 additional to the amount of the outstanding first mortgage in that State. At the time these mortgages were executed the Board of Directors of these Companies had formulated a consolidation agreement between the two companies, which subsequently to the date of the execution and delivery of the second mortgages was approved by the Board of Directors of the two Companies and by the stockholders, and went into effect in November, 1858, whereby was formed the consolidated company in the States of Ohio and Indiana known as the Toledo and Wabash Railroad Company. In the consolidated agree-

ment forming this Company all the debts and obligations of every kind, nature and description of the constituent Companies were expressly assumed by the consolidated Company (Record, p. 224).

In the year 1862, this consolidated Company, The Toledo and Wabash Railway Company, issued and sold equipment bonds to the total amount of $600,000 in denominations of $100, $500 and $1,000 each, but all of the same form. These bonds were all payable to bearer, dated the 1st day of November, 1862, and all fell due on the first day of May, 1883, and bore interest from and after the first day of May, 1863, at the rate of 7 per cent. per annum, payable, semi-annually, on the first days of May and November in each year, and had interest coupons attached, evidencing the interest payments. On the face of the bonds it was provided that the bond was convertible into common stock of the Railway Company at par, at any time within five years from its date, and expressed upon its face that it was one of a series authorized to be issued not exceeding in the total amount, $600,000. They were not secured by any mortgage, but were simply unsecured, sealed negotiable notes of the Company, evidenced by the signature of the President and the Treasurer and the seal of the Company (Record, p. 225).

On the first day of August, 1865, this Toledo and Wabash Railway Company entered into a further agreement of consolidation with three corporations of the State of Illinois, owning and operating railroads in the last-named State, whose railroads were so connected, one with the other that they formed a continuous line of railway from the State Line between Indiana and Illinois to the Mississippi River. This consolidation agreement dated the 1st of August, 1865, created a corporation known as "The Toledo, Wabash and Western Railway Company," and this consolidation agreement by some provisions therein is claimed to create an equitable lien upon all the property which belonged to the Toledo and

Wabash Railway Company, on the 1st of August, 1865, the date of the consolidation, in favor of the outstanding equipment bonds (Record, p. 225).

This Toledo, Wabash and Western Railway Company, in the year 1867, executed and delivered a consolidated mortgage to Isaac H. Knox and James Jesup, trustees, to secure an intended issue of $15,000,000 of bonds upon all the line of railway, and upon all the property owned by it between Toledo, Ohio, and the Mississippi River. Only about $2,000,000 of these bonds were over issued. Subsequent to 1867, a further mortgage known as the Gold Bond Mortgage was issued by the Toledo, Wabash and Western Railway Company, into which was funded a large amount of the floating indebtedness of that Company. In 1873, this Gold Bond Mortgage was foreclosed in the State Courts of Ohio, Indiana and Illinois, but the sales held under these foreclosures were subject to the prior mortgages upon the property. The purchasers at the foreclosure sales of these Gold Bond Mortgages in the three States named, formed three companies, known as "The Wabash Railway Company in Ohio," "The Wabash Railway Company in Indiana" and "The Wabash Railway Company in Illinois," which respectively acquired the property in each of the States, and after the acquisition of these railway properties consolidated and formed The Wabash Railway Company. Concurrent with the default of the payment of interest in the Gold Bond Mortgage, which resulted in the foreclosure of that mortgage, there was also default by The Toledo, Wabash and Western Railway Company upon the coupons, or interest warrants, attached to the equipment bonds, and none of the coupons falling due on said bonds after the 1st day of November, 1874, has been recognized, or paid, by the corporations which have successively owned the property formerly owned by The Toledo, Wabash and Western Railway Company (Record, pp. 225, 226).

In the year 1879, The Wabash Railway Company

executed a consolidated mortgage to Solon Humphreys and Daniel A. Lindley, trustees, securing bonds to the amount of $2,000,000, covering the railways from Toledo, Ohio, to the Mississippi River, and including a branch line from Decatur, Ills., to St. Louis, which had been acquired in the year 1867, all of which bonds were duly issued and sold. In the same year, but after the execution and sale of the bonds under this consolidated mortgage to Humphreys and Lindley, The Wabash Railway Company and the St. Louis, Kansas City and Northern Railway Company, a corporation of Missouri, entered into an agreement of consolidation whereby was created The Wabash, St. Louis, and Pacific Railway Company, a consolidated corporation formed under the laws of the States of Ohio, Indiana, Illinois and Missouri, which corporation owned lines of railway extending from Toledo, Ohio, to Kansas City, Missouri, with numerous branch lines, unnecessary to be enumerated here (Record, p. 227).

In June, 1880, after the completion of the consolidation of 1879, The Wabash, St. Louis and Pacific Railway Company, executed a general mortgage to the Central Trust Company and James Cheney, trustees, to secure an intended issue of $50,000,000 general mortgage bonds, said bonds being intended to fund all the bonds of previous mortgages and issue $17,000,000 of the $50,000,000 of the first issue (Record, p. 227).

After the execution of the general mortgage, last above described, in 1880, The Wabash, St. Louis and Pacific Railway Company contracted further large debts which it was unable to pay, and on the 27th day of May, 1884, the Company went into the Federal Courts of Missouri, Illinois, Indiana, Iowa, Michigan and Ohio, and filed its bill in each Circuit Court where its lines were located, and alleged its insolvency, and asked that receivers be appointed to take possession of its property for the benefit of its creditors, and administer the same in order to prevent its dissipation,

and destruction by suits which might be brought upon behalf of creditors.

Thereupon each of these Courts acting upon bills thus filed by the corporation, appointed Solon Humphreys and Thomas E. Tutt, as receivers of the property, and these receivers duly qualified and took possession of all the property theretofore operated by the Wabash, St. Louis and Pacific Railway Company (Record, pp. 227, 228).

Immediately after the appointment of these receivers, default occurred upon the coupons due on the 1st day of June, 1884, upon the $17,000,000 of bonds, issued and sold under the general mortgage to the Central Trust Company and James Cheney, trustees, and these trustees instituted suits for the foreclosure of this general mortgage in the several state courts within whose jurisdiction the property of the Company lay. These suits after they were thus instituted were removed to the Federal Courts in their respective States, and were there consolidated by the action of the Federal Courts, with the suits brought by the Company in which receivers had theretofore been appointed. The receivers, by order of the Federal Courts continued to hold the property, and to operate the same, and the foreclosure of the general mortgage of 1880, was carried forward in the Federal Courts (Record, p. 228).

This resulted in a decree of sale of the property upon the foreclosure of the general mortgage, and this sale took place in 1886. At this foreclosure sale, the property was bought by a purchasing committee, consisting of Messrs. Joy, Ashley, Hubbard and Wells, who were constituted such purchasing committee by an agreement entered into by the holders of the general mortgage bonds. The property was acquired by the purchasing committee subject to all prior mortgages, and one of the conditions of purchase by the purchasing committee was the assumption of the payment of a large number of obligations, receivers certificates, etc., which had been authorized by the courts,

and of debts which had been contracted by the receivers in the operations of the property (Record p. 229).

Before the completion of the foreclosure proceedings upon the general mortgage, and before any discharge of the receivers appointed by the United States Courts under the orders entered in May, 1884, had been made, a large number of holders of bonds secured by mortgages prior to the general mortgage filed a bill in the United States Circuit Court for the Southern District of Illinois, and in the other Circuit Courts of the United States in the Circuits East of the Mississippi River, asking for the foreclosure of the Knox and Jessup mortgage of 1867, and the Humphreys and Lindley mortgages of 1879, and the removal of the receivers who had been appointed in May, 1884. In these suits thus begun, the receivers of the property east of the Mississippi River were removed and Thomas M. Cooley, appointed receiver in their stead, by the several United States Circuit Courts within whose circuits the railway property was situated. Thomas M. Cooley remained as receiver in possession of these properties until his voluntary retirement in 1887, when Gen. John McNulta was appointed in his stead, and remained as receiver until final discharge after the foreclosure of all the mortgages upon these properties in 1889 (Record, pp. 229, 230).

In the year 1887, Knox and Jesup, trustees, under the mortgage of 1867, filed their bill in the several courts of Ohio, Indiana, Illinois, for the foreclosure of their mortgage and in 1888 the Farmers' Loan and Trust Company filed bills in the Circuit Courts of Ohio and Indiana respectively for the foreclosure of the first mortgage on the property in those states. In these two last named suits, James F. Joy, Trustee, as successor to Edwin D. Morgan, deceased, appeared and filed answers, representing the second mortgages. Similar suits were begun in the year 1888, to foreclose the prior divisional mortgages upon the divisions in Illinois in the United States Circuit Court,

of the proper circuits. As a result of these suits, there were thus foreclosure suits pending in 1888 on behalf of all the mortgages upon all the railway properties from Toledo, Ohio, to the Mississippi River, except the Humphreys and Lindley mortgage of 1889, but Humphreys and Lindley, as trustees, were parties to all the other foreclosure suits (Record, p. 231).

In October, 1888, by proceedings regularly had by the trustees representing all the mortgages in each of the circuit courts of Ohio, Indiana and Illinois, all of the foreclosure suits were regularly consolidated into one suit under the title of "James R. Jesup and Isaac H. Knox against The Wabash, St. Louis and Pacific Railway Company *et al.*," so that thereafter in each of those states in the United States Circuit Courts there were suits in which as parties there were present the trustee of every mortgage upon the property east of the Mississippi River, whether the property covered by the mortgage was within the jurisdiction of the court or not (Record, p. 231).

In these consolidated causes thus pending in each of the circuit courts, orders were duly entered appointing Gen. John McNulta as the receiver. These causes regularly proceeded to a hearing and resulted in the foreclosure of all divisional and consolidated mortgages upon all of the property East of the Mississippi River. This decree was regularly entered in each of the circuit courts of the United States on the 23d of March, 1889, and by the decree all the mortgages were foreclosed, and the foreclosure sale was had upon the 15th day of May, 1889, and all the properties exposed for sale and sold (Record, p. 231). The terms of this decree are deemed conclusive upon the questions in this case, and attention will be called to them when we come to consider the federal questions presented upon the record. At the sale under this decree, the properties were exposed for sale by divisions first, and bids taken thereon, and thereafter the properties exposed for sale as a unit. The property was sold as a whole, and was purchased by

Messrs. Joy, Ashley, Hubbard and Wells, who had been constituted a purchasing committee on behalf of bondholders under all of the mortgages.

Under the provisions of the decree the claim of James Compton, which will be referred to hereafter, was reserved, and the property was sold free and clear of all liens and incumbrances, and subject to all claims for the expenses of the receivership, and all the debts and liabilities of the receivers, or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that had been, or might thereafter be charged against the property of the said railway Company, or the adjustment of any equities by any of the United States Circuit Courts in any state where said cause was pending, and subject to the right of the court to retake possession of the property, and re-sell it if any claim adjudicated by the Court would not be paid by the purchaser, and also providing that the property should be subject to the power and jurisdiction of the said courts, and remain subject, until all such claims and demands should be fully paid and discharged (Record, p. 181 *et seq.*). The specific provisions of the decree will be specially noticed later.

The purchasing committee caused a new corporation to be formed in each of the several states where the property was situated, and in July, 1889, the Wabash Railroad Company, the plaintiff in error, was formed by the consolidation of these constituent companies of Ohio, Indiana, Michigan, Illinois and Missouri. Gen. McNulta, terminated his position as receiver of the property on the 1st day of July, 1889, when he turned the property over under an order of the United States Court to the Purchasing Committee. The Purchasing Committee, about the 1st day of August, 1889, turned the property over to the Wabash Railroad Company. The Wabash Railroad Company has continued in possession of the property until the present time (Record, pp. 232, 265).

Concurrent with a portion of the history hereinbefore recited, the litigation respecting the equipment

bonds was carried forward, which we will now specially notice.

The Ham Suit.

As has been stated, The Toledo, Wabash and Western Railway Company defaulted in the payment of interest warrants upon the equipment bonds in November, 1874, and there followed the foreclosure of the gold-bond mortgage, and the formation of the Wabash Railway Company. After the formation of the Wabash Railway Company it failed to pay the interest upon the coupons upon the equipment bonds, and thereupon, in May, 1878, one David J. Tyson, together with a number of other persons named, who were holders of the equipment bonds, went into the Circuit Court of Fountain County, Indiana, and filed their suit against the Wabash Railway Company, then owning the railway property from Toledo to the Mississippi, Isaac H. Knox and James R. Jesup, Trustees, and claimed the right, as owners of equipment bonds, to insist upon the exchange of the equipment bonds for bonds to be issued under the consolidated mortgage of 1867 to Knox and Jesup. Upon the application of the defendant The Wabash Railway Company, this case was removed to the United States Circuit Court for the District of Indiana, and thereafter, amended and supplemental bills were filed bringing in additional parties claimed to own other equipment bonds, and also bringing in the trustees, of the prior mortgages upon the railway property situated in the states of Ohio and Indiana (Record, pp. 404–418, 430).

In July, 1880, David J. Tyson ceased to be connected with the suit, but Benjamin F. Ham and others, by leave of the Court, then came into the suit, and in July, 1880, filed a supplemental and amended bill on their own behalf as owners of equipment bonds, as well as on behalf of all other owners of equipment bonds in like interest, "who may come in and contribute to the

expenses and join in prosecution of this suit " (Record, pp. 472, 473).

In this supplemental bill they asked that the entire series of equipment bonds to the amount of $600,000 principal, and the unpaid interest thereon should be declared a lien upon the railway property extending across the states of Ohio and Indiana then owned by the Wabash Railway Company, but formerly belonging to the Toledo and Wabash Railway Company, and in default of payment of the amount then due upon the matured coupons, asked for a decree fixing such lien, and a sale of such property for the amount due of unpaid interest (Record, pp. 473–493).

To the original bill thus filed, The Wabash Railway Company answered, and after the consolidation of 1879, its successor, The Wabash, St. Louis and Pacific Railway Company, answered the amended and supplemental bill, and tendered issues respecting the equities claimed by the equipment bondholders (Record, p. 495). The case was submitted to the Court upon the supplemental bill, and the answer thereto, and upon the 5th day of November, 1883, decree was entered in favor of the plaintiffs as owners of some of the said equipment bonds, and also on behalf of the entire issue of equipment bonds to the amount of $600,000, finding the entire issue to be a lien upon the property formerly belonging to the Toledo, and Wabash Railway Company, from Toledo in the State of Ohio, to the west line of the State of Indiana, and finding the principal due upon all the matured coupons up to the date of the decree, and directing that upon default in the payment of the costs, coupons, and principal sum then due upon all such bonds and interest, the entire property subject to this lien should be sold, together with all the buildings and appurtenances, by a master appointed for the purpose, subject only to the four prior mortgages upon the property, being the first and second divisional mortgages in Ohio and Indiana, respectively (Record, pp. 505–516).

From this decree an appeal was taken to the Supreme Court of the United States by the Wabash, St. Louis and Pacific Railway Company, and that appeal was heard in May, 1885. Upon that appeal the decree of the Circuit Court was reversed by this Court, and a mandate was sent down to the Circuit Court directing that the decree which had been entered in November, 1883, in favor of said equipment bonds be reversed and vacated, and directing that the claim of lien on behalf of said equipment bonds set up in that cause be disallowed, and the bill dismissed for want of equity (Record, pp. 516–526; Wabash, St. Louis and Pacific Railway Company *et al.* vs. Ham, 114 U. S., 587). This was accordingly done, and a decree entered in the Circuit Court, dismissing the bill of Ham and others, for want of equity, on the 7th day of May, 1888 (Record, p. 527). This decree entered on the 7th day of May, 1888, is relied on by the Wabash Railroad Company as a bar to the prosecution of the case at bar by the defendants in error, and this claim under this decree was denied by the judgment of the State Courts.

The Compton Suit.

In February, 1880, James Compton filed his petition in the Court of Common Pleas of Lucas County, Ohio, alleging that he was the owner of equipment bonds issued by the Toledo and Wabash Railway Company, in 1862, to the amount of $150,000, and setting up the facts respecting their issue and the subsequent, consolidation of the corporations on the 1st day of August, 1865; alleging that he was entitled to assert an equitable lien on behalf of the said equipment bonds upon the property formerly belonging to the Toledo and Wabash Railway Company, in Ohio and Indiana, which passed to the consolidated Company, and in the possession of the then owner of the property, the Wabash, St. Louis and the Pacific Railway Company; asking that

such equitable lien be decreed in favor of the said equipment bonds, that the amounts found due upon the unpaid interest warrants or coupons set forth in his petition might be ascertained, and that in default of payment of the said amount thus found to be due by the Wabash, St. Louis and Pacific Railway Company, the railway property formerly belonging to the Toledo and Wabash Railway Company in Ohio and Indiana, might be sold in satisfaction of the amount thus found due (Record, pp. 282–308). On the 10th of March, 1882, the Common Pleas Court of Lucas County, entered a decree sustaining Compton's contention, defining the lien on behalf of the equipment bonds, ascertaining the amount due on the interest warrants, and upon default of payment of such amount, directing the sale of the railway property (Record. p. 340). The Wabash, St. Louis and Pacific Railway Company, appealed to the district court of Lucas County, and the District Court of Lucas County, upon an agreed statement of facts, reserved the cause for determination to the Supreme Court of Ohio (Record, pp. 351–394. The Supreme Court of Ohio, in May, 1888, handed down an opinion, sustaining the decree entered in the Common Pleas Court, and refused to follow the decision of the Supreme Court of the United States respecting the lien of such equipment bonds, which had been made in the Ham suit, and reported in the case of The Wabash, St. Louis and Pacific Railway and others vs. Ham, 114 U. S., 587 (Compton vs. Railway Co., 45 Ohio State, 592).

The decree of the Supreme Court which was duly entered on the 18th of May, 1888, found the equipment bonds to be a lien upon all of the property of the Toledo and Wabash Railway Company, which it owned at the time it entered into the consolidation of 1865. It also found the amount due at that time upon the $150,000 of bonds owned by James Compton, all of the equipment bonds having matured in May, 1883, pending the litigation, and directed that in event of the default of payment to Compton of the amount

found to be due, that a sale of the property situated in the State of Ohio upon which these equipment bonds were a lien should be had, and the proceeds brought into court for further proceedings on the foot of this decree (Record, pp. 394–398). Upon the entry of decree upon the mandate from the Supreme Court, in the Court of Common Pleas of Lucas County, in October, 1888, Compton was made a party to the then pending foreclosure proceedings in the consolidated action of Knox and Jesup against the Wabash, St. Louis and Pacific Railway Company, in the United States Circuit Courts for the District of Indiana and Northern District of Ohio, Western Division (Record, p. 628).

Compton appeared in both courts, and set up the decree rendered in accordance with the opinion of the Supreme Court of Ohio, in said cause (Record, pp. 639–663).

At the time of the entry of the foreclosure decrees in the United States Circuit Courts on the 23d day of March, 1889, the questions respecting the claim of James Compton were not ripe for decision, issues having only been joined recently, and a reservation was accordingly entered in said foreclosure decree, reserving Compton's rights, notwithstanding the foreclosure of all the mortgages, to which reservation, more particular reference will be made hereafter (Record, p. 182). After the foreclosure sale and the turning over of the property to the purchasers under the foreclosure sale, the issues relating to Compton were, in an order entered in August, 1889, referred to Bluford Wilson, as master to hear and determine (Record, p. 528).

In 1891, Bluford Wilson reported on the lien and claim of James Compton, and upon his report decrees were entered in the United States Circuit Courts for the District of Indiana, and for the Northern District of Ohio, Western Division, in July, 1892 (Record, pp. 529 and 669–714). Compton appealed from the decree entered in the United States Circuit Court for the

Northern District of Ohio, Western Division, to the Circuit Court of Appeals, but did not appeal from the decree of the Circuit Court for the District of Indiana. By the decree of July, 1892, Compton was given the right to redeem the property in Ohio and Indiana upon payment of the amount due on the four prior mortgages thereon (Record, p. 532). Judges TAFT and LURTON of the Circuit Court of Appeals were unable to agree upon certain questions presented upon the record and certified the questions upon which they differed to the Supreme Court of the United States as to the rights of Compton. Upon this certification this court rendered an opinion in May, 1897, to the effect that under the reservations of Compton's rights in the decree of foreclosure of March 23d, 1889, in the consolidated foreclosure clause, Compton had a right to a resale of the property formerly belonging to the Toledo and Wabash Railway Company situated in the State of Ohio upon the event of non-payment of the amount found due in his decree, within a certain date after such event (Compton vs. Jesup, 167 U. S., 1).

The Circuit Court of Appeals, in obedience to the mandate of the Supreme Court of the United States, reversed the decree of July 1, 1892, in so far as it required Compton to redeem, and decreed his right to a sale of the property in Ohio, subject to prior liens thereon. Prior to making such sale it referred the questions to a Master to ascertain, and determine the amount of such prior liens upon the property after crediting all net earnings of the property covered by the liens during the period since the sale under the decree of March 23d, 1889. This accounting is now in progress before the Master appointed by the United States Circuit Court for the Northern District of Ohio, Western Division.

The claim of the Wabash Railroad Company with respect to this accounting, in view of the reservations in the decree, is that the railroad property sought to be affected by the lien in favor of the equipment bond-

holders represented in this case is still in the custody and exclusive jurisdiction of the United States Court.

Adelbert College Litigation.

The suit of the Adelbert College of the Western Reserve University was brought in the Common Pleas Court of Lucas County, Ohio, by the filing therein on the 28th of April, 1883, of a petition against the Toledo, Wabash and Western Railway Company, The Wabash Railway Company, and The Wabash, St. Louis and Pacific Railway Company, James R. Jesup and Isaac H. Knox, as trustees, and George I. Seney, Trustee, and John Humphreys and Daniel A. Lindley, as trustees, defendants, and of a precipe, directing the sheriff to summon the defendants named in the petition (Record, pp. 14, 15). The petition was based upon two equipment bonds of $500 each, and followed very closely the allegations which had been made in the prior suit of James Compton against the Wabash, St. Louis and Pacific Railway Company, and asked the declaration of a lien in favor of the equipment bonds; for an ascertainment of the amount due on the bonds owned by the plaintiff, and an adjudication that the bonds known as equipment bonds became a charge and lien upon all the property of the defendant Wabash, St. Louis and Pacific Railway Company situated in the States of Ohio and Indiana, so far as the same was owned by the Toledo and Wabash Railway Company at the time of the consolidation of August 1st, 1865; asked an adjudication of the lien of said plaintiff on the property mentioned, with priority over all liens of all kinds existing upon the same, except the first mortgage executed by the Toledo and Illinois Railroad Company, and the second mortgage executed by the Toledo and Wabash Railway Company, being the first mortgage of $900,000 and the second mortgage of $1,000,000 upon the property; also, except the first mortgage of $2,500,000 and

second mortgage of $1,500,000 in Indiana (Record, pp. 39-400). On the 5th of May, 1883, the sheriff made return that he served the Wabash, St. Louis and Pacific Railway Company by service upon their freight agent, at Toledo, and that the other defendants were not found in Lucas County (Record, p. 59). A formal answer was interposed by the Wabash, St. Louis and Pacific Railway Company and nothing further was done with this cause until the 8th day of June, 1888, when an amended answer was filed on behalf of the Wabash, St. Louis and Pacific Railway Company, denying most of the averments of the complaint, and setting up as a further defence the adjudication in the Ham suit as a bar to the right to enforce the lien, and also as a still further defence the appointment of receivers of all the property belonging to the Wabash, St. Louis and Pacific Railway, and alleging exclusive jurisdiction of the Federal Court over all proceedings to adjudicate claims against the said property (Record, pp. 60-65). Following this amended answer, on the 2d of January, 1889, William F. Redmond, and a large number of other parties by leave of court filed their answer and cross petition in the Court of Common Pleas of Lucas County in the said Adelbert College case on their own behalf and on behalf of all holders of equipment bonds issued by the Toledo, Wabash and Railroad Company, who may appear and unite in the cross petition, and contribute to the expense thereof, asking that their bonds might be declared a lien upon the railway property formerly belonging to the Wabash Railway Company, and setting up the provisions of the consolidation agreement of August, 1865 (Record, pp. 68-82). In said answer and cross petition the said cross petitioners further set up that the mortgage of the Toledo and Illinois Railway Company to the Farmers, Loan and Trust Company was no longer a lien upon said premises, and asked that the Farmers Loan and Trust Company might be required to appear and disclose the full nature and extent of its claim, and also made the same

averments respecting James F. Joy, the substituted trustee under the second mortgage upon the Railway property in Ohio (Record, pp. 77, 78). This, it may be observed, notwithstanding both these trustees were at that time prosecuting the foreclosure of said mortgages in the Federal Court, and the Federal Court had by order in said foreclosure proceedings appointed Gen. John McNulta as receiver of these railway properties, and the said receiver was in possession, and operating these railway properties.

Subsequently, in 1891, the Adelbert College filed an amended petition, and during the year 1889, further holders of equipment bonds united in filing Cross petitions making substantially the same averments as those made by William F. Redmond and others (Record, pp. 60-68).

Summons was issued upon the cross petition of William F. Redmond and others directed to the Wabash, St. Louis and Pacific Railway Company, and to the purchasing Committee and after the organization of the Wabash Railroad Company in August, 1889, it was made a defendant to the amended and supplemental petition of the Adelbert College, and service made upon it (Record, pp. 96-109).

In October, 1889, a second supplemental and amended petition was filed, setting forth the sale and the conveyance of the title to the property to the Wabash Railroad Company in a proceeding in which it is alleged the cross petitioners were not parties (Record, p. 109).

In March, 1889, the purchasing committee who had been made parties to the cross petition of William F. Redmond and others, filed their answer to such cross petition, setting up the possession of the receivers under orders of the Federal Courts of all the properties, and the pendency of the consolidated suits for the foreclosure of all the mortgages, and the extension, by the orders of the said United States Courts, of the receivership to all of said suits and foreclosures, and alleging that the said United States Courts are pro-

ceeding to foreclose all the mortgage liens and to determine the amount and priority of said liens and to adjust all rights and equities of all parties in and to said property and that the said courts have therefore duly acquired prior jurisdiction and control over such property, and the defendants the purchasing committee, and have exclusive right to determine the rights of the cross petitioners in and to the same (Record, pp. 111–115).

For a second defense they set up the issue under orders of said United States Courts of a large amount of receivers' certificates, and evidences of indebtedness, of which the defendants the purchasing committee became the owners and holders (Record, p. 113). The defendants also set up the decree in the Ham suit as a adjudication against the right of the cross petitioners to any such lien as they were seeking to enforce (Record, p. 114).

The same answer was filed by James F. Joy, who was also made a party to the answer and cross petition of William F. Redmond (Record, p. 115). Solon Humphreys and Daniel A. Lindley appeared and demurred to the petition as not stating facts sufficient to constitute a cause of action (Record, p. 118). The Farmers Loan and Trust Company also appeared, and filed an answer likewise setting up the prior jurisdiction of the Federal Courts (Record, pp. 119–124). In April, 1889, the purchasing committee further set up by supplemental answer the entry of the decree for foreclosure of March 23d, 1889, and attached to their supplemental answer a copy of such decree as a part of their answer, and set it out in full with all the reservations and provisions thereof, as the decree entered in each of the United States Circuit Courts (Record, pp. 130–184). James F. Joy also filed an answer referring to said decree, and setting up the entry of said decree referring to the copy attached to the answer of the purchasing committee (Record, p. 184). After the Wabash Railroad Company was made a party, in October, 1889, it appeared and filed

its answer to the allegations of the petition, and supplemental and amended petition of the Adelbert College, and set up as a defense, the proceedings in the Federal Courts relating to the possession of said property, and the subsequent suits beginning in May, 1884, and continuing down to the foreclosure decree of 1889. Its answer recited the various suits, and the various orders and provisions of the various orders made in each of said suits, and the decree of March, 1889, under all of the mortgages existing upon said railway property, and the sale under said decree and the formation of the Wabash Railroad Company, and the conveyance to it of the lines of railway by the purchasers at a foreclosure sale (Record, pp. 185-192). The important part of its answer is that it adopts all the allegations of the answer and supplemental answers of said purchasing committee (Record, p. 191), and asks that the same may be taken as a part of its answer as though set out in full, and also all of the answers of James F. Joy, and asks that the same may be taken as its answer, the same as if set out in full (Record, p. 192).

On the 2d of June, 1890, The Wabash Railroad Company filed a further answer to the cross petition of Henry F. James, one of the equipment bondholders and adopted as its answer the answer made by it to the petition of the plaintiff and the cross petition of Redmond and others, and further set forth the special provisions of the decree of March 23d, 1889, relating to the reservation of jurisdiction by the Federal Court over all claims and equities respecting the property of the Wabash, Saint Louis and Pacific Railway Company, setting out *in extenso*, the provisions of said decree, and reciting as a further evidence of the exclusive jurisdiction of the Federal Courts, that the claim of James Compton to a lien upon the portion of said line of railway was then pending and undetermined in such Federal Courts and had been referred to the Hon. BLUFORD WILSON, Master in Chancery, to take testimony, and report thereon. It averred the fact

to be that the said United States Courts were still in such possession and control of said property as to have exclusive jurisdiction to hear and determine all questions relating to liens upon the lines of said railway (Record, pp. 195–198).

In April, 1889, a reply was filed by Redmond and others to the answer of the purchasing committee denying the exclusive jurisdiction of the Federal Courts as set up in the answer of the purchasing committee, and alleging that they were entitled to go on in the State Courts notwithstanding the proceedings in the Federal Courts (Record, pp. 201–204).

In 1890, said Redmond and others also replied to the answer of the Wabash Railroad Company, denying the jurisdiction of the Federal Courts as set up in the answer, and averring that the said Federal Courts did not have, and could not have any jurisdiction over the petitioners (Record, pp. 210–212).

Upon these issues, the parties went to trial upon an agreed statement of facts in the Court of Common Pleas and the Court rendered judgment in favor of the plaintiff and cross-petitioners, denying each and every contention respecting the prior jurisdiction of the Federal Court. Appeal was then taken by the Wabash Railroad Company to the Circuit Court of Lucas County, which under the practice prevailing in Ohio in equity causes, retries the case upon the issues *de novo*. Upon the trial in the circuit Court, judgment was likewise entered in favor of the plaintiff, and the cross petitioners, denying each and every contention made by the Wabash Railroad Company respecting the prior and exclusive jurisdiction of the Federal Court. Thereupon a bill of exceptions was duly taken by the Wabash Railroad Company embodying all the evidence produced before the court, and this bill of exceptions was duly signed, and petition in error filed in the Supreme Court of Ohio, which upon hearing affirmed the judgment of the Circuit Court, likewise denying each and every one of the contentions of the Wabash Railroad Company respecting the federal questions in the case (Record,

p. 958). Thereupon writ of error was sued out in this court to the Supreme Court of Ohio, and the case brought here upon the Federal questions presented upon the record.

Assignment of Errors.

I. The Supreme Court of Ohio erred in holding that the defendants in error were entitled to a decree enforcing a lien upon the railway property of plaintiff in error in the State of Ohio, whereas the Supreme Court should have held that the decree and determination of the Circuit Court of the United States for the district of Indiana, in the suit of Benjamin F. Ham and others, against the Wabash Railroad Company and others was a final adjudication that all equipment bondholders, save and except those in the suit of James Compton, had no lien upon the property of the said Railway Company in the states of Ohio and Indiana.

II. That the Supreme Court of Ohio erred in holding that the jurisdiction to ascertain and determine the liens, or any of them, upon the railway property now belonging to the Wabash Railroad Company in the State of Ohio in the years 1888 and 1889, was in the Common Pleas Court of Lucas County, or that the said Common Pleas Court of Lucas County, or the Circuit Court of that County acquired any jurisdiction over that property, whereas the Supreme Court of the State of Ohio should have held that the exclusive jurisdiction to ascertain and determine the liens upon said railway property in the years 1888 and 1889 was in the United States Circuit Court for the Northern District of Ohio, and that the said Supreme Court of Ohio should have decided that the State Courts acquired no jurisdiction in this case.

III. That the Supreme Court of the State of Ohio erred in holding that the decree of the Circuit Court

of Lucas County was a valid decree, whereas the Supreme Court of the State of Ohio, should have held that the same was invalid, in that the same did not give due credit and effect to the decree of the Circuit Court of the United States for the Northern District of Ohio, foreclosing mortgages, dated March 23d, 1889, upon said property and marshalling the liens thereon.

IV. That the Supreme Court of the State of Ohio erred in holding that the said defendants in error were entitled to a decree affirming the judgment of the Circuit Court of Lucas County, Ohio, whereas the Supreme Court of the State of Ohio should have held that the said decree and judgment should have been wholly reversed and set aside as null and void.

V. That the Supreme Court of the State of Ohio erred in not giving due force and effect to the decree of the United States Circuit Court of the District of Indiana, in the suit of Benjamin F. Ham against the Wabash Railroad Company *et al.*

VI. That the Supreme Court of the United States erred in not giving due effect and credit to the decree of the United States Circuit Court for the Northern District of Ohio, Western Division, dated March 23d, 1889.

VII. That the Supreme Court of the State of Ohio erred in not giving due force, validity and effect to the title of the plaintiffs in error, acquired under and by virtue of the sale in foreclosure held on the 15th May, 1889, under the decree of foreclosure entered in the United States Circuit Court for the Northern District of Ohio, Western Division, dated March 23d, 1889.

VIII. That the Supreme Court of the State of Ohio erred in its judgment affirming the Circuit Court of Lucas County, wherein the Circuit Court of Lucas County had held that the lien of the bonds of the

defendants in error was prior upon the terminal property in Toledo, and also attached to the equipment acquired on and after August 1st, 1865; whereas, the Supreme Court should have held that as determined by the United States Circuit Court for the Northern District of Ohio, Western Division, such prior mortgages upon said line running to the state line, were prior also upon the terminal properties in Toledo, and also upon all equipment belonging to the said line of railway and acquired subsequent to August 1st, 1865.

IX. That the Supreme Court of Ohio erred in holding that the United States Circuit Court for the Northern District of Ohio, had ceased to have any jurisdiction over the said railway property, and that the State Court had by reason of such relinquishment of jurisdiction, power to determine the liens of said equipment bonds upon said property, whereas, the said Supreme Court of the State of Ohio should have held that the said United States Circuit Court for the Northern District of Ohio was in possession and control of the said property, and had not relinquished the same, having retained possession for the purpose of adjudicating the claim of James Compton to a lien upon a portion of said line of railway, and the sale of the same for the satisfaction of the said lien, and that said cause relating to the claim of said James Compton is still pending and undetermined in the said United States Circuit Court, the said jurisdiction for the determination of said cause having been reserved in the decree rendered in said United States Circuit Court for the Northern District of Ohio, dated March 23d, 1889.

The federal questions which arise upon the record will be discussed under the following heads:

I.

The claim of The Wabash Railroad Company is that the prior and exclusive jurisdiction

over all the property involved in this case was in the Federal Court from the time of the appointment of the receivers of the Wabash Railroad property in May, 1884, and the taking possession by such Receivers of all the property, and that the Federal Court has never relinquished such jurisdiction, and therefore the State Court could have no jurisdiction to determine the questions presented in this case, and that the State Court completely failed to give due force and effect to the decree of foreclosure entered in the Federal Court on the 23d of March, 1889.

II.

The State Court failed to give due force and effect to the decree of the Circuit Court of the United States of Indiana in the case of Ham and others against the Wabash, St. Louis and Pacific Railway Company. The claim of the Wabash Railroad Company is that such decree was a final and conclusive adjudication of all the issues in this case adversely to the claim of the defendants in error.

ARGUMENT.

The claim of the Wabash Railroad Company is that the prior and exclusive jurisdiction of all the property involved in this case was in the Federal Court from the time of the appointment of the receivers of the Wabash Railroad proper, in May, 1884, and the taking possession by such receivers of all the property, and that the Federal Court has never relinquished such jurisdiction, and, therefore, the State Court could have no jurisdiction to determine the questions presented in this case, and that the State Court completely failed to give due force and effect to the decree of foreclosure entered in the Federal Court on the 23d of March, 1889.

I.

The relation between the State Courts and the Federal Courts early came before the Courts for consideration. These courts having co-ordinate jurisdiction within the same territory, it early became essential to define the duty of each to the other in respect to litigations arising in both, and the rule was very early established, and is without question.

In Hagan vs. Lucas, 10 Peters, 400 (1836), it was held that the first levy, whether made by the Marshall of the United States or the Sheriff, *withdraws the property from the reach of process of the other Court.* In this case certain slaves were levied upon by the Sheriff as the property of Bynum and McDade, one Lucas claiming them, who gave bond to try the right of property. On his giving bond the slaves were given

into his possession. While thus in his possession the Marshall levied an execution on them, issued on a judgment of the Federal Court.

It was held that the Marshal's levy was void, because the slaves, though in Lucas's possession were in legal contemplation in the custody of the law.

McLEAN, J. (p. 403), says: "A most injurious conflict of jurisdiction would be likely often to arise between Federal and State Courts, if the final process of the one could be levied on property which had been taken by the process of the other."

In Williams vs. Benedict, 8 How (U. S.), 107, 112 (1849), it was held that where the Probate Court of a State is administering the assets of a deceased person, these are in the custody of the law, and cannot be seized on execution by the United States Marshal, as this would "cause manifest injustice and an unpleasant conflict between Courts of separate and independent jurisdictions. This levy could not be made although "the execution is laid upon property upon which the judgment was a lien in case the estate was not insolvent."

Per TANEY, C. J., in Peale vs. Phipps, 14 How, 375 (1852).
Yonley vs. Lavender, 21 Wall, 276 (1874).

"A Receiver appointed by a State Court cannot in that capacity be sued in the Court of the United States; not even to recover damages and mesne profits in respect of lands which in an ejectment suit in the U. S. Circuit Court had been adjudged to belong to the plaintiff. The Circuit Court having taken jurisdiction over the State Court Receiver, the Supreme Court reversed its judgment for want of jurisdiction in the Circuit Court."

Peale vs. Phipps, 14 How, 368, 1852.
Barton vs. Barbour, 104, U. S., 126, 1881.

Wiswall vs. Simpson, 14 How, U. S., 52, is an important and leading case:

There was ejectment for a lot in Mobile. Both parties claimed title under Ticknor. The plaintiff,

Sampson, claimed under a sale on execution on judgments of the U. S. Circuit Court rendered against Ticknor in 1840, and which were conceded to be the first liens on the property. Execution was levied under these judgments Febuary 24, 1845, and April 7, 1845, and the property sold thereunder July 7, 1845, to the lessor of the plaintiff.

The defendant below, Wiswall, claimed title under judgments against Ticknor, rendered by the State Court in 1842. In 1843 Wiswall brought his bill in the State Court against Ticknor and one Day, his alleged fraudulent grantee, to set aside the deed of Ticknor to Day as fraudulent. The judgment creditors in the said judgments rendered by the U. S. Circuit Court were not parties. June 27, 1845, the State Court in this chancery suit appointed a Receiver, who went into possession. So that at the time the Receiver was appointed and went into possession the property was not only subject to the lien of the judgment of the U. S. Court, but executions thereunder had been actually levied on the lots in question.

Solely on the ground that the sale on these executions on July 7, 1845, though they had been levied before the Receiver was appointed, was made when the property was in the custody of the State Court Receiver, it was held to be "illegal and void and passed no title to the purchaser," although such sale did not interfere with the possession of the Receiver.

The ground of the doctrine is, that the Receiver's possession is that of the Court, "that the property is a fund in the Court" to be administered by the Court, and whose possession cannot be interfered with "without its leave;" and that the effect of the appointment of a Receiver is not to oust any party of his rights for the benefit of the party who may ultimately appear to be entitled to it, and when the party entitled to it has been ascertained the Receiver will be considered his receiver."

This principle was approved and reaffirmed by the Supreme Court of the United States in Heidretter vs. Elizabeth Oil Cloth Company, 112 U. S., 294, 304 (1884). In Pulliam vs. Osborne, 17 How. (U. S.), 471, the headnote of Justice CURTIS is:

"Where co-ordinate liens are obtained by one judgment in a State and another in a United States Court, the seizure by a Sheriff, under an execution of the State judgment, gave priority to the lien of that judgment."

CAMPBELL, J. (p. 475): "The demands of the respective creditors, in the present instance, were reduced to judgments, and the officers of either Court were invested with authority to seize the property."

"The liens were consequently co-ordinate or equal; and in such cases, the tribunal which first acquires the possession of the property, by the seizure of its officer, may dispose of it so as to vest a title in the purchaser, discharged of the claims of creditors of the same grade."

This Court applied this principle (Williams vs. Benedict, 8 How., 107), to determine between judgment creditors in a Court of the United States and an administrator holding under the orders of a probate court of a State. In Wiswall vs. Simpson, 14 How., 52, in favor of a Receiver holding under the appointment of a court of chancery of a State and a judgment creditor. In Peale vs. Phipps, 14 How., 368, in favor of a trustee in possession, under the order of a county court, against such creditor. And in Hagan vs. Lucas, 10 Peters, 400, between execution creditors issuing from State and Federal jurisdiction.

In Taylor vs. Carryl, 20 How, 583, the headnote prepared by Mr. Justice MILLER (2 Miller's U. S. Supreme Court Decisions, pp. 616, 617) is as follows:

"1. Where a vessel has been seized under process of attachment in a State Court, and is in actual custody of the Sheriff, *no valid seizure can be made of her so as to give jurisdiction in proceedings in rem* in the District Court of the United States sitting in Admiralty.

" 2. Consequently, where a vessel was sold under the attachment proceeding, having been in the actual custody of the Sheriff, until sale, and was afterwards sold under the decree of the Admiralty Court, the title was in the purchaser under the attachment proceeding (see Freeman vs. Howe, 24 How., 450; Buck vs. Colbath, 3 Wall., 334)."

In Freeman vs. Howe, 24 How., 450, Mr. Justice MILLER's headnote (4 Miller's Court Decisions, 222) is as follows:

" Where an officer of a Federal Court seizes personal property under the writ of that Court, the property is in the custody of the Court, and cannot be lawfully seized or taken from his possession by the process of any other Court.

" 2. Hence, where a United States marshal had taken possession of property by virtue of a writ of attachment, it cannot be taken from his possession by a writ of replevin issued from the State Court.

" 3. *Nor does the fact that the replevin suit was brought by one not a party to the first suit, on the ground that his property was seized for debt of another person, lead to a different result.*

" 4. The case of Taylor vs. Carryl, 20 How., 583 (2 Miller, 616), did not rest, as is now argued, upon anything peculiar to the jurisdiction of the Admiralty Courts, but upon the broad proposition that, by a principle of comity, no Court can take from another of concurrent jurisdiction property in its possession or control.

See Buck vs. Colbath, 3 Wall., 334.

" 5. Where property of A. is wrongfully seized under a writ of attachment against B, as is asserted in this case, *the proper mode of relief in the Federal Courts is by a petition of the rightful owner for its release. Such a petition will be heard and relief granted without regard to citizenship of the parties.*"

In the opinion of NELSON, J., he says (24 How., p. 457),

" We agree with Mr. Justice GRIER, in Peck *et al.* vs. Jennis *et al.* (7 How., 624–5):

" It is a doctrine of law too long established to require citation of authorities that where a court has

jurisdiction it has the right to decide every question which occurs in the cause, and whether its decision be correct or otherwise its judgment, till reversed, is regarded as binding in every Court; and that where the jurisdiction of a Court, and the right of a plaintiff in it have once attached, that right cannot be arrested or taken away by proceedings in another Court." "Neither can one take the property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

In People's Bank vs. Calhoun, 102 U. S., 256 (1880) the headnote correctly states the point decided:

"In a foreclosure suit, the Circuit Court of the United States having jurisdiction of the subject matter and the parties, appointed a receiver, who, pursuant to its orders, took possession of the mortgaged road. In an action between other parties subsequently brought in a State Court an attachment was sued out and levied upon the road. Pending an application thereupon made to the United States Circuit Court to restrain plaintiff from further proceeding with his attachment, he and the defendant to the action consented to its removal to the United States Circuit Court, where, upon a finding that the road was not, at the date of the levy of attachment, the property of that defendant, the writ was dismissed. Held, that the United States Circuit Court had a right to determine upon the conflicting claims to the possession of the road, and that the parties to the action, by consenting to transfer it, did no more, in effect, than that Court might have compelled them to do."

MILLER, J., page 262, says:

"The bank was attempting in the State Court to enforce by judicial sale a rival and conflicting lien to that of Calhoun and Opdyke (Mortgage Trustees), who were proceeding in the Federal Court to sell the same property under their lien. The latter Court had not only obtained jurisdiction of the question of lien prior to the initiation of the bank's suit, but it had taken possession of the property by its Receiver. It had thus drawn to itself the subject matter of the litigation, and the right to decide upon the conflicting claims to the possession and control of the road."

" It was also held that the Federal Court had jurisdiction over the proceedings in the State Court, although it did not anywhere appear in the record that the parties had the citizenship or the alienage which would authorize the Federal Court to entertain jurisdiction of the case " (p. 261).

" Covell vs. Heyman, 111 U. S., 176, 1883, was replevin by wife of judgment debtor against the U. S. Marshal for goods levied on by the Marshal on execution as the property of the husband. The Supreme Court of Michigan gave judgment for the plaintiff in replevin, but this was reversed by the Supreme Court of the United States.

" In this case, Mr. Justice MATTHEWS, delivering the unanimous opinion of the Court, thus expounds the relation between the State and Federal Courts (pp. 182, 183).

" The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent and have no superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process and the decision of questions relating to it are part of the jurisdiction of the Court from which it issues. 'The jurisdiction of a Court,' says Chief Justice MARSHALL, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent

to the judgment in which jurisdiction is to be exercised.'"

Wayman vs. Southard, 10 Wheat., 1.

In Heidretter vs. Elizabeth Oil Cloth Co., 112 U. S., 294, 1884, the distillery premises of one Sicher, the owner, was seized by the United States Marshal January 24, 1873, for violation of the internal revenue laws. Heidretter was a material man, and furnished materials for the building of the distillery, which, under the mechanics' lien laws of New Jersey, gave him a lien from the time of the commencement of the building. After the Marshal's seizure Heidretter duly filed his lien and commenced suit in the State Court to enforce it, and served his process by publication, and made no attempt to interfere with the Marshal's possession of the property.

The property was condemned by decree of United States Court, and sold, conveyed and delivered by the Marshal to the grantor of the Oil Cloth Company. After such sale and delivery to the purchaser, and when, therefore, the property was no longer in the possession of the United States Court, or its officer, or of the law, it was sold and conveyed by the Sheriff to Heidretter under his judgment for a mechanic's lien rendered by the State Court. It was held that such judgment, sale and conveyance were "vain, nugatory aad void," on the ground that "the property involving the control and disposition of it was withdrawn from the jurisdiction of the Courts of New Jersey (p. 302).

"Mr. Justice MATTHEWS delivering the opinion of the whole Court says (p. 305):

"This, view, though decisive of the case and resulting in the affirmance of the judgment of the Circuit Court, proceeds upon assumptions the most favorable which can be indulged to the plaintiff in error. It is merely an application of the familiar and necessary rule, so often applied, which governs the relations of courts of concurrent jurisdiction, where, as the case is here, it concerns those of a State and of the United States, constituted by the authority of distinct governments, through exercising jurisdiction over the same

territory. That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and, therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that Court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it for the purposes of its jurisdiction. It was in accordance with this principle that in Pulliam vs. Osborne, 17 How., 471, this Court confirmed the legal title of land to a purchaser under an execution out of the District Court of the United States, which had a priority of lien by reason of having been first issued."

The effect of the appointment of a receiver of the property of a corporation by a State Court upon the jurisdiction of the federal courts respecting the corporation and its property was considered in the case of Porter vs. Sabin, 149 U. S., 473. Mr. Justice GRAY thus summarizes the authorities and the consequences of such action.

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. Wiswall v. Sampson, 14 How. 52, 65; Peale v. Phipps, 14 How. 368, 374; Booth vs. Clark, 17 How. 322, 331; Union Bank v. Kansas City Bank, 136 U. S., 223; Thompson v. Phenix Ins. Co., 136 T. S., 287, 297.

It is for that court, in its discretion to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the

receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. Barton v. Barbour, 104 U. S. 126; Texas and Pacific Railway v. Cox, 145 U. S., 593, 601.

The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration of that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. Wiswall v. Sampson, Peale vs. Phipps and Barton vs. Barbour, above cited; Williams v. Benedict, 8 How. 107; Pulliam vs. Osborne, 17 How. 471, 475; People's Bank v. Calhoun, 102 U. S. 256; Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294; In *re* Tyler, *ante* 164.

The principle that the Court having obtained jurisdiction, will retain it for all purposes incident to the judgment or decree rendered therein, and which is simply the protection of its own jurisdiction, is thus stated in Bispham's Equity, Section, 413:

"A court of equity frequently interferes by injunction to restrain proceedings at law for the purpose of preventing unnecessary or vexatious litigation. This it does by compelling a party to elect between two remedies, by restraining a party from bringing an action in another Court after a Court of Equity has once obtained possession of a cause. * * * As to the first of the above instances a court of chancery will not permit a man to proceed both in law and in equity at the same time in respect of the same demand, but will compel him to elect in which court to proceed.

To this rule there appears to be but one exception, viz., the case of a mortgagee which is entitled to enforce all his remedies at once."

Hogue vs. Curtis, 1 Jac. & W., 429.
Fenning vs. Humphrey, 4 Beav., 1.
Kerr on Injunction, 103.

In Bispham Eq., Sec. 414, it is said:

"After a Court of Equity has once got possession of a cause it will not suffer any of the litigating parties to resort to another tribunal. Even the plaintiff or defendant who attempts to do so may be restrained by motion in the cause."

Schoole vs. Sal., 1 Sch. & Lef., 176.
Taylor vs. Walters, 1 Myl. & C., 266.
Kerr on Injunction, 106.

Following this rule, whenever the Circuit Court of the United States has jurisdiction of a suit in Equity, either originally or by removal from the State Court, it will enjoin a party to such suit from commencing or prosecuting a subsequent suit relating to the same matter in a State Court against another party to the equity case; and the Statute of the United States (Rev. Stats., Sec. 720), that "a writ of injunction shall not be granted to stay proceeding in any Court of a State" has no application to such a case. The foregoing propositions were distinctly decided by the Supreme Court of the United States in French, Trustee, vs. Hay, 22 Wall., 250 (1874)."

In this case the suit in equity related to the respective rights of French, trustee, on the one hand, and the rights and liabilities of Stewart and Hay on the other, in respect to a house and lot in Alexandria, Virginia. There was no injunction or receiver, and the bill of French was to settle the title and for an account from Stewart and Hay in respect of rents of the house. December 23, 1869, the State court rendered a decree *pro confesso* against Hay for $2,389 (p. 243) without jurisdiction as to Hay. In February, 1870, the cause was removed by Hay to the U. S. Circuit Court, but on the 3d of February, 1870, *i. e.*, five days before the re-

moval of the case, French sued Hay in one of the Courts of Pennsylvania on the decree for $2,389 (*supra*). Hay went into the U. S. Circuit Court and asked and obtained an injunction "to restrain French from proceeding further in Pennsylvania or elsewhere to collect" the decree for $2,389, which injunction was made perpetual in the final decree (p. 251).

This was affirmed by the Supreme Court of the United States.

Mr. Justice SWAYNE, delivering the opinion of the Court, said:

"This bill is not an original one. It is auxiliary and dependent in its character, as much so as if it were a bill of review. The Court having jurisdiction *in personam*, had the power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its determination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal. The Court below might upon a cross bill, and perhaps upon motion, have given the relief which was given by interlocutory and final decree in the case before us. If it could not be given in this case the result would have shown the existence of a great defect in our Federal jurisprudence, and have been a reproach upon the administration of justice.

"The prohibition in the Judiciary Act against the granting of Injunctions by the State Courts of the United States touching proceeding in State Courts, has no application here. The prior jurisdiction of the Court below took the case out of the operation of that provision.

"If the State Courts should persist in proceeding—a thing not to be expected—the wrong will be on the part of those tribunals and not of the Court below."

Peck vs. Jenniss, 7 How., 624–5, *supra*.
Peoples' Bank vs. Calhoun, *supra*.
French vs. Hay, *supra*.

Application of Foregoing Authorities to Case at Bar.

The Federal Courts took possession of this railroad property and were operating it continuously from May, 1884, until July, 1889. During that period it is the contention of the Wabash Railroad Company that no other court could by any proceedings relative to that property acquire jurisdiction to ascertain what liens or claims existed against the same. Contention, however, was made in this case in the Courts below, by the defendants in error, that by the discharge of the receiver and the turning the property over, first to the Purchasing Committee, and then the conveyance by the Purchasing Committee to the Wabash Railroad Company in August, 1889, the property was released from the jurisdiction of the Federal Courts, and thereafter any proceedings could be had in the State Court relating to the liens upon the same. This we believe to be fundamentally erroneous, in view of the facts disclosed in the record in this case, and that so far from this being the case, the Federal Court has never even to this day relinquished jurisdiction of this property as to all claims existing, or claimed to exist, against the same at the time of the decree under the peculiar provisions of the decree.

The provisions of the decree in this cause entered on the 23d of March, 1889, indicate a clear intention on the part of the Federal Court to draw to itself and to retain the final adjudication of all existing questions respecting this property. It should be observed that this entire property from Toledo to the Mississippi River was sold as a unit and the decree provides that after the several divisions shall have been offered separately by special Master, that he shall then proceed to offer the said property for sale as a unit, or entirety and "*free and clear of liens and incumbrances*" (Record, p. 178).

It is further provided in the said decree as follows:

"It is further ordered that upon the confirmation of the sale by the Court and the full payment of the whole of the purchase price therefor and the compliance by the purchaser with the conditions of sale and the orders of the Court in that behalf, the said special masters convey to the purchaser or purchasers, or his or their assigns, the premises and property so sold by good and sufficient deed therefor, which said deed, or deeds when so executed and delivered shall vest in the grantee or grantees all the right, title, estate, interest, property and equity of redemption, except as hereby reserved, of, in and to all and singular the real estate, property, premises and franchises therein described in fee simple forever, and shall entitle said grantee or grantees to the possession thereof" (Record, p. 181).

* * * * * *

"All other questions arising under any of the pleadings and proceedings herein, not hereby disposed of or determined, are hereby reserved for future adjudication, including the claim for unearned interest on bonds not yet due."

And the defendant, James Compton, having in open court, on the final hearing herein, objected to the rendering or entry of any decree in this cause at this time, on the ground that the issue raised by the amendment to the complainants' amended and supplemental and ancillary bill, and to the cross bill of the cross complainants, Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant, James Compton to be filed herein have not been tried and determined, the court overrules such objection and the defendant, James Compton, duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of trial and determination of such issues is upon and subject to the following conditions, to-wit:

If upon the determination of such issues it should be adjudged by this Court that the decree rendered by the Supreme Court of the State of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis and Pacific Railway Company and others referred to in the pleadings herein and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser, or pur-

chasers at any sale or sales had hereunder of that portion of the property sold, covered and affected of the said lien, or the successors in the title of said purchaser, or purchasers, shall pay to said James Compton, or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of $339,920.40, with interest thereon at 6 per cent. per annum from May 1st, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit, **and in default of such payment this Court shall resume possession of the property covered and affected by the said lien of the defendant, James Compton, and enforce such decree as it may render herein in his favor by a re-sale of such property or otherwise, as this Court may direct.**

And it is further ordered and adjudged that, notwithstanding the entry of this decree, the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this Court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien, from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul or abridge any right, claim, interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold, or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

"**Any sale, conveyance or assignment of the railway and property hereinabove described made under this decree shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full**

payment of all the debts and liabilities of the Receivers of the Wabash, St. Louis and Pacific Railway Company—viz., Solon Humphreys and Thomas E. Tutt and Thomas M. Cooley and Gen. John McNulta—or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis and Pacific Railway Company, or any part thereof, or said Receivers, or either of them, or the adjustment of any equities arising out of the same between the parties hereto, or their successors, either by this court or by the Circuit Court of the United States for the Eastern District of Missouri, or by any United States Circuit Court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or by any United States Circuit Court, to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis and Pacific Railway Company and others in the Circuit Court of the United States for the eastern district of Missouri, including the receivers, have been by the said Circuit Court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last named court, or otherwise.

"Nor shall any such sale, conveyance, transfer, or assignment, made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser, or purchasers thereof or any of them, and shall afterwards be subject to be retaken and if necessary, resold, if the sum so charged or to be charged against said property or any part thereof, or said receivers as aforesaid shall not be paid within a reasonable time after being required by order of this or said other courts.

"The conveyance and transfer of said prop-

erty sold under this decree shall be subject to the powers and jurisdiction of the said Courts and the purchasers of the property sold under this decree, or any part thereof, and the parties hereto or their successors shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all claims and demands that have been or may be allowed against said property of The Wabash, St. Louis and Pacific Railway Company, or any part thereof, or said receivers, by order of said courts shall be fully paid and discharged.

" The provisions aforesaid shall apply to the purchasers of the same under this decree and all persons taking such property through or under them, but the foregoing provisions shall not, nor shall any reservations in this decree contained have the effect or be construed, nor are they or any of them intended to give any claims that may exist any validity, character or status superior to what they now have nor to decide or imply that any such claims exist.

" The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property, heretofore and hereby foreclosed and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist.

" And the Court reserves the right to make such further order and direction at the foot of this decree as may seem proper" (Record, pp. 181–184).

We may consider these provisions of the decree, first as specific with respect to the claim of James Compton, then known to the Court, and presented by proper pleadings in the cause; and second as respects all claims affecting the property, which the Court was arranging to sell under this decree.

Reservation as to Compton Claim.

In the decree there is, first, the specific reservation of jurisdiction respecting this property as to all questions connected with the claim of James Compton under his decree rendered in the Supreme Court of Ohio. At the time such reservation was made, Compton was a party to the proceeding in the Federal Court. The issues relating to his claim had not been tried. With respect to all the other liens upon the property, the case had been tried before the Masters appointed for that purpose, and report made and report confirmed. The court therefore in making this decree felt justified in selling the property, and reserving to itself the fullest jurisdiction of necessity to pass upon every question connected with the claim of James Compton in its relation to all the mortgages in the cause. This involved of necessity also the complete and entire jurisdiction over the property. It also involved by the same necessity that that jurisdiction should continue until the final decree in the Compton case should be entered, and until the final execution of that decree (Chief Justice MARSHALL in Wayman v. Southard, 10 Wheat., 1). All the authorities unite in holding that such control is necessary in order that the Court should do complete and full justice to Compton under the reservation which it made in its decree respecting his claim.

The agreed statement of facts, in the 29th to the 47th paragraphs, inclusive, sets forth the history of the litigation relating to the Wabash Railroad property and the possession of the receivers and transfers of the possession under the decree of March 23d, 1889 (Record, pp. 227–232). Paragraph 60 of the same statement shows the relation of James Compton to this litigation, and the jurisdiction obtained by the Federal Courts over his claim, and that at the time the judgment was entered in favor of the defendants in error in the Circuit Court of Lucas County, and which the

Supreme Court of Ohio affirmed, the Federal Court was actively engaged in a proceeding in that Court to ascertain the rights of James Compton, and that the cause was then pending upon appeal in the Circuit Court of Appeals for the sixth circuit (Record, p. 235). Although it does not appear upon the record, it is a conceded fact that the questions respecting this claim are still under examination in that Court. The judges of the Circuit Court of Appeals not being able to agree upon the law, certified the questions to this Court, and decision was rendered by this Court on such certification, and the cause returned to the Circuit Court which sent the matter to a master for an accounting, where the matter is still pending (Compton v. Jesup, 167 U. S., 1).

Under the reservations in the decree relating to the claim of James Compton, in view of the foregoing facts, it is perfectly clear that this property is still within the exclusive jurisdiction of the Federal Court, and that while there, no State Court could take jurisdiction for the purpose of ascertaining claims against it. Consider the effect of the opposite conclusion! If the Supreme Court of Ohio is right, immediate sale could be made of this property under the decree of that Court. The purchaser would take the property in Ohio subject only to such mortgages or liens as the State Court of Ohio considered superior to the lien of these equipment bonds. This, as we shall note later, is not the same view respecting the priority of these liens which the Federal Court had taken in marshalling the liens prior to the foreclosure, and the purchaser would take the property under that decree of the State Court as the said Court has defined them. In the mean time, when the accounting respecting the James Compton decree, which is simply the lien of the equipment bonds merged into the decree, shall end, decree will be entered in the Federal Court, and a sale ordered under the decree rendered upon the report of the Master. This sale will be made, but which purchaser will hold the title, and what will be the means

of adjusting the respective rights of the parties under these respective decrees? Manifestly, all the considerations named in the authorities (cited *ante*, pp. 27–38) as to the necessity for exclusive jurisdiction in the Court first taking possession of the property, require that the Federal Court having taken possession of the property in May, 1884, continue that possession for the purpose of executing its decree, and the conclusions at which it arrived respecting the priority of liens, until every lien on that property shall be duly adjudicated, and settled by final decree in that court.

Reservation as to All Claims.

The reservations in the decree we think have a wider sweep, however, than simply the claim of James Compton. More than this specific reservation as to James Compton was intended, because while that claim had been specifically brought to the attention of the court, yet the provisions of the decree necessarily mean much more than a reservation as to this specific claim. The language employed requires the conclusion that it was the intention of the court to enter into an agreement in effect with the purchaser of the property to convey the property by a fee simple title, free and clear of liens and incumbrances, and to require that any person claiming to have a lien upon said property should present his claim by proper intervention in one of the United States Circuit Courts in which the receivers had been appointed, and that upon proper hearing, if such Circuit Court should be of opinion that such claim was equitably entitled to assert its rights as against this property, that the purchaser should undertake that while he was given possession of the property, that he held it as an agent of these Courts, subject to be retaken and resold, if he failed to comply with the order of the Courts, or of any one of them respecting the payment of any such claims so found to exist against the property.

The language employed is not ambiguous in this re-

spect, and expressly provides for such a result as hereinabove described. If it is within the power of the Court to thus take possession of property and to thus provide in its decree for its resale, it is difficult to conceive how language more completely apt to express such intention could have been employed for the purpose than is employed in this decree. If this be so, then it was a complete declaration by the Federal Courts in the making of this decree that they did not intend to yield their jurisdiction, and the subsequent act of giving possession of the property to the Purchasing Committee, and through it to the Wabash Railroad Company, is to be interpreted only in the light of these reservations of the decree. The court, notwithstanding such yielding up of the possession, would still remain in the custody of the property in such sense that the State Court could not take possession of the same, and undertake to adjudicate respecting it as to the claims alleged to be liens against this property at the time.

Observe the facts in the light of this claim. The Adelbert College filed its petition in the Common Pleas Court of Ohio, in November, 1883, on two bonds. That court asserted no control over the property. The plaintiff in that case did not seek for a receivership.

The Federal Court in May, 1884, took complete possession through its receivers of these properties, and proceeded to administer them for the benefit of all the creditors of the Railroad Company, the owner of the properties, and it, in later proceedings in the same action, foreclosed all the mortgages and liens upon the property. While it was in the act of thus administering this property, in 1888, and early in 1889, the great body of petitioners in this case filed their answer and cross petition in the Court of Common Pleas (Record, pp. 68-81). Not content with such jurisdiction as the Adelbert College had acquired by its suit instituted in 1883, they sought by the issue of a new summons on their cross petition directed to the purchasing committee, the purchaser of the equity

of redemption under the foreclosure of 1886, and directed to the trustees of such mortgages as were thus foreclosing their mortgages in the Federal Court to vest jurisdiction in the State Court to determine the same questions which were then being determined in the Federal Court, to wit, the priority of such mortgage liens, and their relation to each other respecting this property within the control of the Federal Court (Record, pp. 96–100). They only waited until the Federal Court had made the Wabash Railroad Company its custodian of the property under the terms of the decree of March 23d, 1889, instead of the receivers, and then proceeded in the State Court to press their claims regardless of the question raised by the answers relative to the prior jurisdiction of the Federal Courts.

In Compton vs. Jesup, 68 Fed. Rep., 263, Judge TAFT in considering the claim that the suit of Compton had priority over the proceedings in the Federal Courts because begun earlier, after considering the decision of this Court in the Heidritter case, says (p. 283):

"The holding was expressly limited to the point that a deed under the state proceeding vested no legal title, as against the title conferred by the Court first having custody of the property. It was the actual custody of the premises in the Federal Court, which excluded the right of another court to entertain jurisdiction of a proceeding to subject the property thus removed from its control and disposition to a sale for the purpose of vesting a title superior to that which might be conferred by the Federal Court. Mere constructive possession would not have been enough to exclude possession by another court. In a conflict of jurisdictions it is manifest that there can be no constructive possession by one court, when it cannot take actual possession, but it by no means follows that the constructive possession of one court will exclude the actual taking possession by another. For this reason, even if the proceeding, in the Lucas Common Pleas to establish Compton's lien was a proceeding *in rem*, it did not involve the actual seizure of the property pending the suit, and did not, therefore, prevent the Federal Court from taking actual possession of the property through its receivers, in a proceeding to foreclose mortgages and other liens than Compton's."

Power of Court to Make Reservation Over All Claims.

As to the power of the Court to render a decree with such reservations as appear in the decree of March 23, 1889, there can be no question whatever. Julian vs. Central Trust Company, 193, U. S. 93, disposes of that question. In this case the question arose upon facts varying but slightly from the facts in the case at bar, and the important question was as to the effect of a foreclosure decree rendered in a Federal Court, containing some of the provisions contained in the decree in the case at bar as against a subsequent judgment obtained in a State Court. It is obvious however from a comparison of the decree in that case, and the provisions of the decree in the case at bar, set forth (*ante*, pp. 40–43) that in the case at bar, very much more care has been taken to provide for the complete and entire reservation of the jurisdiction by the Federal Court entering the decree to consider and adjudicate all claims that were to be paid by the purchaser than in the decree considered in the Julian case. Mr. Justice DAY in that case, considering the effect of such provisions in the decree in that case, says :

" It is obvious that by this decree of sale and confirmation, it was the intention and purpose of the Federal Court to retain jurisdiction over the cause so far as it was necessary to determine all liens, and demands to be paid by the purchaser. It accepted the purchaser, and thereby made it a party to the suit. (Blossom vs. Railroad Company, 1 Wall, 655.) The court reserves the right to retake the property if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the Circuit Court might declare and adjudge to be legally due, with the right of appeal from such judgment. These provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens

and demands which the purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because in view of the State Court it was ineffectual to pass the title to the purchaser. In such a case, we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal Court, and to render effectual its decree. *Central Trust Company of New York vs. St. Louis, Arkansas, etc., Railroad Co., 59 Fed. Rep., 385; Fidelity Insurance & Safe Deposit Co. vs. Norfolk and Western R. R. Co., 88 Fed. Rep., 815; State Trust Co. vs. Kansas City Trust Co., 110 Fed. Rep., 10.*"

"In such cases, where the Federal Court acts in defense of its own jurisdiction and to render its decree effectual, it may, notwithstanding Sec. 720, Rev. Stat., restrain all proceedings in a State Court which would have the effect of defeating or impairing its jurisdiction. *Sharon vs. Terry, 33 Fed. Rep., 337*, per Mr. Justice FIELD; *French vs. Hay, 22 Wall., 25; Deitzsch vs. Huidekoper, 103 U. S. 494.*

"Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal Court by its decree reserved the right to determine what liens or claims should be charged upon the title conveyed by the Court, and by the levy and sale to pay these judgments, the title is charged with other liens established in another court in a proceeding to which the purchaser was not a party. The Federal Court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun."

In the last paragraph the learned Justice deals with the only fact distinguishing this case from the case at bar, viz., that the judgments were for causes of action arising subsequent to the confirmation of sale. This fact, however, so far from militating against the principles of that case, being applied to the case at bar, renders their application less difficult. A class of claims arising subsequent to the entry of the decree might very

well be claimed not to be within the mind of the Court in making the reservations in the decree. Clearly the court in reserving jurisdiction of the right to determine as to all claims and demands would be deemed to have in mind all claims then in existence, while it might not intend by such general terms to cover claims arising subsequent to the entry of the decree, and subsequent to the confirmation of sale, and the possession by the purchaser. It might well be said as to such subsequent claims that the State Court could take jurisdiction, and determine as to the lien growing out of such judgments, but even as to those, this case holds that reservations less broad and distinct than are found in the case at bar are sufficient to preserve intact the prior jurisdiction of the Federal Court.

In the order entered subsequent to the sale on the 18th of June, 1889, ordering the receiver to deliver possession to the purchasers of the properties sold on May 15th, 1889, it is expressly provided that the order for the surrender of the property to the purchasing committee is in all respects subject to the provisions of said decree of March 23d, 1889. Thus emphasizing the intention expressed in the decree, that the Federal Court did not relinquish its jurisdiction by yielding possession (Record, p. 269).

In Julian vs. The Central Trust Company, the purchaser at the foreclosure sale under the decree in the Federal Court, it is true, was not a party to the judgment taken in the State Court, and it may be claimed that by reason of this fact those judgments could not be enforced as against the decree in the Federal Court, not being binding upon the purchaser, but the subsequent portion of the opinion indicates clearly the different courses which the purchaser could have adopted, even if it had been a party to the subsequent proceeding in the State Court. It could, if it saw fit, file its supplemental bill, or bills in the nature of a supplemental bill, to enjoin the proceedings in the State Court, and this irrespective of the citizenship of the parties (Freeman vs. Howe, 24 How., 450–60).

Or, as Mr. Justice DAY states in a subsequent part of the opinion: It could set up the Federal right in the proceedings in the State Court, and, if such Federal right were denied, the ultimate rights of the parties could be determined upon writ of error to the Supreme Court of the United States. In Julian vs. Central Trust Company, the purchaser took the first method of enforcing its rights, going directly into the Circuit Court of the United States and filing its supplemental bill for the enforcement of the provisions of the Federal decree under which it obtained title. In the case at bar, the purchasing committee, James F. Joy, trustee, and the Wabash Railroad Company (as soon as formed), set up in the State Court the prior and exclusive jurisdiction of the Federal court, the entry of the decree with its broad provisions, and their right to be protected under such provisions of the decree, and when these rights were denied by the State Court, sued out writ of error to this court. In doing so, the Wabash Railroad Company is sustained by the following additional authorities in this court.

Pittsburg, etc., Railroad vs. Loan & Trust Co., 172 U. S., 493.

Missouri Life Insurance Co. vs. McGrew, 188 U. S., 311.

Hancock National Bank vs. Froman, 176 U. S., 640.

Federal Questions Fully Presented.

The Wabash Railroad Company, the plaintiff in error, has fully preserved all the questions under the decree by its pleadings in this cause. The answers of the purchasing committee when first cited to answer the cross petition of William F. Redmond and others, and the amended and supplemental petition of the plaintiffs raised the question of the prior jurisdiction of the Federal Courts, and the exclusive possession of the property by those courts. So likewise did the answer of James F. Joy, trustee of the second mortgage

(Record, pp. 111–124). The supplemental answer of the purchasing committee subsequently filed set up the entry of the decree of March 23d, 1889, the decree being set out in full as an exhibit to the answer (Record, pp. 130–184). The Wabash Railroad Company in filing its answer adopted as its own the allegations of these answers and supplemental answers of the purchasing committee and James F. Joy and also pleaded the actual continuance of the Federal Court's jurisdiction over the claim of James Compton (Record, pp. 185–192, 195–197, 199–200). The replies filed by the cross-petitioners show their full comprehension of the questions raised, and their repudiation of the claims of any jurisdiction in the Federal Courts (Record, pp. 211–219). The Federal questions therefore, of the prior and exclusive jurisdiction of the Federal Courts, resulting from the litigations in the Federal Courts, and the decree of March 23d, 1889, were presented upon the pleadings at every stage of the case to the State Court, and were by the State Court denied, and therefore the questions are fully presented upon the record justifying their consideration by this court. The State Court wholly refused to give to the decree of March 23d, 1889, the force, validity and effect to which it was entitled, and notwithstanding that decree and the reservations therein, the State Court proceeded to an adjudication respecting the lien of these equipment bonds as though no such decree were in existence, and undertook to determine the lien in its relation to all the other liens in a manner different from that of every Federal Court passing upon the question.

Judges JACKSON and GRESHAM, in the foreclosure decree determined that the mortgage liens upon the Ohio property were a lien upon the terminals and equipment in the order in which the mortgages were issued (Record, pp. 154, 155). The State Court refused to adopt any such view as to the liens upon the terminals (Record, pp. 10, 11, 236). Judges TAFT and LURTON adopted the same view as to the terminals and

equipment, holding that the lien of the equipment bonds was inferior to that of the two mortgages (Compton vs. Jesup, 68 Fed. Rep., 263, 286, 287, 288). The claim of the equipment bondholders in the State Court is that their equipment bonds are a prior lien upon a large amount of the terminal property at Toledo, as to which in the Compton case the Federal Court adjudged their lien inferior to that of the prior mortgages. The equipment bondholders undertake to assert in the State Court that the Toledo and Illinois first mortgage is unenforceable by reason of the statute of limitations while the decree of the Federal Court gives it full force and effect (Record, pp. 214, 153). Thus there is attempted a complete repudiation by the State Courts as a result of this adjudication, of the force and effect of the prior determination of the Federal Courts.

II.

The State Court failed to give due force to the decree of the Circuit Court of the United States for the District of Indiana in the case of Ham and others against the Wabash, St. Louis and Pacific Railway Company. The claim of the Wabash Railroad Company is, that such a decree was a final and conclusive adjudication of all the issues in this case.

This Ham suit in Indiana, in July, 1880, whatever may have been its character prior to that time, became, in view of the allegations of the amended and supplemental bill then filed, distinctively a class suit on behalf of all the holders of equipment bonds for

the entire issue of $600,000, for the purpose of having the lien which was claimed to exist in favor of all those bonds declared equally and ratably upon all the property of the Toledo and Wabash Railway Company, which was owned by that Company at the time of its entering into the consolidation of August, 1865 (Record, pp. 474–494). The averment of the Amended Bill in the Ham suit in that respect is in almost identically the same language as that of the answer and cross petition of William F. Redmond and others in this case, which is conceded to have been filed on behalf of all of the equipment bonds (Record, p. 473, for form of averments in supplemental bill ; p. 69 for form of averments in cross petition).

That the case was such a class suit on behalf of all the bondholders was evident from the fact that it was so treated by the parties thereto in all its steps subsequently. Judge GRESHAM, Circuit Judge, who decided the case, evidently so understood it, for his opinion in unmistakable terms treats it as a suit on behalf of all the equipment bondholders. He commences his opinion as follows :

"No liens of any kind existed in favor of the holders of the equipment bonds prior to the consolidation in 1865."

And after discussing the effect of the terms of the consolidation agreement, he concludes :

"The Wabash, St. Louis & Pacific Railway Company, now owns and operates the property which the Toledo, Wabash & Western Railway Company acquired from the Toledo & Wabash Railway Company, and denies its liability on the equipment bonds. There is nothing to prevent the holders of these bonds from asserting against the present owner of this property the equitable lien which they are entitled to under the consolidation agreement of 1865. All subsequent interests have been acquired with knowledge of this agreement.

"These are briefly my reasons for holding that the equipment bonds are a charge upon the property owned by the Wabash, St. Louis & Pacific Railway

Company, which originally belonged to the Toledo & Wabash Company.

"A decree will be entered declaring such a charge, and for accrued interest.

"Of course, there is no personal liability of the said Wabash, St. Louis & Pacific Railway Company, to pay either the principal or interest of the said equipment bonds; but its line of road situated in Ohio and Indiana is subject to the lien of said equipment bonds and the unpaid coupons thereunto belonging, as hereinbefore found and declared.

"Inasmuch, however, as the principal of said equipment bonds will become due and payable on the first day of May, 1883, no decree will be entered or made in pursuance of the foregoing opinion and finding until said principal shall have matured, after which a final decree will be made and entered in the cause, in accordance with this opinion and finding" (Record, pp. 505–507).

In the decree subsequently entered at the November term of said court on the 5th of May, 1884, the 9th paragraph thereof finds the amount due on the several interest warrants matured and unpaid, and also in the concluding paragraph, as follows:

"That there is now, to wit, on this first day of May, 1884, due to the holders and owners of the bonds known as equipment bonds, issued by the Toledo and Wabash Railway and to holders of the interest warrants thereunto belonging, the sums following, that is to say:

* * * * * *

(After finding amounts due on the several interest installments.)

"To the owners and holders of said bonds for the principal sum thereof, the sum of $600,000, together with interest thereon from the 1st day of May, 1883, to this date, at the rate of 6% per annum, to-wit, the sum of $36,000; the above several items making a total of $1,100,110, which said sum is a lien on all the property described in the 8th paragraph of this decree and as found therein" (Record, 513–16).

From this decree the appeal was taken and prosecuted in this court and the opinion of this court rendered thereon in the year 1885 in the case of the

Wabash, St. Louis and Pacific Railroad Company vs. Ham, 114 U. S., 587. In accordance with that opinion, at the May Term of 1888 of the Circuit Court of the United States, mandate from this court was filed, and after a recitation of the decree of the Circuit Court, it concluded as follows:

"It is Ordered that the same be reversed with costs. And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to disallow the lien claimed by the holders of equipment bonds" (Record, p. 526).

In the Circuit Court the following entry was made in obedience to that mandate of this court.

"It is therefore ordered and decreed by this court in obedience to such mandate that the decree of this court in this court in this cause rendered on the 5th day of May, 1884, be, and the same is vacated and set aside and held for naught, and that the claim of lien set up in this cause by the holders of equipment bonds be, and the same is disallowed, and the bill herein is dismissed for want of equity with costs to be taxed" (Record, p. 527).

In the courts below it was argued that this is not a final decree but a mere dismissal or non-suit, and that such decree does not create a bar to a new suit on the same cause of action. The authority of Holland vs. Hatch, 15 Ohio State, 464, was invoked in support of this claim. This, however, is not a voluntary dismissal of the bill without prejudice on complainant's motion, nor is it an involuntary non-suit simply, but is a decree upon the merits of the contention, a decree in favor of the defendants against the complainant in that suit, finding authoritatively the absence of equity in the complainant's case, and concluding the complainants, and all of the class represented by them as to the merits of the questions involved in that litigation. Such is the proper form of a final decree in equity. It finds the equity of the case with the defendants, and dismisses the plaintiff's bill with costs

to the defendants (Daniel, Chy. Pldgs., Vol. 3, E. 2355–6, 5th Ed.).

"When causes are dismissed upon final hearing, and the dismissal signed by the Lord Chancellor, such action shall not be retained again, nor new bill exhibited except it be upon new matter like to the case of a bill of review.

Ordinances of Lord Bacon, No. 13.
Bartons Suit in Equity (p. 207)."

The decisions of this Court are in conformity with the principle thus announced by Lord BACON. In the case of Swan Land and Cattle Company vs. Frank, 148 U. S., 603, the matter is considered by Mr. Justice JACKSON, delivering the opinion of the Court in that case. In that case the Circuit Court upon sustaining demurrer to the bill, dismissed the bill generally for the want of indispensable parties. Justice JACKSON says concerning this feature of the case:

"Our conclusion is that there is no error in the decree of the Circuit Court sustaining the demurrer to the bill, but we are of opinion that the bill, instead of being dismissed generally, should have been dismissed without prejudice. In Durant v. Essex Company, 7 Wall., 107, 113, it is said that the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, it is for the court to express in its decree that the dismissal is without prejudice, and that the omission of that qualification in a proper case will be corrected by this court on appeal, in support of which numerous authorities are cited. In Kendig v. Dean, 97 U. S., 423, 426, the same practice is adopted."

The question therefore, we have to deal with in this case is as to the nature of a class litigation such as this Ham suit was, and whether a final decree of this kind is effectual as a bar on behalf of other parties than those actually named in the proceeding, but belonging to the class on whose behalf the suit was instituted. This Ham suit was a litigation brought under the well recognized rule that where a proceeding is one of common interest, and the parties are so numerous that it

is impracticable to bring them all before the Court, one or more may sue for the benefit of all. As we understand the contention of the cross petitioners' counsel the objection they make to the finality of this decree is that a party who was not named in the proceeding, although of the class, did not have his day in court, and is therefore not bound by the decree. This however we submit is a begging of the whole question, because the fundamental inquiry is, who, in the case of a class litigation, is in court, and whether or not all belonging to the class for whom suit is brought are not represented in the court by those who bring the litigation?

The consequences of the doctrine contended for by the cross petitioners would seem to be that the whole theory of a class suit is that when a certain number of parties bring such a litigation on behalf of themselves, and all other parties belonging to that class, the litigation is effective and binding when successful, and something is gained for the entire class, and it is to the clear interest of the members of the class not actually named in the proceeding to come into Court and claim the benefits of the litigation; and even then it is only effective as to them when they actually do come in and enter their appearance as parties and accept the benefit of the litigation; but if the litigation is not effective in favor of the entire class and the judgment goes the other way, as in this case, then, everybody in the class, except those actually named on the record is at liberty to bring as many other suits as he or they may be advised, to try the question over again.

In the Courts below Equity Rules 47 and 48 were relied upon in support of this contention by the counsel for the defendants in error.

Equity Rules Nos. 47 and 48 are simply rules corresponding with the provisions of Section 737 of the Revised Statutes of the United States, originally passed February 28th, 1839, and which are simply declaratory of the rule which previously existed in equity. The origi-

nal equity rule is clearly stated in Daniell's Chancery Pleadings, Volume 1, star paging 149, *et seq.* Concerning the rule excepting from the decree the rights of persons out of the jurisdiction wherever practicable, Mr. Justice STORY says:

"This ground of exception is peculiarly applicable to suits in equity in the Courts of the United States, which suits can be maintained in general only by and against citizens of different states. If, therefore, the rule as to the parties were of universal operations, many suits in those courts would be incapable of being sustained therein, because all the proper and necessary parties might not be citizens of different states; so that the jurisdiction of the court would be ousted by any attempt to join them. On this account, it is a general rule in the courts of the United States to dispense, if consistently with the merits of the case it can possibly be done, with all parties over whom the court would not possess jurisdiction."

West vs. Randall, 2 Mason, 196.
Russell vs. Clark, 7 Cranch, 69-98.

But if the person not before the court be indispensable the jurisdiction fails, notwithstanding the Act of Congress of 1839, Section 36; Revised Statutes, Section 737.

Coiron vs. Millaudon, 19 How., 113.
Williams vs. Bankhead, 19 Wall., 563.

That section 737 and rules 47 and 48 do not authorize the omission of indispensable parties even when they are out of the jurisdiction, and it is impossible to bring them in, and in such cases the ordinary rules apply, and the court will not proceed to a decree, see Minnesota vs. Northern Securities Company, 184 U. S., 236; California vs. Southern Pacific Railroad Co., 157 U. S., 229; Swan Land Co., etc., vs. Frank, 148 U. S., 603, and other cases collated in Federal Statutes, annotated, Vol. 4, Page 553.

Daniell's Chancery Pleadings, Volume 1, Chapter 5, discusses the necessary parties to a suit in respect to a concurrence of their interests with those of the

plaintiff. He says, after stating the general rule as to the necessity of bringing all parties interested before the court:

"A strict application of this rule in many cases creates difficulties which have induced the court to relax it; and as we shall see, it has been the established practice of the court to allow a plaintiff to sue on behalf of himself and all of the others of a numerous class of which he is one, and to make one of a numerous class, (as members of a joint stock company) the only defendant as representing the others on the allegation that they are too numerous to be all made parties;" in treating on this subject, (star paging, 191–238) he speaks of the various classes who are thus permitted to represent the entire class, and says at page 239:

"The great increase in the number of joint stock companies and trading associations in which large classes of persons are jointly interested has had the affect in modern times of extending the practice which allows a few persons to sue in equity on behalf of themselves and others similarly interested. In the case of Walworth v. Holt, (4 M. & C. 635), a bill was filed by the plaintiff on behalf of themselves and all other stockholders and partners of a banking company, called the Imperial Bank of England, except those who were made defendants. It did not in terms pray a dissolution, or a final winding up of the affairs of the Company, but it prayed the assistance of the Court in the realization of the assets of the Company, and in the payment of its debts, and that for that purpose, a receiver might be appointed, and authorized to sue for calls unpaid, and other debts due to the Company in the name of the registered officer, who was one of the defendants. To this appeal a demurrer was put in, upon the argument of which the two most important objections to the bill, were, 1st, that it was not the practice of the court to interfere between partners, except upon a bill praying a dissolution; and 2dly, that al the parties interested in the concern were necessary parties to the bill. LORD COTTENHAM overruled the demurrer, and in his judgment observed:

"The result, therefore, of these two rules—the one binding the court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it—would be that the doors of this court

would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law; for, as I have said upon other occasions, I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the practice of this court, though not at all times sufficiently attended to. It is the ground upon which the court has in many actions dispensed with the presence of parties who would, according to the general practice, have been necessary parties."

In Mosely v. Alston (1 Phil. 790–798), Lord COTTENHAM said that this form of suit is subject to this restriction; that the relief which is prayed must be one in which the parties whom the plaintiff professes to represent have all of them an interest identical with his own; for, if what is asked may by possibility be injurious to any of them, those parties must be made defendants, because each and every of them may have a case to make adverse to the interests of the parties suing. If, indeed, they are so numerous that it is impossible to make them all defendants, that is a state of things for which no remedy has yet been provided." If, however, such persons are so numerous that it is impossible to make them parties, it is apprehended that, according to the present practice, the court will, in such cases, permit the suit to proceed upon one or several of such parties having interests not identified with the plaintiff, or of each class of them, if there are several classes, being made defendant to represent the others, unless it it be the object of the suit is to have the suit or partnership of the company dissolved."

Daniel Chy. Pr., Vol. 1, pp. 239, 240.

It may be noted that rule 48 was originally promulgated in 1842. In Smith vs. Swormstedt, 16th, Howard, 303, decided in 1853, NELSON, J., considers in the

opinion in that case this class rule which we are discussing. He says:

"A court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all there can be very little danger, but that the interest of all will be properly protected and maintained."

If rule 48 has the force and effect contended for by the defendants in error, evidently NELSON, J., would not have used the language which he did in deciding this case only eleven years after the promulgation of the rule. But the question as between rule 48 and this doctrine of class suit, is one of the distinction between formal and indispensable parties, and rule 48 applies to the first class simply, and provides that where there are such parties, who can not be brought into the court in a particular proceeding, that then the decree may be entered on behalf of the parties who are in court saving the rights of the absent parties and which, of course, will not be conclusive upon those who are not present before the court. But, where there is a common right, as in this case, a lien common to an entire body of bondholders, how can it be said that any one of those entitled to participate in the proceedings of that lien is a mere formal party. They are indispensable parties, being equally and rightly interested in the relief, and therefore necessary in the decree to be entered to secure that relief. This seems to us clear from the authorities in this court, and in other courts as follows:

"In Fish vs. New York Waterproof Paper Co., 29 N. J. Eq., 16. The Paper Company gave two mortgages, one on real estate, and the other a chattel mortgage on fixtures, to secure an issue of bonds. One of the bondholders undertook by getting a judgment upon his bonds and levying an attachment to acquire a priority over the lien of the other bonds upon the fixtures, upon

the ground that the chattel mortgages had not been kept alive by complying with the provisions of the laws of the State of New Jersey, by refiling. It was held that one bondholder could not by obtaining a judgment upon his bonds and levying on the fixtures acquire a preference over the other bondholders, even if the fixtures were not a part of the realty and the chattel mortgage had not been refiled within the time required by the statute; that it would be inequitable, and against the equality in which equity delights. Pennock v. Coe, 23 How. (U. S.), 117."

This last was a case which came to this court on appeal from the Northern district of Ohio, and arising on the statute of Ohio, relating to mortgages of railroads. One of the questions in the case was as to the right of some of the bondholders by levy upon execution, to secure priority against other bondholders, and Judge NELSON thus discusses the question.

"In the second place, the judgment sought to be enforced by the defendants was recovered upon bonds of the second issue and secured in common with all the bonds of that issue upon this property; by virtue of the second mortgage these bondholders have a common interest in the security, and are all equally entitled to the benefit of it. In case of a deficiency of the fund to satisfy the whole of the debt in equity a distribution is made among the holders *pro rata;* the payment of the bonds of the second issue is also postponed until satisfaction of the issue comprehended within the first mortgage, and the second was taken with full knowledge of the first. To permit, therefore, one of the bondholders under the second mortgage to proceed at law for the collection of its debt upon execution would not only disturb the priority of distribution in case of a deficiency and give him an inequitable preference over his associates, but also have the effect to prejudice the superiority of the first mortgage, which possesses the prior lien."

"The question is quite carefully considered *In re* Chickering (56 Vt., 89). ROSS, J., thus discusses it:

"The pendency of a suit brought by the trustees, or when they improperly refuse or neglect to sue, by one or more of the bondholders, for them-

selves and all the other bondholders, for the enforcement of the mortgage, would abate subsequent suits by individual bondholders for the same purpose. The prevention of a multiplicity of suits is one of the grounds of equity jurisprudence. Ordinarily bondholders are allowed to bring a suit in equity for the enforcement of such a mortgage only in case the trustees improperly refuse or neglect to sue upon request, and then they must bring the suit as well for all the other bondholders as themselves. While the bonds are the separate property of each bondholder, and when he seeks to enforce the obligation arising from the bond alone he stands by himself, unaffected by what the bondholders may have done or omitted to do, the mortgage securing the bonds is common to all the bondholders given to trustees for their common benefit, and whatever is done by the trustees, or by one or more of the bondholders in behalf of all, for the enforcement of the common security, enures to the benefit of all."

In Hackensack Water Co. vs. De Kay, 36 N. J., 548, DEPUE, J., says :

" This bill was filed for the establishment of the trustees' mortgage for the benefit of all the owners of the bonds secured by it. The mortgage was given to the trustee to secure one hundred and thirty-three bonds, aggregating $66,500. The complainants held only 24 of these bonds amounting to $12,000. On account of the number of persons interested in the trust, the trustee might have filed a foreclosure bill in his own name for the benefit of the *cestui que trust* without making any of the bondholders parties.

Willink vs. Morris Canal Co., 3 Gr. Ch., 377 (N. J.).
Franklinite Co. vs. Ames, 1 Beas., 507.
Shaw vs. N. C. R. R. Co., 5 Gray, 162.

" A single bondholder in cases of this sort will not be permitted in a court of equity to proceed for his demand without bringing in the other bondholders in some form or manner " (Story's Equity Pl., Secs. 102, 103, 157).

This question was very carefully considered by the late Justice BRADLEY, sitting at Circuit in the case of Campbell vs. The Railroad Company and others (1 Woods, 368). A quotation from the opinion states the precise contention before the court so clearly that no other statement of the case is necessary. We quote from page 376:

"The first question raised by the defendants is the propriety of this suit. It is brought to set aside a former decree of this Court and to obtain a new decree on the same subject matter, having in general the same view; namely, the foreclosure of the mortgage and sale of the property of The Texas and New Orleans Railroad Company to pay the incumbrances thereon. The first suit was brought by the bondholders for themselves and all others interested. This suit is brought by other bondholders, not parties to the first suit, for themselves and all others interested. The present suit seeks to set aside the decree in the former and to have a new decree on the same matters. At first sight this seems to be an anomalous proceeding."

"The query at once arises: Will not such a practice lead to endless litigation? What are the principles by which we are to be guided in such cases? It seems to me on reflection that we need not be at any great loss to discover a solution of the difficulty. The first suit was or was not defective for want of proper parties. Are all the bondholders of a railroad company necessary parties to a bill of foreclosure, brought by the trustees of the mortgage by which the bonds are secured? Or, where there are successive mortgages, and the trustees of a prior mortgage file a bill to foreclose the same, must all the bondholders under a subsequent mortgage be made parties to the suit in order to make the proceedings valid and binding on all? It seems to me impossible to contend for the affirmative. The rule of chancery pleading which allows some parties to sue or be sued in behalf of all where their right is the same and the number is so large as to render it difficult to bring them all before the court, must certainly apply to this case. The very fact that trustees are interposed to receive and hold the mortgage given to secure an issue of bonds, sometimes amounting to hundreds and thousands, and transferable by delivery, shows that it is the intent and understanding of all parties, unless the contrary appears,

that the trustees are to represent the bondholders in all matters of litigation respecting their general and common rights; and, if the trustees fail or refuse to act, any of the bondholders, for themselves and in behalf of the rest, may step forward and put in motion the machinery of the law, making the trustees parties defendant. In my judgment, it is not necessary, where the bondholders secured by a railroad mortgage are numerous (as in the case of an issue of several hundred bonds they will be presumed to be), to make all of them parties to the suit, or to make any of them parties, if their trustees are parties. This I regard as the general proper rule growing out of, and being merely an application of, the more general rule that where parties are exceedingly numerous, and it would be impracticable to join them all without almost interminable delays and other inconveniences which would obstruct and perhaps defeat the purpose of justice, it is not necessary that they should all be made parties to a suit in equity; but a suit brought by or against some in the behalf of all will be binding upon all (Story's Equity Pleadings, Sec. 94 *et seq.*)."

In the case of Richmond vs. Irons (121 U. S., 27), Justice MATTHEWS very clearly indicates in the opinion the same conclusion. He says (p. 44):

"If this bill had been prosecuted as originally framed to final decree, and had resulted in the recovery of assets of the bank applicable to the purposes, it would necessarily have been made to appear, during the progress of the suit, that there were other creditors of the bank equally entitled with the complainant to share in the fruits of the litigation. The relief that would have been granted in such circumstances would have been by means of a decree distributing the assets obtained equally among all the creditors, including the complainant, who, in respect to such assets, would have been entitled to no priority, either by virtue of his having reduced his claim to judgment or by reason of having first filed a bill to enforce the trust. In the case of an insolvent corporation thus brought into liquidation and wound up by judicial process at the suit of a creditor, whether he sues in his own right or on behalf of himself and other creditors, the rule of distribution is the same, and is founded upon the principle of equality in which equity

delights ; unless a claimant or some other judgment creditor had, previously to the filing of the bill obtained a lien at law upon some portin of the property distributed, or could establish a superior equity, existing at the time of the filing of the bill. (Curran vs. Arkansas, 15 How., 304 ; Wood vs. Dummer, 3 Mason, 308 ; Ogilvie vs. Knox Ins. Co., 22 How., 380, 387 ; Sawyer vs. Hoag, 17 Wall., 610)."

The claim was further made in the court below that the conclusion contended for by the defendants in error must be so, because the parties named as complainants had control of the litigation, and could at any time dismiss or discontinue it.

In Belmont Nail Co. vs. Columbia Iron & Steel Co., 46 Federal Reporter, 336, the question was presented where a receiver had been appointed for an insolvent incorporation on the application of a creditor of the defendant, and in which proceeding subsequently other creditors had presented petitions asking to be joined as plaintiffs. The original complainant asked for leave to dismiss his appeal, to which the defendant consented, but the other creditors who had come in opposed this action. Judge REID thus deals with this branch of the case :

"The bill having been filed as a bill for the benefit of creditors generally, the relief demanded being for the benefit of all, any creditor has a right to become a party plaintiff upon application to the court (Fost., Fed. Pr., pp. 88, 290 ; Forbes v. Railroad Co., 2 Woods, 334 ; Campbell v. Railroad Co., 1 Woods, 368). The question then remains whether the original plaintiff can move for and obtain leave to dismiss the bill, the defendant consenting, but the other creditors, who have asked leave to join, objecting. The rights of John Huckenstein should date back to the filing of his petition which was before the motion to dismiss was made by the original plaintiff, and therefore, as co-plaintiff, his consent is requisite before dismissal of the bill solely upon the ground of consent of parties. But it is doubtful whether the original plaintiff could dismiss the bill, after the appointment of the receiver, without the consent of the other creditors. "After a decree has been made of such a kind

that other persons besides the parties on the record are interested in the prosecution of it, neither the plaintiff, nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill. Thus, where a plaintiff sues on behalf of himself and all other persons of the same class, although he acts on his own mere motion, and retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure, yet after a decree he cannot by his conduct deprive others of the same class of the benefit of a decree, if they think fit to prosecute it" (1 Daniell, Ch. Pr., 794). "After decree made establishing right of legatees to recover on a bill filed by one of several legatees, the complainant cannot after such decree dismiss his bill to the prejudice of the other legatees" (Collins vs. Taylor's Exrs., 4 N. J. Eq., 163). "A bill filed by one creditor, for the benefit of himself and others, for the appointment of a receiver of an insolvent bank is substantially a proceeding in behalf of all the creditors, and the suit being once instituted as a statute remedy for all, the plaintiff has no power to discontinue the bill (Atlas Bank v. Nahant Bank, 23 Pick., 480). Where an individual creditor had filed his bill against a moneyed corporation, obtained an injunction and appointment of a receiver, and the receiver had taken upon himself the trust, and other creditors had filed their claims, it was held that the creditor who had filed his bill, obtained the injunction and the appointment of a receiver, was not entitled, as a matter of right, upon being paid his demand, to dissolve the injunction, dismiss his bill and discharge the receiver (Fay v. Bank, Har. [Mich.], 194)."

It would not be denied for a moment that in the litigation in Indiana, if the decree had not been reversed by this court, The Wabash, St. Louis and Pacific Railroad Company, the then owner of the property, and the other lienors, would have been entirely and absolutely estopped from contesting any of the matters therein involved as against any of the other unnamed equipment bondholders who should have come forward to claim the benefit of the decree in favor of the issue of equipment

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bonds. It is likewise incontestable that if the decree had not been reversed, and the sale had been made in accordance with the provisions of the decree, it would have been a sale subject to the prior liens as found by the decree, and the entire proceeds of the sale would have been brought into court for distribution to the holders of the entire issue of equipment bonds. But, it is claimed, that the other equipment bondholders not named in the proceedings in that cause, can now, because the final decree was adverse to the claimed lien, set up this claim in other jurisdictions and have the questions relitigated there. Aside from the suggestion that the estoppels of such a judgment would not be mutual which are the fundamental characteristics of estoppels of this character, we make the suggestion further that this result would be entirely and utterly destructive of the purpose and foundation of the equitable rule that where there is a common right equally applicable to all persons of a class and those persons are so numerous that it is impracticable to reach and bring them all before the court, some of that class may sue on behalf of all for the enforcement of the common right. If this is done in good faith and there is a fair representation of the interest of all by those who appear, then all ought to be bound, or else the rule has no foundation whatever, because clearly all those would be bound who appear in the proceedings without reference to its being a class suit, and likewise, those would be bound who would afterwards come in, and by taking the benefit of the litigation, make themselves parties thereto. But if those who are not named in the proceedings, and stand aloof are not bound as is claimed by the defendants in error, then in fact and essence the rule has no substantial existence or effect.

This is evidently not the way in which this rule is understood by the leading jurists who have discussed the rule and applied it. Thus, in the case of Small vs. Atwood, 1 Younge, 407, a suit was brought by some of

the partners of a company on behalf of all to rescind a contract for the purchase of iron mines. Objection was made to the bill because of the absence of the other partners, and Lord LYNDHURST, at page 458, says :

" In the case of Meux vs. Maltby, the late Master of the Rolls, Sir Thomas Plummer, with that industry which he always exhibited on questions of this nature, has collected all the authorities down to that time, beginning with the case of the City of London vs. Richmond, as far back as the year 1701. From that time to the present, it has been a rule, as I understand, of courts of equity that, when parties are so numerous as to render it inconvenient or impracticable that they should be parties to the record, if they all have one common interest, a few may sue on behalf of themselves, and of all members of the association. I apprehend that this rule will apply strictly to the case before the Court. The object of this suit is to get rid of a disadvantageous agreement, on the ground of imputed fraud, an agreement which is said to be disadvantageous and ruinous to the interest of the company, and all the members of the company, therefore, stand in that respect in the same situation. They have the same interest to get rid of this agreement, and upon the principle which I have stated, some may sue in their own name and in the name of the whole association."

In this case, the Court, upon the petition of some of the partners, annulled the contract which was the subject of attack in the bill.

One of the earliest cases is Chancey vs. May, Precedents in Chancery (Finch's Ed.) Case 356, p. 592, which was a bill brought by the treasurer against members of a certain South Sea Company. *Demurrer was interposed for want of parties.* The claim was on account of mismanagement, embezzlement, &c.; the original shares were but 18, but these were subdivided into 800. The demurrer was disallowed; first, because the bill was " on behalf of themselves and all others, " the " proprietors of the same undertaking, except the defendants," and so all the rest were in effect parties.

In Adair vs. New River Co., 11 Vesey, Jr., 429, at page 444, Lord ELDON says, discussing this precise question of alleged absence of parties in that case:

"There is one class of cases very important upon this subject, viz., where a person having at law a general right to demand service from the individuals of a large district, to his mill, for instance, may sue thus in equity. His demand is upon every individual not to grind corn for his own subsistence except at his mill. To bring actions against every individual for subtracting that service is regarded as perfectly impracticable. Therefore a bill is filed to establish that right and it is not necessary to bring in all the individuals. Why? Not that it is inexpedient, but that it is impracticable to bring them all. The Court, therefore, has required so many that it can be justly said they will fairly and honestly try the legal right between themselves, all others interested, and the plaintiff; and when the legal right is so established at law, the remedy in equity is very simple; merely a bill stating that the right has been established in such a proceeding and upon that ground a court of equity will give the plaintiff relief against the defendants in the second suit only represented by those in the first.

"And it would be competent to the court in such a state of circumstances to say if the plaintiff brings so many of those who represent the king's share as can be taken duly and honestly to enter into that contest in which all others are concerned, that ought in equity to bind those who are present representing those who are absent."

And the rule seems to be so applied in the authorities. Because we find that where the litigation has been thus conducted, the judgment is held to be conclusive. Thus, a very common class of cases of this sort are what is known as administration suits; and we have the case of Hickens vs. Congreve (4 Russ., 562), in which some of a body of stockholders proceeded on behalf of all the stockholders to recover ten thousand pounds alleged to have been fraudulently taken from the company. Lord LYNDHURST upheld the right of the few to sue for the many in this case, saying:

" It is said each shareholder might file a bill to recover his proportion of the money. Such a course would produce enormous inconvenience. Are two hundred bills to be filed in order to do justice in this matter? If justice can be done in one suit, the Court will sustain such a proceeding; for, to require all the shareholders to be parties, or to leave each shareholder to file a separate bill to redress his own wrong, would in substance be a denial of justice.

" In the present case it appears to me that justice may be done in one suit; all the shareholders stand in the same situation; the property has been taken out of their common fund: they are entitled to have that property brought back again for the benefit of the concern. When all parties stand in the same situation, and have one common right and one common interest, in what respect can it be inconvenient that two, three or more should sue in their own names for the benefit of all?"

The rule is very clearly recognized in Carpenter vs. Canal Co. (35 Ohio St., 307). Judge OKEY, at page 307, says:

" The parties were very numerous, and, aside from the provisions in the mortgage allowing one to prosecute for the others, the statute, which accords with the rule in equity, provides that 'where the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.' (Civil Code, Sec. 37; Rev. Stat., 5008). *And no doubt a judgment or order in such case is binding on all persons standing in the like predicament;* but the Court will take care 'that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest.'" (Story Eq. Pl., Sec. 120.)

This opinion of Judge OKEY recognized the principle that the Code provisions of Ohio and Indiana simply state the prior equity rule on the same subject. This provision is the same in each State and is as follows:

" When the question is one of a common or general interest of many persons, or when the parties are numerous and it may be impracticable to bring them all

before the Court, one or more may sue or defend for the benefit of the whole" (Rev. Stats. of Ohio, Sec. 5003).

The general question was also before this Court for consideration in the case of Quinlan vs. Myers (29 O. S., 500), the suit in that case having been brought under the 37th Section of the Code of Civil Procedure. GILMORE, J., considering the question of the availability of a former decree in the bar, says, at page 510:

"It is further to be observed that, under the Act of May 13th, 1868 (S. & S., 677), in any action brought to enjoin the collection of any assessment levied, the Court may, if there be manifest error in the proceedings affecting the rights of the plaintiff in such action, set the same aside as to him, without affecting the rights or liabilities of the other parties in interest.

"Relief can therefore only be granted to those who ask it, or, in other words, those who are named as plaintiffs in the petition. In the absence of this statutory provision, however, upon general principles, *if the party named as plaintiff, who sues in behalf of himself and others fails in his suit, those whom he represents must also fail, for the rights of those represented cannot rise higher than those of the parties named as plaintiff.*"

In Matheny vs. Golden, Treasurer, 5 O. S., 361, a bill was filed by one lessee of school lands leased by the Ohio University for ninety-nine years, renewable forever, seeking on behalf of himself and all other lessees of the same lands holding on like terms with himself, to restrain the collection of taxes thereon by the State by reason of the provisions in the act under which the leases were made that the lands should be forever exempt from State taxes. BRINKERHOFF, J., says at page 314:

"The first question presented here is whether, conceding the claims of the plaintiff and his associates to exemption from State taxes on their leaseholds to be well founded, they can have relief by injunction in a court of equity. In Exchange Bank of Columbus vs. Hines (3 Ohio St. Rep., 1), which was a proceeding to enjoin the collection of a tax alleged to be illegally as-

sessed, it was held by a majority of the Court—RANNEY, J., dissenting on this point—that relief could not be had in this form, on the ground that a full and adequate remedy was afforded by action at law against the party who might distrain for the collection of the tax. That, however, was the case of a single party seeking relief for himself alone, and it seems to be well settled that 'where one person claims or defends a right against many, or where many claim or defend a right against one,' courts of equity will interpose in order to prevent multiplicity of suits (2 Waterman's Eden on Injunctions, 415."

The right of the plaintiff thus to maintain his suit was sustained by the Court, and a decree "for complainant and those for whom he sues" entered.

To a similar effect is the case of Adler vs. Whitbeck, 44 O. S., 539 (see Opinion of MINSHALL, J., p. 555).

See, also, Cincinnati Street Railroad Co. vs. Smith, 29 O. S., 291, opinion of GILMORE, J., at page 303.

In Hurlbutt vs. Butenop (27 Cal., 50), suit was brought by one Gibbons, for himself and others not named, against one Peralto, to set aside a deed to a large and valuable tract of land in the City of Oakland. The petition alleged that this tract of land was owned by so large a number of persons that it was impracticable to bring them all before the Court, and they were all affected in the same way by the deed in question. A decree was rendered in this suit setting aside the deed in question for fraud.

The suit of Hurlbutt vs. Butenop was afterwards brought in ejectment, both parties claiming through Peralto, the defendant in the former suit. In this suit in ejectment, the plaintiff, who was not named in the Gibbons suit at all, nor connected with it in any way, and who had not brought himself into the suit either before or after the decree, offered in evidence the decree in the Gibbons suit for the purpose of establishing his title as against the defendant. It was held by the Court that, although he was not named or connected with the Gibbons suit, he was entitled to claim the benefit of the decree, and that

the defendant was likewise bound by the provisions of the decree.

In M'Intosh vs. City of Pittsburg, 112 Fed. Rep., 705, the question was presented to BUFFINGTON, J., where a non-resident filed her bill upon the equity side of the United States Circuit Court, to enjoin the city from entering upon her premises and appropriating the same for a street, on the ground that the ordinance of the City of Pittsburg was null and void because not petitioned for by a majority in interest of the property owners abutting on the line of the proposed improvement. To this bill a plea was filed to the effect that in the State Court in the Common Pleas Court of Allegheny County, some of the property owners interested, other than the complainants appealed by petition and sought to have the ordinance set aside. Upon their appeal, the Court of Common Pleas sustained the ordinance, and these parties took the case to the Supreme Court of Pennsylvania, which likewise sustained the ordinance. This action was pleaded in bar of the bill in the McIntosh case, although the complainant had not been a party, and she claimed that she was not bound by this former proceeding. Concerning her claim respecting this plea, BUFFINGTON, J., says:

"It is clear that the interests of the present complainant, and that of the appellants in the common pleas case were identical. It was one common to both as members of a class. Where such common interests exist, one or more of a class may litigate such interest without making all class members parties (Story on Equity Pleadings, cited in Smith v. Swormstedt, 16 How., 302, 14 L. Ed., 942). Such facts constitute an exception to the general rule in courts of equity that all persons in interest must be parties to a bill; and where *bona fide* bills are filed and litigated by representatives of a class, and the subject matter of the suit is common to all the decree binds the entire class as fully as if all were before the court (Smith v. Swormstedt, *supra*). This well-settled principle of equity procedure has been applied in municipal litigation. A judgment against a muni-

cipality or its legal representatives in a matter of general interest to all its inhabitants —for example, respecting the levy and collection of a tax—is conclusive not only upon the municipal defendant, but upon all of its inhabitants, though not made parties. Such inhabitant cannot collaterally attack such judgment or relitigate the subject matter. Sauls v. Freeman, 24 Fla., 222, 4 South., 525, 12 Am. St. Rep., 190; Clark v. Wolf, 29 Iowa, 197; Gaskill v. Dudley, 6 Metc, (Mass.), 546, 39 Am. Dec., 750; Terry v. Town of Waterbury, 35 Conn., 526; Cromwell v. County of Sac, 94 U. S., 351, 24 L. Ed., 195; Lyman v. Faris, 53 Iowa. 498, 5 N. W., 621; Ashton v. City of Rochester, 133 N. Y., 193, 30 N. E., 965, 31 N. E., 334, 28 Ann. St. Rep., 619. In the case of the common pleas of Allegheny county the approval of the ordinance in question was in issue. That such court had jurisdiction both of the subject matter and of the parties litigant cannot be questioned. The decree of that court approved the ordinance, and judicially established the fact it was duly established law of the city. Certain it is that this decree thus adjudging this ordinance valid, is final and conclusive upon the parties to that suit. They could not again raise that issue, and in a collateral proceeding question the validity of such ordinance. But the binding effect of the decree extended beyond the immediate parties. The authorities cited are to the effect that not only were the immediate parties concluded thereby, but all citizens of Pittsburg were bound, because they and their interests were represented by the city, and all property holders abutting on the line of the street, because they and their common interests were represented by the appellants. "The judgment of a court of competent jurisdiction will sometimes operate as an estoppel and a former adjudication against persons who were not named in the proceeding, and who were not parties to the record by name. It is enough if they were represented in the action or proceeding which resulted in the judgment, or were entitled to be heard." See Ashton v. City of Rochester, *supra*, where certain property owners were held concluded by a prior decree establishing the legality of the municipal improvement ordinance again sought to be contested, because, though not parties to the record, their rights were represented by other fellow property owners, whose interests were identical. "The legal and equitable rights and liabilities of all being before the court by

representation, and especially where the sabject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." Smith v. Swormstedt, *supra*.

Commissioners of Sewers of the City of London vs. Gellatly, 3 Chancery Division, 610, was a case based upon a decree against parties not named in the original suit, in which the defendant Gellatly claimed that the proceedings resulting in the decree for injunction in the original suit were not an adjudication as to him in the subsequent suit. That he was not bound by the decree in the other suit not having been a party to the proceeding.

The original suit was between two classes of parties, the suit being instituted in the Court of Chancery by plaintiffs on behalf of themselves and all other occupiers of lands and tenements within Epping Forest, against, among others, the lord of a manor within that forest, and two grantees from that lord of part of the wastes of the manor. The plaintiffs claimed to be entitled to rights of common over the wastes of the manor, and alleged that the lord of the manor in question inclosed or authorized the inclosure of large portions of the waste, so as to interfere with the rights of similar inclosures, and that such persons were too numerous to be made parties to the suit, but were sufficiently represented by the two grantees made defendants thereto. A decree was made establishing the right of common claimed, and granting injunction.

Respecting the claim of the defendant Gellatly, Sir George Jessup, Master of Rolls, makes the following report :

" The Master of the rolls referred to Mayor of York v. Pilkington, 1 Atk., 282, and said that he understood the rule of the Court of Chancery ever since Lord HARDWICKE'S time to have been this, that where one multitude of persons were interested in a right, and another multitude of persons interested in contesting

that right, and that right was a general right, and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number, some individuals out of the one multitude might be selected to represent one set of claimants and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted. No doubt the plaintiffs must have the right of selecting the defendants unless the persons interested in resisting the claim chose to file a bill to establish their rights, in which case the two suits would go on together as cross-suits. For example, in the present case Mr. Gellatly might have filed a bill to restrain interference with his inclosures, and there might have been two plaintiffs selecting their defendants. But that was not done, and the Court, being satisfied that the parties were fairly represented before it, and that the matter was fairly contested, made a final decision of the right, and everybody interested, although not actually present, was bound by that decision, because he was present by representation. Mr. Gellatly was as much bound as he would have been in a suit by a shareholder who filed a bill to have the rights of the shareholders declared, as in Henry v. Great Northern Railway Company, 1 De G. & J., 606, though the plaintiff in that case was only a single shareholder. But if Mr. Gellatly could show fraud or collusion, or anything of that sort, or show that the Court was cheated into believing that the case was fairly fought or fairly represented, when in point of fact it was not, then he was entitled to the same benefit of such a defence as anybody else in a similar case. * * *

"This demurrer is filed on two grounds. The first is one of substance, viz., that the defendant is not bound by the decree which I pronounced in the former case. I think for the reasons I have already given that he is already bound by it, and in my opinion the defendant fails on that ground."

The question is clearly decided in a case by the Court of Chancery of New Jersey. It is the case of Willoughby *et al.* vs. Chicago Junction Railroad and Union Stock Yard Co. (50 N. J. Eq., p. 656). The precise question was presented in this case which we have

for consideration before us in the case at bar. In this case a bill was filed in 1891 by Willoughby on behalf of himself as a stockholder in a New Jersey Company and all other stockholders therein who should come in and contribute to the expenses of the suit. The three other stockholders were afterward, by order of the Court, admitted as parties complainant. The company and several other companies were named as defendants.

The object of the bill was to restrain the defendants from carrying into execution an agreement between the New Jersey company and other parties. This bill was filed on the 17th of December, 1891. Prior thereto, on the 19th of August, 1891, one Ellerman, another stockholder of the New Jersey company, had filed a bill in the Chancery of New Jersey in behalf of himself and all other stockholders who should contribute to the expense of the suit for the purpose of preventing the consummation of the same agreement between the New Jersey Company, and the other parties defendant. The defendants in that suit were the same as in the Willoughby suit. In the Ellerman suits answers was filed, and it was regularly on the calendar for the October Term, 1891, and was heard in the November Term on bill and answer, and on December 18, one day after the Willoughby bill was filed, an opinion was filed by the Vice Chancellor who heard the case, holding that the agreement was not *ultra vires* as to the corporation, was not illegal, and entered a decree dismissing the bill on that ground.

This decree dismissing the bill in the Ellerman suit was pleaded by the company and the other defendants in the Willoughby suit, and the question presented was, therefore, whether the decree in the Ellerman suit was a bar to the prosecution of the suit by Willoughby on behalf of himself and all other stockholders. It is to be noted that Willoughby was not a party to the Ellerman suit, unless represented by Ellerman under the principle that the Ellerman suit

was a suit for himself and all other stockholders. GREEN, Vice Chancellor, says:

"Are the complainants bound by the former adjudication of the question arising in the Eilerman suit? As the rule in question is generally stated, the former judgment is binding only on parties and their privies. But the course of decision has been such as to embrace others who do not stand in a relation, strictly speaking, of privity with the original party." * * *

"The practice has long been recognized of permitting suit to be brought by a few as the representatives of a numerous class, on behalf of themselves and all others of the class, when there is a common interest or a common right which the suit seeks to protect, and against a few as representing a numerous class subject to a common liability, which the suit seeks to enforce" (Story Eq. Pl., Sec. 97). "In most, if not in all cases of this sort, the decree obtained upon such a bill will ordinarily be held binding upon all other persons standing in the same predicament; the Court taking care that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest" (Story Eq. Pl., Sec. 120).

The former decree was held to be a bar.

Harmon vs. Auditor, 123 Ill., 122, was one of the authorities cited in support of the decision. This was a bill filed in 1882 in the Circuit Court of Ogle County by Harmon, Domer, Fager and Marshall, resident property owners and taxpayers, against the auditor of the State, the Treasurer and Clerk of the County, Collector of the Town and the holders of the bonds therein described, charging that fifty bonds of the town of $500 each, and twenty-five of $1,000 each, issued and signed by the officers of the town, were void for want of power in the officers of the town to issue the same, and praying that the same might be decreed to be null and void, and that the officers might be enjoined from collecting any taxes to pay the same from the property of the complainants and the other taxpayers. The indebtedness involved in this suit had already been passed upon by the courts

of Illinois in the case of Railroad Company vs. Pinckney (74 Ill., 277). In the Pinckney suit some other taxpayers had filed their bill in 1871, eleven years prior to Harmon's bill, seeking to enjoin the issue of these same bonds. Upon hearing, the Court had held that the town had power to issue the bonds, and dismissed the bill of Pinckney for want of equity. MAGRUDER, J., in considering the question of the bar of the Pinckney suit to the Harmon suit, says:

"The defendants set up the former proceedings in the Pinckney suit as a bar to the relief sought by the present suit. Both The Chicago and Iowa Railroad Company and the Town of Mount Morris were parties to the Pinckney suit.

* * * * * *

"It is claimed, however, that the Pinckney suit is to be regarded as a controversy between the complainants therein on the one side and the defendants therein on the other side, and not merely as a controversy between two of the defendants, the railroad company, and the town. In this view it is urged that the decree in that suit cannot be pleaded as a former adjudication in the present suit, for the reason that the complainants there were not the same persons as the complainants here. The proceeding instituted by Pinckney and others was a chancery proceeding. The present proceeding is also upon the chancery side of the court. Where the action is at law and a judgment in an action at law is pleaded as a former recovery, the defense has a more restricted character than in a chancery suit.

"The Pinckney bill was filed by certain property owners and taxpayers as representatives of a class. Though not formally stating that it is filed on behalf of all other taxpayers in the town, yet it constantly refers to them and their interests in the question involved. It alleges that 'your said orators and the other taxpayers of said town' will suffer injury, that the issue of bonds will be in violation of the rights 'of your said orators and the other taxpayers of said town', and an attempt to deprive 'your orators and the other taxpayers of said town' of their property, etc., and to take the property of 'your said orators and said other taxpayers of said town' for a private use without compensation to 'your said orators and said other taxpayers'. Its prayer is that the town be

restrained from 'collecting any taxes upon the taxable property of said town of Mount Morris to pay said bonds.' Moreover, the Pinckney suit was adopted by the town as its own litigation when the town paid the expenses of it, and compromised it through the town officers, and by resolutions of the town meetings.

"The present suit was begun by Harmon and others, also taxpayers and property owners of the town and representatives of the same class for whose benefit the Pinckney bill was filed. *The complainants in this proceeding were represented by the complainants in the former suit and are, therefore, bound by the decree therein entered. The remedy in suits of the character here indicated is in the interest of a class of individuals having common rights that need protection, and, in the pursuit of that remedy, individuals have the right to represent the class to which they belong. This jurisdiction in some respects rests on the principles of a proceeding in rem.* We, therefore, think that there is sufficient identity between the parties filing the present bill and those who filed the bill in the Pinckney case to justify the pleading of the decree entered there as *res adjudicata* in this case. The views here expressed are sustained by the following authorities: State vs. Railroad Company, 13 S. C., 290; Terry vs. Town of Waterbury, 35 Conn., 526; Sabin vs. Sherman, 28 Kan., 289; Smith vs. Swormstedt, 16 How., 303."

The New Jersey Court also cites the case of Dewey vs. St. Albans Trust Co., 60 Vt., 1. The head note of this case states the result of the decision briefly, and is as follows:

"Although it is the general rule in equity that persons interested in the subject matter of the litigation must be made parties, there are exceptions when it would have been impossible to give personal notice to all interested, and the notice given was the only one that could well have been given. So, where the Receiver of an insolvent savings bank with a large number of depositors—over 1,100 of whom claimed that they were entitled to be preferred over the others, under the bank's charter, which claim the remaining creditors disputed—brought his petition to the court of chancery, setting up the facts and asking for the direction of the court in the premises, and gave notice to all persons interested by publication in a newspaper,

and by an acceptance of service by the chairman of the depositors' committee, and, when the cause was heard, counsel appeared for many of the depositors claiming a preference, and it was thoroughly tried on their part, it was held that the judgment and decree thus rendered were binding on the whole class."

In this case the decree was that all depositors should stand on terms of perfect equality of right, and that no depositor or class of depositors was entitled to any preference over the others. It was from this decree that the appeal was taken which was affirmed in the Supreme Court. Some parties, who were not named to that original decree, subsequently came in on behalf of themselves and all others seeking to obtain the preference under the charter which had been denied in the original proceeding in which they were not named. It will be observed that these parties in the second suit were not in any way parties to the original suit unless they were by representation in the former suit. The adjudication was likewise adverse to their interests and claims. The defense was that the former adjudication was a bar to the present proceeding.

The Court very fully discusses the question of representative suits, and quotes from and refers to the early English cases, and treats the former decree as binding upon all parties, whether they were named in the original decree or not, upon the ground that they were represented by the parties of the same class, and that their right had been fully and honestly maintained and tried. The conclusion is as follows:

"Therefore, upon well-recognized principle, that decree ought to be held binding upon the whole class."

Citing:

Cockburn vs. Thompson, 16 Ves. Jr., 321.
Newton vs. Egmont, 5 Simons, 137.
Stevenson vs. Austin, 3 Mete., 474.
Crease vs. Babcock, 10 Mete., 532.
Pearce vs. Piper, 17 Ves. Jr., 1.
Kerr vs. Blodgett, 48 N. Y., 66.
West vs. Randall, 2 Mason, 181.
Van Vechten vs. Terry, 2 Johns. Ch., 197.

The rule is thus stated in Beach on Modern Equity Practice:

Sec. 66. Effect of the decree on absent parties. In his celebrated work on Chancery Practice Mr. Daniell, after stating that it has long been the established practice of the Court to allow a plaintiff to sue on behalf of himself and of all the others of a numerous class of which he is one, and to make one of a numerous class the only defendant as representing the others, says that in these cases "the absent parties are generally bound" by the decree (1 Daniell's Ch. Pr., 5th ed., 191). In the only case cited by him[1] three persons constituting a part of the Board of Directors of a mutual assurance Company filed a bill on behalf of themselves and all other stockholders, praying that a policy signed by them might be delivered up to be canceled on the ground of fraud and misrepresentation.[2] It was objected that if the bill were dismissed with costs at the hearing the other members might file a second bill for the same object. To this the Master of the Rolls said: "It cannot be denied that in cases of this description some anomalies do arise and some difficulties do inevitably occur which prevent the court from adhering strictly to its general principles; but if this objection be allowed to prevail there would be an end of the advantage which is afforded by this proceeding and to the rule that when parties are very numerous some of them are allowed to proceed in the name of all. How the court would proceed in such a case as that suggested has never, I think, been decided. I think there is a difficulty in the case, but it is one which the court could deal with. My impression is that in cases where a company have authorized others to enter into obligations for them and have thus placed them in a situation of responsibility to third parties, and these persons have come to this court and sought relief in the name and for the benefit of all, but their suit has been dismissed—my impression is that this court would not allow other members to prosecute another suit for the same object."[3] Judge STORY says that "if in a bill of this sort an account is taken, and there is a decree giving a certain portion of a fund be-

[1] Barker vs. Walters, 8 Beav., 92.

[2] The bill recited that the members of the company were so numerous that it was impossible to make them parties to the suit.

[3] Barker vs. Walters, 8 Beav., 92.

fore the court, the parties not before the court will be bound by that account and decree,[1] and the court will protect the defendant acting under the decree and obeying it from future litigation on the points so decided; for otherwise the defendant would really be deprived of all protection."[2]

If it be claimed, as was the intimation of counsel upon the trial, that this adjudication in the Ham suit as to the lien of the equipment bonds is effective only as to the State of Indiana, within the district of the Court giving the decree, several replies can be made to the suggestion.

In the first place, there is nothing in any of the cases relating to representative suits which would justify the Court in thus limiting the effect of the decree in this Ham suit. If the parties who appeared there were fairly representative of the rights of the whole class, and fully represented those rights and honestly maintained them, then, under the decisions,

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[1] Cf. the language of the Court in Vann vs. Hargett, 2 Dev. & B. (N. C. Eq., 31), quoted in Sec. 62, note 3, *supra*.

[2] Story's Equity Pleading (10th Ed.), Sec. 84, citing Mitf., Eq. Pl., by Jeremy, 167, p. 171; Farrell vs. Smith, 2 Ball & B., 337, 341, 342; Kenyon vs. Worthington, 2 Dick., 668; Hallett vs. Hallett, 2 Paige, 18-20. In Story's Equity Pleading (10th Ed.), Sec. 106, the author says: "But although the court will in cases of this sort entertain jurisdiction by creditors, legatees and distributees on behalf of themselves and all others, and will exempt the executor or administrator or other trustee from all liability in respect to payments of assets made pursuant to its decree, yet it is not to be understood that such a decree absolutely binds the absent creditors, legatees or distributees who have had no opportunity of proving and presenting their claims so that they are entitled to no redress, but are deemed to be concluded. On the contrary, although they have no remedy against the executor or administrator or trustee, yet they have a right to assert their claim to a share in the property against the creditors, legatees or distributees who have received it." See, also, Farrell vs. Smith, 2 Ball & B., 341; Davis vs. Frowd., 1 Myl. & K., 200; Gillespie vs. Alexander, 3 Russ., 130. But the Court is always watchful to protect the rights of absent persons whose interests are incidentally brought to its notice before it finally disposes of the case (Good vs. Blewitt, 13 Ves., 397; s. c., 19 Ves., 336; Story's Equity Pleading (10th Ed.), Sec. 96; Angell vs. Haddon, 1 Mad., 529; Dunch vs. Kent, 1 Vern., 260).

it would not seem to make any difference whether the bar of that adjudication was sought to be enforced in the same jurisdiction, or in any other jurisdiction than that in which the decree was rendered; because the test is not the fact of its being set up in the same jurisdiction, but the fact that the parties who brought that suit, and prosecuted it were, in fact, under the principles of this class of suits, representing the rights not only of those actually named, but of the entire body of unnamed parties in the same predicament.

In the courts below the claim was made that Judges JACKSON and GRESHAM had determined that the Ham suit was not a bar to the Compton suit, and that this is an authority against the position contended for by the plaintiff in error. There was, however, a decided difference between the situation of the Compton case, and the case now before this Court. Compton was prosecuting his rights under a decree obtained in the Ohio State Courts, having been brought into the United States courts after such decree was obtained. At the time Compton began his suit in the State Court in February, 1880, the claim made by him was that upon the record the Ham suit stood dismissed, and was not revived as a class suit, or otherwise, until July, 1880 (Record, pp. 471, 472). Another distinction between the Compton suit, and the case at bar is that neither the pendency of the Ham suit, nor the decree in the Ham suit was ever brought to the attention of any of the Ohio courts by which the Compton case was heard. Upon these grounds Justices JACKSON and GRESHAM really sustained the right of Compton to proceed, notwithstanding the Ham suit, as is shown by the following language of their opinion:

"That said Compton was in no way prevented or precluded from instituting or prosecuting his suit in the Ohio State courts against the Toledo, Wabash and Western Railway Company and others by either the pendency of the Ham (or Tyson) suit in the United States Circuit Court of Indiana, or by the judgment of the Supreme Court of the United States in said suit denying the existence of any lien legal or equitable in favor

of the equipment bonds issued by the Toledo and Wabash Railway Company (Railway Co. vs. Ham, 114 U. S., 587, 588; Pomeroy's Remedies and Remedial Rights, Sections 396, 399 and cases cited). First, because he was not a party to that proceeding and did not appear therein; second, because that Ham suit was not in its inception nor at the time Compton commenced his action in the State Court such a class suit, or so representative in its character as to bind him without his being or becoming an actual party thereto; and, third, because, if said Ham suit had been so representative in its character as that the decree of the Supreme Court therein could or would have concluded said Compton on the question of the lien of the equipment bonds, neither the pendency of the said suit, nor the decree of the Supreme Court was ever interposed by the defendants to his suit in the State court either by way of abatement or in bar thereof, although ample time and opportunity so to do was afforded them (Grant vs. Ludlow, 8 Ohio St., 1; Davis vs. Matthews, 39 Ohio St., 45; Dimick vs. Revere Co., 117 U. S., 570).

"Under such circumstances, the State courts having jurisdiction of both parties, and subject matter were entitled to proceed and determine the questions involved" (Record, p. 704).

In the case at bar, in 1883, when the petition of the Adelbert College was filed, the Ham suit had been converted by the filing of an amended and supplemental bill in July, 1880, into a representative suit, and about the time the petition in the Adelbert case was filed the suit thus representative had eventuated in a decree of the United States Circuit Court in favor of the entire body of equipment bondholders (Record, p. 474). The final decree in the Ham suit has also been pleaded as a bar to the suit of the defendants in error at every stage of the case at bar, and, therefore, the question now before this Court is in all respects different from the question presented to Judges JACKSON and GRESHAM in the Compton case.

III.

Upon both of the grounds above argued, the decree and all proceedings had in the Ohio Courts should be held to be null and void.

Respectfully submitted,
RUSH TAGGART,
For the Wabash Railroad Company.

No. 40.

OCTOBER TERM, 1887

THE WABASH RAILROAD COMPANY,

vs.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL.,

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

RUSH TAGGART,

Supreme Court of the United States.

THE WABASH RAILROAD COMPANY,
Plaintiff-in-Error,

AGAINST

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL.,
Defendants-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR IN OPPOSITION TO MOTION TO DISMISS.

The record in this case presents clearly two federal questions:

FIRST. That the exclusive jurisdiction over the property in question was vested in the Federal Court by virtue of its having taken possession by its receivers of the property involved in the suit, and that it retained and was still in possession of the property at the time the proceedings in the State Court ending in the judgment were instituted, and that the State Courts failed to recognize this exclusive jurisdiction of the Federal Courts over the property.

SECOND. That the prior decree of the Federal Court in the Ham Suit was *res adjudicata* as to the matters sought to be litigated by the plaintiffs in this action, and that the State Courts refused to give validity, force and effect to this federal decree. These two defences were fully presented by the pleadings in the lower court. (See answer of the Wabash Railroad Company, Record, pp. 60–65.)

Answer of the Purchasing Committee, Record, pp. 111–115 and 114.

Answer of James F. Joy, Record, p. 115.

Answer of the Farmers' Loan & Trust Company, Record, pp. 119–124.

Answer of the Purchasing Committee, Record, pp. 130–184.

Answer of James F. Joy, Record, p. 184.

Answer of Wabash Railroad Company, Record, pp. 185–192.

This last answer adopts all the allegations of the answers and supplemental answers of the Purchasing Committee, and also the answers of James F. Joy, Record, pp. 191, 192. See also the further answer of the Wabash Railroad Company, Record, pp. 195–198.

In our main brief we have set forth from pp. 2–22, the manner in which these questions arise upon the record, and the full history of these precedent litigations, and we reproduce this statement as an appendix to this brief.

ARGUMENT.

Both federal questions were fairly presented, and both were decided adversely to the Wabash Railroad Company's contention. There can be no serious question as to the rule under which this Court will re-examine proceedings on a writ of error to the highest court of the state. There must be presented upon the Record; first: the right, privilege or immunity relied upon. That was done in this case by the pleadings to which reference has been made, setting up as a separate defense, the prior, exclusive jurisdiction of the Federal Courts; and the prior adjudication and decree of the Federal Courts, as a bar to any action in the State Court upon the merits. Second: this right, privilege or immunity set up must be denied by the State Court. This was denied in this case, because if the prior exclusive jurisdiction over the property was in the State Court to the extent claimed, it prevented the State Court from taking action with respect thereto, as argued in the main brief in this case, and the State Court by proceeding was denying such prior exclusive jurisdiction, and by entering judgment, necessarily decided that such prior, exclusive jurisdiction did not exist. The State Court, also, with respect to the claim of the prior adjudication by the Federal Court of the merits of the controversy on behalf of the defendants in error, by proceeding to enter judgment, necessarily interpreted such federal decree, and denied that the same constituted an adjudication of the merits, as claimed. By so doing they denied the defence set up under such decree.

The questions we have here, on this motion to dismiss, are fully determined by the recent decisions of this court to which we refer. In Pittsburg,'&c, Railway vs. Loan and Trust Company, 172 U. S., 493, the precise question was involved. In that case a final judgment of the Supreme Court of Ohio was brought before this Court for consideration, the question being whether certain railroad property could be sold in satisfaction of a judgment obtained in the Circuit Court of the United States for the Southern District of Ohio, based upon certain coupon bonds. Suit was brought upon this judgment in the State Court, and by its decree it was compelled to construe and determine the force and effect of the judgment entered in the United States Circuit Court. Objection was made in this Court to the jurisdiction upon the precise ground presented by the brief filed in support of the motion to dismiss. We can do no better than to quote that portion of the opinion of the Court delivered by Mr. Justice HARLAN upon this question:

"The first question to be considered relates to the jurisdiction of this court to review the final judgment of the Supreme Court of Ohio.

"The contention of the defendant in error is that the record presents no Federal question which this court will review; and that the state court based its decision upon an independent ground, not involving a Federal question, but depending upon principles of general law and broad enough to sustain its judgment. Its further contention is that the Supreme Court of Ohio rightly held that neither Lynde nor the trustee, Parkhurst, were affected by the proceedings in the foreclosure suits instituted in the Circuit Courts of the United States.

"Upon looking into the record, we find that the defendant railway company claimed in its answer that if a lien at any time attached to the property in question to secure the 36 bonds purchased by Lynde, such lien was wholly divested and discharged by the above proceedings in the Federal courts under which that company claims title. This, it would seem, was such an assertion of a right and title under an 'authority exercised under the United States' as gives this court jurisdiction to re-examine the final judgment of the state court (Rev. Stat., Sec. 709).

"In Dupasseur v. Rochereau, 21 Wall., 130, 134, 135—which was a suit to subject certain lands in satisfaction of a debt secured by mortgage, and for the amount of which debt judgment had been obtained—the defense was rested upon the ground that the defendant purchased the property at a sale made under a judgment of the Circuit Court of the United States for the Eastern District of Louisiana, in a named case, 'free of all mortgages and incumbrances

and especially from the alleged mortgage of the plaintiff.' This defense was not recognized by the Supreme Court of Louisiana, and the case was brought to this court by writ of error. One of the questions considered was as to the jurisdiction of this court under the act of February 5, 1867, which gives a writ of error to the highest court of a State in which a decision in the suit could be had, 'where any title, right, privilege or immunity is claimed under or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed under * * * such authority' (Rev. Stat., Sec. 709; act of February 5, 1867, c. 28, 14 Stat., 385). Mr. Justice BRADLEY, delivering the opinion of the court, said: 'Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which under the act of 1867 may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts.' Having disposed of the question of jurisdiction, the court then inquired whether the state court, in overruling the defense, had given proper validity and effect to the judgment of the Circuit Court of the United States. Upon this point the court said: "The only effect that can be justly claimed for the judgment in the Circuit Court of the United States is such as would belong to judgments of the state courts rendered under similar circumstances. Dupasseur & Co. were citizen of France, and brought the suit in the Circuit Court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State and its proceedings were had in accordance with the forms and course of proceeding in the state courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances. If by the laws of the State a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a state court, then it should have the same effect, being rendered by the Circuit Court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court. We are bound to inquire, therefore, whether the judg-

ment of the Circuit Court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a state court. We have examined this question with some care, and have come to the conclusion that it would not."

The same question was again before this court in Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 141, 146, which was an action for malicious prosecution, the defence being that existence of probable cause had been previously determined by a judgment in the Circuit Court of the United States. It was contended that the Supreme Court of the State failed to give proper effect to that judgment, and thereby denied to the defendant a right arising under the authority of the United States. The case came here upon writ of error, and the jurisdiction of this court to review the final judgment was sustained. Mr. Justice MATTHEWS, speaking for the court, said: "It must, therefore, be conceded that the sole question to be determined is, did the Supreme Court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the Circuit Court of the United States, subsequently reversed by this court. It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that State is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process, although, as was said by this court in Dupasseur v. Rochereau, 21 Wall. 130, 135,' 'no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in a like case, under similar circumstances. Embry v. Palmer, 107 U. S., 3. It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State, are to be accorded such effect and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question. The decree of the Circuit Court was relied upon in the state court as a complete defence to the action for malicious prosecution, on the ground that it was conclusive proof of probable cause. The Supreme Court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever."

According to these decisions and in view of the statute giving this court authority to re-examine the final judgment of the highest court of a State denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the Circuit Court of the United States under which the plaintiff in error claims title to the lands and property in question."

To a similar effect is the case of Hancock National Bank, against Farnum, 176, U. S., 640. Also, Missouri Life Insurance Company, vs. McGrew, 188, U. S., 311.

The distinction between the cases cited in the brief filed in support of the motion to dismiss and the case at bar is a perfectly clear one. Many of the cases cited are cases where the federal question was not presented to the State Court for decision or was not decided by such Court. Such is the case of San Francisco City and County against Itsell. Other cases are where the case was decided on special facts in the case not involving the Federal question, as, Central National Bank vs. Stevens, 169 U. S., 432, or involved other questions upon which the case was decided, without deciding the federal question, as Avery vs. Popper, 179 U. S., 305. In most of the cases cited however, the principle contended for by us is recognized. Thus in Avery vs. Popper, it is stated at page 314 :

" With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this : That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution are assailed."

That case turned on the question whether, under the laws of Texas, a chattel mortgage upon property sold under execution is good, which does not identify the particular property covered by it. The case at bar turned upon the questions, first : Did the Federal court have exclusive jurisdiction; and second, Did the Federal decree bar the subsequent proceedings in the State Court ? So, likewise in Central National Bank against Stevens (p. 460) :

" Whether such due effect has been given by a state Court to a judgment or decree of a court of the United States is a federal question within the jurisdiction of this Court on a writ of error to the Supreme Court of the State " (Crescent City Live Stock vs. Butchers' Union, 120 U. S., 141).

At this time we present no argument upon the merits of the defenses pleaded. Those questions are fully argued in our main brief and have to do with the argument upon the merits. It is sufficient to point out on the motion to dismiss the facts upon the record, that defenses were set up depending upon federal rights and decrees, and that the decision of the State Court necessarily denied these defenses.

On these authorities it is earnestly contended that the motion to dismiss should be denied, or the question reserved for discussion with the arguments on the merits.

Respectfully submitted,

RUSH TAGGART,
Attorney for Wabash Railroad Company.

APPENDIX.

History of the Wabash Railroad.

The first of the railway corporations now forming part of the Wabash System, with which we are concerned in this litigation, was organized in the year 1853, under the laws of the State of Ohio, as the Toledo and Illinois Railroad Company, for the construction of the line of Railway from Toledo to the west line of the State of Ohio. It began the construction of its road in that year and built its railroad from Toledo to a point in the West line of Paulding County, Ohio, on the State line between Ohio and Indiana. To secure funds to enable it to construct its railroad, upon the 8th day of September, 1853, it executed its mortgage to The Farmers' Loan and Trust Company of New York, to secure the issue of $900,000 of bonds. These bonds were issued and sold and constituted the first mortgage on the Ohio Division, as it is now called (Record, pp. 222, 223).

In June, 1852, the Lake Erie, Wabash and St. Louis Railroad Company was organized as a corporation under the laws of the State of Indiana for the purpose of the construction of the line of Railroad across the State of Indiana, connecting at the Eastern boundary with the line of the Toledo and Illinois Railroad.

Upon the first day of August, 1853, this Indiana corporation executed and delivered its mortgage to The Farmers' Loan and Trust Company of New York, to secure the payment of $2,500,000 worth of bonds. These bonds were issued and sold and constituted the first mortgage upon the Indiana Division. In June, 1856, these two corporations consolidated and formed The Toledo and Wabash Railroad Company, which consolidated Company contracted large debts, and issued a consolidated mortgage upon the property, and in June, 1857, this property was sold under foreclosure proceedings, under the second mortgage, the first mortgages remaining undisturbed (Record, p. 223).

In July, 1858, an Ohio corporation, known as The Toledo and Wabash Railroad Company, was formed, which acquired from the purchaser at the foreclosure sale, that part of the Railroad sold in

1857, which was located in Ohio. About the same time The Wabash and Western Railroad Company was organized under the laws of the State of Indiana for the purpose of acquiring from the purchaser at the foreclosure sale held in 1857 that part of the Railroad which was situated in the State of Indiana. To these respective corporations, the purchasers at the foreclosure sales in the two states duly conveyed the properties acquired by them. As part payment of the purchase money in each State, the Railway Companies above named, purchasers, respectively executed a mortgage to Edwin D. Morgan to secure bonds to the amount of the first mortgage upon the property in each of the States, it being expressed to be a part of the consideration of the purchase of tIe railway properties, that the new Company in each state should assume and pay the outstanding first mortgage upon the property purchased. After such assumption as a part of the purchase price of the first mortgage in each State respectively, each Company delivered its mortgage to Edwin D. Morgan, Trustee, to secure an issue of bonds upon the second mortgage, the Ohio Company mortgaging the Ohio Division to the amount $1,000,000, additional to the outstanding first mortgage, and the Indiana Company to the amount of $1,500,000 additional to the amount of the outstanding first mortgage in that State. At the time these mortgages were executed the Board of Directors of these Companies had formulated a consolidation agreement between the two companies, which subsequently to the date of the execution and delivery of the second mortgages was approved by the Board of Directors of the two Companies and by the stockholders, and went into effect in November, 1858, whereby was formed the consolidated Company in the States of Ohio and Indiana known as the Toledo and Wabash Railroad Company. In the consolidated agreement forming this Company all the debts and obligations of every kind, nature and description of the constituent Companies were expressly assumed by the consolidated Company (Record, p. 224).

In the year 1862, this consolidated Company, The Toledo and Wabash Railway Company, issued and sold equipment bonds to the total amount of $600,000 in denominations of $100, $500 and $1,000 each, but all of the same form. These bonds were all payable to bearer, dated the 1st day of November, 1862, and all fell due on the first day of May, 1883, and bore interest from and after the first day of May, 1863, at the rate of seven per cent. per annum, payable, semiannually, on the first days of May and November in each year,

and had interest coupons attached, evidencing the interest payments. On the face of the bonds it was provided that the bond was convertible into common stock of the Railway Company at par, at any time within five years from its date, and expressed upon its face that it was one of a series authorized to be issued not exceeding in the total amount, $600,000. They were not secured by any mortgage, but were simply unsecured, sealed negotiable notes of the Company, evidenced by the signature of the President and the Treasurer and the seal of the Company (Record, p. 225).

On the first day of August, 1865, this Toledo and Wabash Railway Company entered into a further agreement of consolidation with three corporations of the State of Illinois, owning and operating railroads in the last-named State, whose railroads were so connected, one with the other that they formed a continuous line of railway from the State Line between Indiana and Illinois to the Mississippi River. This consolidation agreement dated the 1st of August, 1865, created a corporation known as "The Toledo, Wabash and Western Railway Company," and this consolidation agreement by some provisions therein is claimed to create an equitable lien upon all the property which belonged to the Toledo and Wabash Railway Company, on the 1st of August, 1865, the date of the consolidation, in favor of the outstanding equipment bonds (Record, p. 225).

This Toledo, Wabash and Western Railway Company, in the year 1867, executed and delivered a consolidated mortgage to Isaac H. Knox and James Jesup, trustees, to secure an intended issue of $15,000,000 of bonds upon all the line of railway, and upon all the property owned by it between Toledo, Ohio, and the Mississippi River. Only about $2,000,000 of these bonds were ever issued. Subsequent to 1867, a further mortgage known as the Gold Bond Mortgage was issued by the Toledo, Wabash and Western Railway Company, into which was funded a large amount of the floating indebtedness of that Company. In 1873, this Gold Bond Mortgage was foreclosed in the State Courts of Ohio, Indiana and Illinois, but the sales held under these foreclosures were subject to the prior mortgages upon the property. The purchasers at the foreclosure sales of these Gold Bond Mortgages in the three States named, formed three companies, known as "The Wabash Railway Company in Ohio," "The Wabash Railway Company in Indiana" and "The Wabash Railway Company in Illinois," which respectively acquired the property in each of the States, and after the ac-

quisition of these railway properties consolidated and formed The Wabash Railway Company. Concurrent with the default of the payment of interest in the Gold Bond Mortgage, which resulted in the foreclosure of that mortgage, there was also default by The Toledo, Wabash and Western Railway Company upon the coupons, or interest warrants, attached to the equipment bonds, and none of the coupons falling due on said bonds after the 1st day of November, 1874, has been recognized, or paid, by the corporations which have successively owned the property formerly owned by The Toledo, Wabash and Western Railway Company (Record, pp. 225, 226).

In the year 1879, The Wabash Railway Company executed a consolidated mortgage to Solon Humphreys and Daniel A. Lindley, trustees, securing bonds to the amount of $2,000,000, covering the railways from Toledo, Ohio, to the Mississippi River, and including a branch line from Decatur, Ills., to St. Louis, which had been acquired in the year 1867, all of which bonds were duly issued and sold. In the same year, but after the execution and sale of the bonds under this consolidated mortgage to Humphreys and Lindley, The Wabash Railway Company and the St. Louis, Kansas City and Northern Railway Company, a corporation of Missouri, entered into an agreement of consolidation whereby was created The Wabash, St. Louis and Pacific Railway Company, a consolidated corporation formed under the laws of the States of Ohio, Indiana, Illinois and Missouri, which corporation owned lines of railway extending from Toledo, Ohio, to Kansas City, Missouri, with numerous branch lines, unnecessary to be enumerated here (Record, p. 227).

In June, 1880, after the completion of the consolidation of 1879, The Wabash, St. Louis and Pacific Railway Company, executed a general mortgage to the Central Trust Company and James Cheney, trustees, to secure an intended issue of $50,000,000 general mortgage bonds, said bonds being intended to fund all the bonds of previous mortgages and issue $17,000,000 of the $50,000,000 of the first issue (Record, p. 227).

After the execution of the general mortgage, last above described, in 1880, The Wabash, St. Louis and Pacific Railway Company contracted further large debts which it was unable to pay, and on the 27th day of May, 1884, the Company went into the Federal Courts of Missouri, Illinois, Indiana, Iowa, Michigan and Ohio, and filed its bill in each Circuit Court where its lines were located, and alleged its insolvency, and asked that receivers be appointed

to take possession of its property for the benefit of its creditors, and administer the same in order to prevent its dissipation and destruction by suits which might be brought upon behalf of creditors.

Thereupon each of these Courts acting upon bills thus filed by the corporation, appointed Solon Humphreys and Thomas E. Tutt, as receivers of the property, and these receivers duly qualified and took possession of all the property theretofore operated by the Wabash, St. Louis and Pacific Railway Company (Record, pp. 227, 228).

Immediately after the appointment of these receivers, default occurred upon the coupons due on the 1st day of June, 1884, upon the $17,000,000 of bonds, issued and sold under the general mortgage to the Central Trust Company and James Cheney, trustees, and these trustees instituted suits for the foreclosure of this general mortgage in the several state courts within whose jurisdiction the property of the Company lay. These suits after they were thus instituted were removed to the Federal Courts in their respective States, and were there consolidated by the action of the Federal Courts, with the suits brought by the Company in which receivers had theretofore been appointed. The receivers, by order of the Federal Courts continued to hold the property, and to operate the same, and the foreclosure of the general mortgage of 1880, was carried forward in the Federal Courts (Record, p. 228).

This resulted in a decree of sale of the property upon the foreclosure of the general mortgage, and this sale took place in 1886. At this foreclosure sale, the property was bought by a purchasing committee, consisting of Messrs. Joy, Ashley, Hubbard and Wells, who were constituted such purchasing committee by an agreement entered into by the holders of the general mortgage bonds. The property was acquired by the purchasing committee subject to all prior mortgages, and one of the conditions of purchase by the purchasing committee was the assumption of the payment of a large number of obligations, receivers certificates, etc., which had been authorized by the courts, and of debts which had been contracted by the receivers in the operations of the property (Record, p. 229).

Before the completion of the foreclosure proceedings upon the general mortgage, and before any discharge of the receivers appointed by the United States Courts under the orders entered in May, 1884, had been made, a large number of holders of bonds

secured by mortgages prior to the general mortgage filed a bill in the United States Circuit Court for the Southern District of Illinois, and in the other Circuit Courts of the United States in the Circuits East of the Mississippi River, asking for the foreclosure of the Knox and Jessup mortgage of 1867, and the Humphreys and Lindley mortgages of 1879, and the removal of the receivers who had been appointed in May, 1884. In these suits thus begun, the receivers of the property east of the Mississippi River were removed and Thomas M. Cooley appointed receiver in their stead by the several United States Circuit Courts within whose circuits the railway property was situated. Thomas M. Cooley remained as receiver in possession of these properties until his voluntary retirement in 1887, when Gen. John McNulta was appointed in his stead, and remained as receiver until final discharge after the foreclosure of all the mortgages upon these properties in 1889 (Record, pp. 229, 230).

In the year 1887 Knox and Jesup, trustees, under the mortgage of 1867, filed their bill in the several courts of Ohio, Indiana, Illinois, for the foreclosure of their mortgage, and in 1888 the Farmers' Loan and Trust Company filed bills in the Circuit Courts of Ohio and Indiana, respectively, for the foreclosure of the first mortgage on the property in those states. In these two last-named suits James F. Joy, Trustee, as successor to Edwin D. Morgan, deceased, appeared and filed answers, representing the second mortgages. Similar suits were begun in the year 1888, to foreclose the prior divisional mortgages upon the divisions in Illinois in the United States Circuit Court, of the proper circuits. As a result of these suits, there were thus foreclosure suits pending in 1888 in behalf of all the mortgages upon all the railway properties from Toledo, Ohio, to the Mississippi River, except the Humphreys and Lindley mortgage of 1889, but Humphreys and Lindley, as trustees, were parties to all the other foreclosure suits (Record, p. 231).

In October, 1888, by proceedings regularly had by the trustees representing all the mortgages in each of the circuit courts of Ohio, Indiana and Illinois, all of the foreclosure suits were regularly consolidated into one suit under the title of "James R. Jesup and Isaac H. Knox against The Wabash, St. Louis and Pacific Railway Company *et al.*," so that thereafter in each of those states in the United States Circuit Courts there were suits in which as parties there were present the trustee of every mortgage upon the property

east of the Mississippi River, whether the property covered by the mortgage was within the jurisdiction of the court or not (Record, p. 231).

In these consolidated causes thus pending in each of the circuit courts, orders were duly entered appointing Gen. John McNulta as the receiver. These causes regularly proceeded to a hearing and resulted in the foreclosure of all divisional and consolidated mortgages upon all of the property East of the Mississippi River. This decree was regularly entered in each of the circuit courts of the United States on the 23d of March, 1889, and by the decree all the mortgages were foreclosed, and the foreclosure sale was had upon the 15th day of March, 1889, and all the property exposed for sale and sold (Record, p. 231). The terms of this decree are deemed conclusive upon the questions in this case, and attention will be called to them when we come to consider the federal questions presented upon the record. At the sale under this decree, the properties were exposed for sale by divisions first, and bids taken thereon, and thereafter the properties were exposed for sale as a unit. The property was sold as a whole, and was purchased by Messrs. Joy, Ashley, Hubbard and Wells, who had been constituted a purchasing committee on behalf of bondholders under all of the mortgages.

Under the provisions of the decree the claim of James Compton, which will be referred to hereafter, was reserved, and the property was sold free and clear of all liens and incumbrances, and subject to all claims for the expenses of the receivership, and all the debts and liabilities of the receivers, or upon the intervening claims allowed or to be allowed, or upon any other claims or allowances that had been, or might hereafter be charged against the property of the said railway Company, or the adjustment of any equities by any of the United States Circuit Courts in any state where said cause was pending, and subject to the right of the court to retake possession of the property, and resell it if any claim adjudicated by the Court would not be paid by the purchaser, and also providing that the property should be subject to the power and jurisdiction of the said courts, and remain subject, until all such claims and demands should be fully paid and discharged (Record, p. 181 *et seq.)*. The specific provisions of the decree will be specially noticed later.

The purchasing committee caused a new corporation to be formed in each of the several states where the property was situ-

ated, and in July, 1889, the Wabash Railroad Company, the plaintiff in error, was formed by the consolidation of these constituent companies of Ohio, Indiana, Michigan, Illinois and Missouri. Gen. McNulta terminated his position as receiver of the property on the 1st day of July, 1889, when he turned the property over under an order of the United States Court to the Purchasing Committee. The Purchasing Committee, about the 1st day of August, 1889, turned the property over to the Wabash Railroad Company. The Wabash Railroad Company has continued in possession of the property until the present time (Record, pp. 232, 265).

Concurrent with a portion of the history hereinbefore recited, the litigation respecting the equipment bonds was carried forward, which we will now specially notice.

The Ham Suit.

As has been stated, The Toledo, Wabash and Western Railway Company defaulted in the payment of interest warrants upon the equipment bonds in November, 1874, and there followed the foreclosure of the gold-bond mortgage, and the formation of the Wabash Railway Company. After the formation of the Wabash Railway Company. After the formation of the Wabash Railway Company it failed to pay the interest upon the coupons upon the equipment bonds, and thereupon, in May, 1878, one David J. Tyson, together with a number of other persons named, who were holders of the equipment bonds, went into the Circuit Court of Fountain County, Indiana, and filed their suit against the Wabash Railway Company, then owning the railway property from Toledo to the Mississippi, Isaac H. Knox and James R. Jesup, Trustees, and claimed the right, as owners of equipment bonds, to insist upon the exchange of the equipment bonds for bonds to be issued under the consolidated mortgage of 1867 to Knox and Jesup. Upon the application of the defendant The Wabash Railway Company, this case was removed to the United States Circuit Court for the District of Indiana, and thereafter, amended and supplemental bills were filed bringing in additional parties claimed to own other equipment bonds, and also bringing in the trustees, of the prior mortgages upon the railway property situated in the states of Ohio and Indiana (Record, pp. 404–418, 430).

In July, 1880, David J. Tyson ceased to be connected with the

suit, but Benjamin F. Ham and others, by leave of the Court, then came into the suit, and in July, 1880, filed a supplemental and amended bill on their own behalf as owners of equipment bonds, as well as on behalf of all other owners of equipment bonds in like interest, " who may come in and contribute to the expenses and join in prosecution of this suit " (Record, pp. 472, 473).

In this supplemental bill they asked that the entire series of equipment bonds to the amount of $600,000 principal, and the unpaid interest thereon should be declared a lien upon the railway property extending across the states of Ohio and Indiana then owned by the Wabash Railway Company, but formerly belonging to the Toledo and Wabash Railway Company, and in default of payment of the amount then due upon the matured coupons, asked for a decree fixing such lien, and a sale of such property for the amount due of unpaid interest (Record, pp. 473–493).

To the original bill thus filed, the Wabash Railway Company answered, and after the consolidation of 1879, its successor, The Wabash, St. Louis and Pacific Railway Company, answered the amended and supplemental bill, and tendered issues respecting the equities claimed by the equipment bondholders (Record, p. 495). The case was submitted to the Court upon the supplemental bill, and the answer thereto, and upon the 5th day of November, 1883, decree was entered in favor of the plaintiffs as owners of some of the said equipment bonds, and also on behalf of the entire issue of equipment bonds to the amount of $600,000, finding the entire issue to be a lien upon the property formerly belonging to the Toledo, and Wabash Railway Company, from Toledo in the State of Ohio, to the west line of the State of Indiana, and finding the principal due upon all the matured coupons up to the date of the decree, and directing that upon default of the payment of the costs, coupons and principal sum then due upon all such bonds and interest, the entire property subject to this lien should be sold, together with all the buildings and appurtenances, by a master appointed for the purpose, subject only to the four prior mortgages upon the property, being the first and second divisional mortgages in Ohio and Indiana, respectively (Record, pp. 505–516).

From this decree an appeal was taken to the Supreme Court of the United States by the Wabash, St. Louis and Pacific Railway Company, and that appeal was heard in May, 1885. Upon that appeal the decree of the Circuit Court was reversed by this Court, and a mandate was sent down to the Circuit Court directing that the de-

cree which had been entered in November, 1883, in favor of said equipment bonds be reversed and vacated, and directing that the claim of lien on behalf of said equipment bonds set up in that cause be disallowed, and the bill dismissed for want of equity (Record, pp. 516–526; Wabash, St. Louis and Pacific Railway Company *et al.* vs. Ham, 114 U. S., 587). This was accordingly done, and a decree entered in the Circuit Court, dismissing the bill of Ham and others, for want of equity, on the 7th day of May, 1888 (Record, p. 527). This decree entered on the 7th day of May, 1888, is relied on by the Wabash Railroad Company as a bar to the prosecution of the case at bar by the defendants in error, and this claim under this decree was denied by the judgment of the State Courts.

The Compton Suit.

In February, 1880, James Compton filed his petition in the Court of Common Pleas of Lucas County, Ohio, alleging that he was the owner of equipment bonds issued by the Toledo and Wabash Railway Company, in 1862, to the amount of $150,000, and setting up the facts respecting their issue and the subsequent consolidation of the corporations on the 1st day of August, 1865; alleging that he was entitled to assert an equitable lien on behalf of the said equipment bonds upon the property formerly belonging to the Toledo and Wabash Railway Company, in Ohio and Indiana, which passed to the consolidated Company, and in the possession of the then owner of the property, the Wabash, St. Louis and the Pacific Railway Company; asking that such equitable lien be decreed in favor of the said equipment bonds, that the amounts found due upon the unpaid interest warrants or coupons set forth in his petition might be ascertained, and that in default of payment of the said amount thus found to be due by the Wabash, St. Louis and Pacific Railway Company, the railway property formerly belonging to the Toledo and Wabash Railway Company in Ohio and Indiana, might be sold in satisfaction of the amount thus found due (Record, pp. 282–308). On the 10th of March, 1882, the Common Pleas Court of Lucas County, entered a decree sustaining Compton's contention, defining the lien on behalf of the equipment bonds, ascertaining the amount due on the interest warrants, and upon default of payment of such amount, directing the sale of the railway property (Record, p. 340). The Wabash,

St. Louis and Pacific Railway Company appealed to the district court of Lucas County, and the District Court of Lucas County, upon an agreed statement of facts, reserved the cause for determination to the Supreme Court of Ohio (Record, pp. 351–394). The Supreme Court of Ohio, in May, 1888, handed down an opinion sustaining the decree entered in the Common Pleas Court, and refused to follow the decision of the Supreme Court of the United States respecting the lien of such equipment bonds, which had been made in the Ham suit, and reported in the case of The Wabash, St. Louis and Pacific Railway and others vs. Ham, 114 U. S., 587 (Compton vs. Railway Co., 45 Ohio State, 592).

The decree of the Supreme Court which was duly entered on the 18th of May, 1888, found the equipment bonds to be a lien upon all of the property of the Toledo and Wabash Railway Company, which it owned at the time it entered into the consolidation of 1865. It also found the amount due at that time upon the $150,000 bonds owned by James Compton, all of the equipment bonds having matured in May, 1883, pending the litigation, and directed that in event of default of payment to Compton of the amount found to be due, that a sale of the property situated in the State of Ohio upon which these equipment bonds were a lien should be had, and the proceeds brought into court for further proceedings on the foot of this decree (Record, pp. 394–398). Upon the entry of decree upon the mandate from the Supreme Court, in the Court of Common Pleas of Lucas County, in October, 1888, Compton was made a party to the then pending foreclosure proceedings in the consolidated action of Knox and Jesup against the Wabash, St. Louis and Pacific Railway Company, in the United States Circuit Courts for the District of Indiana and Northern District of Ohio, Western Division (Record, p. 628).

Compton appeared in both courts, and set up the decree rendered in accordance with the opinion of the Supreme Court of Ohio, in said cause (Record, pp. 639–663).

At the time of the entry of the foreclosure decrees in the United States Circuit Courts on the 23d day of March, 1889, the questions respecting the claim of James Compton were not ripe for decision, issues having only been joined recently, and a reservation was accordingly entered in said foreclosure decree, reserving Compton's rights, notwithstanding the foreclosure of all the mortgages, to which reservation more particular reference will be made hereafter (Record, p. 182). After the foreclosure sale and the turning over

of the property to the purchasers under the foreclosure sale, the issues relating to Compton were, in an order entered in August, 1889, referred to Bluford Wilson, as master to hear and determine (Record, p. 528).

In 1891, Bluford Wilson reported on the lien and claim of James Compton, and upon his report decrees were entered in the United States Circuit Courts for the District of Indiana, and for the Northern District of Ohio, Western Division, in July, 1892 (Record, pp. 529 and 669-714). Compton appealed from the decree entered in the United States Circuit Court for the Northern District of Ohio, Western Division, to the Circuit Court of Appeals, but did not appeal from the decree of the Circuit Court for the District of Indiana. By the decree of July, 1892, Compton was given the right to redeem the property in Ohio and Indiana upon payment of the amount due on the four prior mortgages thereon (Record, p. 532). Judges TAFT and LURTON of the Circuit Court of Appeals were unable to agree upon certain questions presented upon the record and certified the questions upon which they differed to the Supreme Court of the United States as to the rights of Compton. Upon this certification this court rendered an opinion in May, 1897, to the effect that under the reservations of Compton's rights in the decree of foreclosure of March 23d, 1889, in the consolidated foreclosure clause, Compton had a right to a resale of the property formerly belonging to the Toledo and Wabash Railway Company situated in the State of Ohio upon the event of non-payment of the amount found due in his decree, within a certain date after such event (Compton vs. Jesup, 167 U. S., 1).

The Circuit Court of Appeals, in obedience to the mandate of the Supreme Court of the United States, reversed the decree of July 1, 1892, in so far as it required Compton to redeem, and decreed his right to a sale of the property in Ohio, subject to prior liens thereon. Prior to making such sale it referred the questions to a Master to ascertain, and determine the amount of such prior liens upon the property after crediting all net earnings of the property covered by the liens during the period since the sale under the decree of March 23d, 1889. This accounting is now in progress before rhe Master appointed by the United States Circuit Court for the Northern District of Ohio, Western Division.

The claim of the Wabash Railroad Company with respect to this accounting, in view of the reservations in the decree, is that the railroad property sought to be affected by the lien in favor of the

equipment bondholders represented in this case is still in the custody and exclusive jurisdiction of the United States Court.

Adelbert College Litigation.

The suit of the Adelbert College of the Western Reserve University was brought in the Common Pleas Court of Lucas County, Ohio, by the filing therein on the 28th of April, 1883, of a petition against the Toledo, Wabash and Western Railway Company, The Wabash Railway Company, and The Wabash, St. Louis and Pacific Railway Company, James R. Jesup and Isaac H. Knox, as trustees, and George I. Seney, Trustee, and John Humphreys and Daniel A. Lindley, as trustees, defendants, and of a precipe, directing the sheriff to summon the defendants named in the petition (Record, pp. 14, 15). The petition was based upon two equipment bonds of $500 each, and followed very closely the allegations which had been made in the prior suit of James Compton against the Wabash, St. Louis and Pacific Railway Company, and asked the declaration of a lien in favor of the equipment bonds; for an ascertainment of the amount due on the bonds owned by the plaintiff, and an adjudication that the bonds known as equipment bonds became a charge and lien upon all the property of the defendant Wabash, St. Louis and Pacific Railway Company situated in the States of Ohio and Indiana, so far as the same was owned by the Toledo and Wabash Railway Company at the time of the consolidation of August 1st, 1865; asked an adjudication of the lien of said plaintiff on the property mentioned, with priority over all liens of all kinds existing upon the same, except the first mortgage executed by the Toledo and Illinois Railroad Company, and the second mortgage executed by the Toledo and Wabash Railway Company, being the first mortgage of $900,000 and the second mortgage of $1,000,000 upon the property; also, except the first mortgage of $2,500,000 and second mortgage of $1,500,000 in Indiana (Record, pp. 39–400). On the 5th of May, 1883, the sheriff made return that he served the Wabash, St. Louis and Pacific Railway Company by service upon their freight agent, at Toledo, and that the other defendants were not found in Lucas County (Record, p. 59). A formal answer was interposed by the Wabash, St. Louis and Pacific Railway Company and nothing further was done with this cause until the 8th day of June, 1888, when an amended answer was filed on behalf of the

Wabash, St. Louis and Pacific Railway Company, denying most of the averments of the complaint, and setting up as a further defence the adjudication in the Ham suit as a bar to the right to enforce the lien, and also as a still further defence the appointment of receivers of all the property belonging to the Wabash, St. Louis and Pacific Railway, and alleging exclusive jurisdiction of the Federal Court over all proceedings to adjudicate claims against the said property (Record, pp. 60-65). Following this amended answer, on the 2d of January, 1889, William F. Redmond, and a large number of other parties by leave of court filed their answer and cross petition in the Court of Common Pleas of Lucas County in the said Adelbert College case on their own behalf and on behalf of all holders of equipment bonds issued by the Toledo, Wabash and Railroad Company, who may appear and unite in the cross petition, and contribute to the expense thereof, asking that their bonds might be declared a lien upon the railway property formerly belonging to the Wabash Railway Company, and setting up the provisions of the consolidation agreement of August, 1865 (Record, pp. 68–82). In said answer and cross petition the said cross petitioners further set up that the mortgage of the Toledo and Illinois Railway Company to the Farmers Loan and Trust Company was no longer a lien upon said premises, and asked that the Farmers Loan and Trust Company might be required to appear and disclose the full nature and extent of its claim, and also made the same averments respecting James F. Joy, the substituted trustee under the second mortgage upon the Railway property in Ohio (Record, pp. 77, 78). This, it may be observed, notwithstanding both these trustees were at the time prosecuting the foreclosure of said mortgages in the Federal Court, and the Federal Court had by order in said foreclosure proceedings appointed Gen. John McNulta as receiver of these railway properties, and the said receiver was in possession, and operating these railway properties.

Subsequently, in 1891, the Adelbert College filed an amended petition, and during the year 1889, further holders of equipment bonds united in filing Cross petitions making substantially the same averments as those made by William F. Redmond and others (Record, pp. 60–68).

Summons was issued upon the cross petition of William F. Redmond and others directed to the Wabash, St. Louis and Pacific Railway Company, and to the purchasing Committee and after the

organization of the Wabash Railroad Company in August, 1889, it was made a defendant to the amended and supplemental petition of the Adelbert College, and service made upon it (Record, pp. 96–109).

In October, 1889, a second supplemental and amended petition was filed, setting forth the sale and conveyance of the title to the property to the Wabash Railroad Company in a proceeding in which it is alleged the cross petitioners were not parties (Record, p. 109).

In March, 1889, the purchasing committee who had been made parties to the cross petition of William F. Redmond and others, filed their answer to such cross petition, setting up the possession of the receivers under orders of the Federal Courts of all the properties, and the pendency of the consolidated suits for the foreclosure of all the mortgages, and the extension, by the orders of the said United States Courts of the receivership to all of said suits and foreclosures, and alleging that the said United States Courts are proceeding to foreclose all the mortgage liens and to determine the amount and priority of said liens and to adjust all rights and equities of all parties in and to said property and that the said courts have theretofore duly acquired prior jurisdiction and control over such property, and the defendants the purchasing committee, and have exclusive right to determine the rights of the cross petitioners in and to the same (Record, pp. 111–115).

For a second defense they set up the issue under orders of said United States Courts of a large amount of receivers' certificates, and evidences of indebtedness, of which the defendants the purchasing committee became the owners and holders (Record, p. 113). The defendants also set up the decree in the Ham suit as an adjudication against the right of the cross petitioners to any such lien as they were seeking to enforce (Record, p. 114).

The same answer was filed by James F. Joy, who was also made a party to the answer and cross petition of William F. Redmond (Record, p. 115). Solon Humphreys and Daniel A. Lindley appeared and demurred to the petition as not stating facts sufficient to constitute a cause of action (Record, p. 118). The Farmers Loan and Trust Company also appeared, and filed an answer likewise setting up the prior jurisdiction of the Federal Courts (Record, pp. 119–124). In April, 1889, the purchasing committee further set up by supplemental answer the entry of the decree for foreclosure of

March 23d, 1889, and attached to their supplemental answer a copy of such decree as a part of their answer, and set it out in full with all the reservations and provisions thereof, as the decree entered in each of the United States Circuit Courts (Record, pp. 130–184). James F. Joy also filed an answer referring to said decree, and setting up the entry of said decree referring to the copy attached to the answer of the purchasing committee (Record, p. 184). After the Wabash Railroad Company was made a party, in October, 1889, it appeared and filed its answer to the allegations of the petition, and supplemental and amended petition of the Adelbert College, and set up as a defense, the proceedings in the Federal Courts relating to the possession of said property, and the subsequent suits beginning in May, 1884, and continuing down to the foreclosure decree of 1889. Its answer recited the various suits, and the various orders and provisions of the various orders made in each of said suits, and the decree of March, 1889, under all of the mortgages existing upon said railway property, and the sale under said decree and the formation of the Wabash Railroad Company, and the conveyance to it of the lines of railway by the purchasers at a foreclosure sale (Record, pp. 185–192). The important part of its answer is that it adopts all the allegations of the answer and supplemental answers of said purchasing committee (Record, p. 191), and asks that the same may be taken as a part of its answer as though set out in full, and also all of the answers of James F. Joy, and asks that the same may be taken as its answer, the same as if set out in full (Record, p. 192).

On the 2d of June, 1890, The Wabash Railroad Company filed a further answer to the cross petition of Henry F. James, one of the equipment bondholders and adopted as its answer the answer made by it to the petition of the plaintiff and the cross petition of Redmond and others, and further set forth the special provisions of the decree of March 23d, 1889, relating to the reservation of jurisdiction by the Federal Court over all claims and equities respecting the property of the Wabash, Saint Louis and Pacific Railway Company, setting out *in extenso*, the provisions of said decree, and reciting as a further evidence of the exclusive jurisdiction of the Federal Courts, that the claim of James Compton to a lien upon the portion of said line of railway was then pending and undetermined in such Federal Courts and had been referred to the Hon. Bluford Wilson, Master in Chancery to take testimony, and report thereon. It averred the fact to be that the United States Courts were still in such possession

and control of said property as to have exclusive jurisdiction to hear and determine all questions relating to liens upon the lines of said railway (Record, pp. 195–198).

In April, 1889, a reply was filed by Redmond and others to the answer of the purchasing committee denying the exclusive jurisdiction of the Federal Courts as set up in the answer of the purchasing committee, and alleging that they were entitled to go on in the State Courts notwithstanding the proceedings in the Federal Courts (Record, pp. 201–204).

In 1890, said Redmond and others also replied to the answer of the Wabash Railroad Company, denying the jurisdiction of the Federal Courts as set up in the answer, and averring that the said Federal Courts did not have, and could not have any jurisdiction over the petitioners (Record, pp. 210–212).

Upon these issues, the parties went to trial upon an agreed statement of facts in the Court of Common Pleas and the Court rendered judgment in favor of the plaintiff and cross-petitioners, denying each and every contention respecting the prior jurisdiction of the Federal Court. Appeal was then taken by the Wabash Railroad Company to the Circuit Court of Lucas County, which under the practice prevailing in Ohio in equity causes, retries the case upon the issues *de novo*. Upon the trial in the Circuit Court, judgment was likewise entered in favor of the plaintiff, and the cross-petitioners, denying each and every contention made by the Wabash Railroad Company respecting the prior and exclusive jurisdiction of the Federal Court. Thereupon a bill of exceptions was duly taken by the Wabash Railroad Company embodying all the evidence produced before the court, and this bill of exceptions was duly signed, and petition in error filed in the Supreme Court of Ohio, which upon hearing affirmed the judgment of the Circuit Court, likewise denying each and every one of the contentions of the Wabash Railroad Company respecting the federal questions in the case (Record, p. 958). Thereupon writ of error was sued out in this court to the Supreme Court of Ohio, and the case brought here upon the Federal questions presented upon the record.

Supreme Court of the United States.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY,
Defendant in Error.

No. 308.
October Term, 1906.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

Under the second paragraph of the argument of the defendant's brief there are several suggestions by which the defendant in error seeks to avoid the force of the proposition that the prior and exclusive jurisdiction to determine the questions involved in this case was in the Federal Court. The first is found at pages 32 and 33 of the brief, and is to the effect that the Lucas County Court of Common Pleas first obtained jurisdiction of the property in question in this cause. As stated in this brief, his position upon this proposition is:

"That according to the rules prevailing in the Federal Courts, the Lucas County Common Pleas first obtained jurisdiction of the property in question in this cause; that is, the Common Pleas Court acquired jurisdiction prior to the Federal Court. The petition in the present case was filed and summons issued a year before the receivership proceedings in the Federal Court were begun" (Brief, p. 32)).

Then, after reciting the dates of receivership and the date of the answer of the Wabash, St. Louis and Pacific Railroad Company, and the petition filed in the cause, it is further stated:

"Considering the nature of the present case and the dates of commencement of actions, first in the Lucas Common Pleas, and, second, in the Federal Court, it would seem plain under the

decisions that the present action was maintainable not only for having the lien declared, but for seizing and selling the property covered by the lien. The very nature of the action contemplated this very thing, and issue was joined upon it. It might well have been claimed that the railway company and the trustees of the mortgages were bound to try all questions in the present action instead of going into the Federal Court later to secure receiverships and foreclose the mortgages " (Brief, p. 33).

In support of this contention there is cited the case of the Farmers' Loan, etc., Co. vs. Lake Street, etc., Co., 177 U. S., 51, 61, Louisville Trust Company vs. Knott (1904), 130 Fed. Rep., 820, at page 824, per LURTON, SEVERENS and RICHARDS, JJ., Zimmerman vs. SoRelle (1897), 80 Fed. Rep., 417, at page 420, per SANBORN, THAYER and LOCHREN, JJ.

Examination of these cases show clearly that they are not in point on the question for which they are cited. The facts in those cases are entirely different from the facts in the case at bar.

In the first case cited, the question as to the exclusive jurisdiction was as to which court had first obtained jurisdiction upon the following facts: At 10:35 A. M., January 30th, 1896, the Farmers' Loan and Trust Company filed its bill in the Circuit Court of the United States for the Northern District of Illinois, to foreclose a mortgage against the Lake Street Elevated Railroad Company, and asking the appointment of a Receiver. Upon this bill a subpœna was issued, and subsequent thereto, and on the same date, the Lake Street Elevated Railroad Company went into the Superior Court of Cooke County, and filed a bill against the Farmers' Loan & Trust Company, seeking to have it removed as trustee under a certain mortgage or deed of trust, and the question was as between these two proceedings, the proceeding instituted in the State Court having been removed subsequently to the United States Court. Notwithstanding which, the State Courts went forward and decided the questions presented upon the bill of the Elevated Railway Company. As between these two suits, it was held that the Federal Court had first acquired jurisdiction, and with respect thereto this Court said:

" As then the bill of foreclosure had been filed in the Circuit Court of the United States and the jurisdiction of that Court had thus attached before the commencement of the suit in the state court it follows upon principle and authority that it was not competent for the State Court to interfere by injunction or otherwise with the proceedings in the Federal Court."

The Court says further:

"The possession of the *res* vests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between Courts whose jurisdiction embraces the same subjects and persons.

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume possession and control of the property to be affected. The rule has been declared to be of a special importance in its application to Federal and State courts.

Peck vs. Jenness, 7 How., 612.
Freeman vs. Howe, 24 How., 450.
Moran vs. Sturges, 154 U. S., 256.
Central Bank vs. Stevens, 169 U. S., 432.
Harkrader vs. Wadley, 172 U. S., 148.
(177 U. S., p. 71.)"

The case of Zimmerman vs. So Relle, 80 Fed. Rep., 417, is another case of the same kind, where there were pending at the same time in the Federal Court and in the State Court, suits to quiet title to the same land, and in which the holding was, that the State Court having first acquired jurisdiction by service of process the Federal Court would stay its hand.

In Louisville Trust Company v. Knott, the State Court had in accordance with the State statutes entered upon the proceeding for the dissolution of the affairs of a corporation which necessarily involved the taking possession of the property of the corporation and distribution of the same to its stockholders. Before the State Court had actually seized the property a collusive judgment was obtained in the Federal Court on behalf of a creditor who was acting in collusion with a faction of the stockholders to prevent the successful prosecution of the proceedings in the State Court. The creditor's bill was immediately filed upon this collusive judgment and upon this creditor's bill a receiver appointed and the property taken into his possession and the question came before the Federal Court as to what was its duty in the premises, and the

Federal Court very properly, in view of the facts there presented, held that it should yield possession of the property to the State Court.

But these cases do not reach the question that we have presented in this case. In this case, according to the Record, as stated on defendant's brief (pp. 32 and 33), all that was done was the filing of a petition on the 28th day of April, 1883, and the issue of a summons thereon directed to the Toledo, Wabash and Western Railway Company, the Wabash, St. Louis and Pacific Railway Company and the filing of an answer by the Wabash, St. Louis and Pacific Railway Company. This petition will be found in the Record (pp. 14-54). It was based upon two bonds of $500 each, property of the Adelbert College of the Western Reserve University, and asked the Court to order, adjudge and decree that the said bonds, known as equipment bonds, held and owned by the plaintiff, should be considered secured by a certain consolidated mortgage. In the prayer plaintiff prayed for an ascertainment of the amount due on the said bonds, held and owned by the plaintiff herein, and asked that they might be decreed to be a lien upon all the property of the defendant, Wabash, St. Louis and Pacific Railway Company, so far as the same was owned by the Toledo, Wabash and St. Louis Railway Company at the time of a certain consolidation (Record, p. 39). Plaintiff further prayed that :

"It may be decreed to pay the plaintiff the amount due upon the said bonds, and in default that a sale might be had (Record, pp. 39 and 40). Also that the Court would order, adjudge and decree that the said bonds, held and owned by the plaintiff, should be considered secured by a certain consolidated mortgage" (Record, p. 40).

The Court will observe that this was a suit on behalf of the Adelbert College as owner of two bonds of $500 each, and prayed that the same be decreed to be a lien upon certain property, and that the owner of said property should be directed to pay those bonds, and in default of payment, that a sale should be had. In this respect, the petition is substantially the same as the petition filed by James Compton, in 1880, for the enforcement of bonds owned by him, and which this Court in Compton vs. Jessup, 167 U. S., 1, decided was a suit by Compton for himself alone (see 167 U. S., p. 34).

After the filing of this suit upon which no action whatever was taken, the Federal Court in the latter part of May, 1884, took physical possession of all the property by its receivers, and was in physical possession of this property continuously thereafter, and as claimed by plaintiff in error, remains in constructive possession of the same by virtue of the provisions of the decree of March 23d, 1889. The precise question of priority of jurisdiction in the State Court, presented by these facts was raised by Compton in the proceeding relating to his claim, and which later came before this Court. Upon Compton's appeal to the Circuit Court of Appeals from the decree entered upon his claim by Judges JACKSON and GRESHAM, he presented precisely this question upon substantially the same state of facts which is presented by this feature of the brief of the defendants in error, and it was dealt with by the Court of Appeals in the case of Compton vs. Wabash Railroad Company, 31 U. S. Court of Appeals, 486. At p. 531, the question is considered by TAFT, J., speaking for the Court of Appeals. After considering the theory and scope of the decision in Heidritter vs. Elizabeth Oil Cloth Co., he says:

"It was the actual custody of the premises in the Federal Court which excluded the right of another Court to entertain jurisdiction of a proceeding to subject the property thus removed from its control and disposition to a sale for the purpose of vesting a title superior to that which might be conferred by the Federal Court. Mere constructive possession would not have been enough to exclude possession by another Court. In a conflict of jurisdiction it is manifest that there can be no constructive possession by one court where it cannot take actual possession, but it by no means follows that the constructive possession of one court will exclude the actual taking of possession by another. For this reason, even if the proceeding in the Lucas County Common Pleas to establish Compton's lien was a proceeding *in rem* it did not involve the actual seizure of the property, pending the suit, and did not, therefore, prevent the Federal Court from taking actual possession of the property through its receivers in a proceeding to foreclose mortgages and other liens than Compton's. This objection to the jurisdiction of the Court below over the Knox and Jesup bill cannot therefore be sustained."

The reasoning of Judge TAFT is within the line and principle of the decisions of this Court respecting the co-ordinate jurisdiction of Federal and State tribunals and cited in our main brief.

The question further argued under this point in the brief is that

the jurisdiction of the Federal Court over this property was entirely terminated in July, 1889, when Receiver McNulta delivered possession of the property to the Purchasing Committee, and they subsequently turned the property over to the Wabash Railroad Company. This is presented in various forms in the brief. Thus, at page 36:

"We insist that it is not the law that when an action has been brought in which a Receiver has been appointed and put in charge of the property, the persons who have not been made parties to the cause are precluded from seeking the liquidation of their claims, or the adjustment of their rights by judicial action in other courts. The thing forbidden to them is to disturb the possession of the Receiver; they may at least go on and litigate their rights *inter sese* until final decree and judgment, and then enforce such judgment by sale or change of possession, but not until after the receivership has ceased. This is precisely what we originally sought to do in this case.

Further (brief, p. 37): "The objection is not now true in point of fact. We are trying this case now upon an issue made up after the receivership had ceased, and after the Wabash Railroad Company had taken possession of the property, and when the property was no longer in *custodia legis*. It surely is not an objection to proceeding in this cause now that there had once been a receivership. The receiver was directed to surrender possession on the 1st day of July, 1889 (R., 232). And the Wabash Railroad Company was organized August 1st, 1889 (R., 232), and has ever since had possession."

Further, the same page:

"On the 18th day of December, 1889 (R. 185), the Wabash Railway Company answered the petition and supplemental and amended petition of the college, and the cross petition of William T. Redmond and others, cross petitioners, without setting up the defence of want of jurisdiction." Further on p. 38 of brief, "It is proper to add that in answer to the cross petition of Henry F. James, filed April 30, 1890 (R. 87), Joy, Ashley, Hubbard and Wells, as purchasing committee, and Joy individually, and the Wabash Railroad Company severally, on the 5th day of June, 1890, answered (R. 194–195). In these answers there is no trace of the claim of want of jurisdiction now made." Whether, therefore, the litigation was originally begun without jurisdiction or not, before the Receiver surrendered possession, to the Wabash Railroad Company, this certainly became a pending case, without any possibility of successful objejtion on this ground, after the Wabash Railroad

Company had taken possession, and pleadings just described had been filed and issue joined."

Further, page 39. "This suit was begun so far as most of the petitioners are concerned on January 2, 1889 (R. 82); so far as Charles G. Peters, one of the cross petitioners is concerned, it was begun on April ----, 1889 (R. 84). But as to the cross petitioners James, Hampton, Pierce and Henry, the litigation did not begin until after the Wabash Railroad Company had taken possession, and the receivership was at an end."

At page 40, a further statement: "It thus follows that after the two pleadings of the cross petitioners hereinbefore referred to, viz., their original answer and cross petition, filed January 2nd, 1889, and the answer and cross petition of Charles G. Peters, filed April , 1889, but before the amended and supplemental pleading filed in behalf of the cross petitioners generally, against the Wabash Railroad Company, on which the case was tried and judgment was rendered, which made the Wabash Railroad Company practically sole defendant, viz. October 8th, 1889, answer and cross petition of Henry F. James, filed April 28, 1889 (R., 89) executors of Maria C. Henry, October 16th, 1891 (R., 92); Wilson H. Pierce, October 20th, 1891 (R., 92); Louis G. Hampton (R, 96): February 21, 1893, James, Henry, Pierce and Hampton were not parties to the case until after the proceedings in the Federal Court had ended by the delivery of possession to the Wabash Railroad Company. The Wabash Railroad Company had been made a party defendant to this cause, and had been averred to be in possession and substantially the progress of the original cause was arrested and the proceedings ceased as against all other defendants in October, 1889."

The second supplemental and amended petition of the plaintiff, which made the Wabash Railroad Company defendant, was filed October 16th, 1889 (R., 111); the answer of the Wabash Railroad Company to the cross petition of William F. Redmond and others, were made to the issue, so far as that company was concerned, was filed December 11th, 1889 (R., 189–192). At page 52, he thus concludes respecting the answer.

"It thus appears that, with the exception of two pleadings, the entire body of the litigation in this case, so far as the present parties are concerned, viz., the plaintiff, cross-petitioners and the Wabash Railroad Company, was initiated and carried out after the litigation in the Federal Court had ceased, and after possession had been taken by the Wabash Railroad Company."

Further, at page 45, "But in the present case the jurisdiction of the Federal Court over the proceedings ceased in July, when possession was delivered to the Purchasing Committee, or, at the latest, in August, 1889, when possession was taken by the Wabash Railroad Company, which thereafter continued, and still continues in possession of the same."

We have quoted from this brief in order to emphasize the exact status of this litigation upon the precise question involved. The first position is the claim that the Adelbert College suit brought in 1883, vested prior jurisdiction in the State Court. This suit was upon two bonds of $500 each. In 1889, by answer and cross petition in the Adelbert College suit, all the other parties to the suit came in amounting in the aggregate to about $260,000 par value of the bonds upon answers and cross petitions filed at various times subsequent to January, 1889. While the Federal Court was in possession of the property there was thus instituted what was in all respects a new litigation. The Adelbert College case was only a suit for the two bonds held by it, but these parties changed the litigation into one for the entire outstanding equipment bonds of which they owned a part (Record, pp. 69, 85, 91).

A reference to the answers and cross-petitions which they thus filed, and upon which they issued summons for the Wabash Railroad Company and other parties, and the answers filed thereto, will show that the brief is mistaken in stating that the want of jurisdiction in the State Courts was not presented in the answers to the pleadings filed by these parties. In each and all of the answers of the Purchasing Committee the objection of the possession by the Federal Courts of the property upon which these parties were seeking to enforce their lien and the existence of the decree of foreclosure and of the prior exclusive jurisdiction of the Federal Court was fully presented (see Record, pp. 111-115, 116, 140-184, 185-192, 191).

But what we wish especially to note is that the argument is largely based upon the proposition that, when the Court, by its order of June 18th, directed the Receiver to turn over this property to the Wabash Railroad Company under and subject to the terms and conditions of the decree of March 23d, 1889, that then the control over this property by the Federal Court wholly ceased. This is the fundamental question upon this branch of the case which we have argued in our main brief and which we think, in view of the reservations and provisions of the decree of March 23d, 1889, must be held to the contrary of the position assumed in the brief of the defendants in error. First, there was the specific reservation by the Federal Court of the right to determine all questions relating to the claim of James Compton, including the right to resell the property in Ohio. This necessarily involved the possession of this property until all questions relating to the claim of James Compton have been disposed of. It is a conceded fact that

that claim has not been disposed of, but is still pending and undetermined (see Brief of Defendants in Error, pp. 8, 9).

In addition to that there was the specific provisions in the decree that the title to the purchaser should be in fee simple free of all liens and incumbrances, and that the court reserved the right to determine as to all other intervening claims allowed or to be allowed, that have been, or may hereafter be charged against the property of the Wabash, St. Louis and Pacific Railroad Company. (See Record, pp. 181–183).

Under the decision in this court, in Julian vs. Central Trust Company, 193 U. S., 93, it is impossible that the position taken in the brief of the defendants in error and which is vital to his argument upon this branch of the case, should be upheld by this court. Upon this question we call attention to the decision of the Circuit Court in Jesup vs. Wabash, St. Louis and Pacific Railroad Co., 44 Fed. Rep., 663, construing this same decree upon facts very similar to those claimed by the defendants in error in its brief.

II.

Upon the third point upon the brief with respect to the effect of the adjudication in the Ham suit, the fundamental contention there is that the Ham suit was never a representative suit, and quotations are made from the original bill filed by Tyson and from the amended and supplemental bill, in support of this view of the case. So far as we have been able to discover the allegations do conform to the precedents upon bills of this character.

Thus the following forms are given:

(Creditor, suing on behalf of himself and others.) A. B., of, &c., on behalf of himself and all other unsatisfied creditors of E. F., &c., who shall come in and contribute to the expenses of this suit, &c.

(Shareholders in a Company.) A. B., of, &c., on behalf of himself and all other the shareholders (except the defendants hereto) in a certain company called "——".

(Daniels' Chancery Pleadings, pp. 360 and 1881, Fifth Edition; Little, Brown & Company, Edited by J. C. Perkins and, W. F. Cooper.)

In addition to the eminent authority above quoted, we beg to cite the authority of the attorneys for the cross-petitioners in this case. In filing their answers and cross-petitions in this case the eminent attorneys who prepared those cross-petitions used the following form :

" and by way of cross-petitions, these cross-petitioners, not only in their own behalf, but for and in behalf of all holders of equipment bonds issued by the Toledo & Wabash Railway Company of the issue and class described in the said petition, and who appear and unite in the prosecution of this cross-petition and contribute to the expenses thereof, aver," etc. (Record, p. 69).

This is substantially the form of averment which was employed by the pleaders in the Ham Suit. In the first amended bill the form of it ran as follows :

" Your orators David J. Tysen, Jr., Samuel Barton, Edward De Rose, Henry A. Mott, John W. Ferdon, Charles Jackson, G. M. Underhill, Townsend Underhill, M. L. Underhill, residents and citizens of the State of New York, and Thomas Mayo, a resident and citizen of the State of Connecticut, on their own behalf, as well as on behalf of all others having like interest, who may come in and contribute to the expenses of and join in the prosecution of this suit bring, by leave of Court first had and obtained, this, their amended bill, &c." (Record, p. 430).

In the supplemental and amended bill the form of the allegation is :

" Your orators Benjamin F. Ham, a resident and citizen of the State of New Jersey, and Edward De Rose, Henry A. Mott, John W. Ferden, Charles Jackson, G. M. Wittemore, Townsend Underhill, residents and citizens of the State of New York, and Thomas Mayo, a resident and citizen of the State of Connecticut, on their own behalf as well as in behalf of all others in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit bring, by leave of Court first had and obtained, etc." (Record, p. 473).

There was no specific prayer in the bill for the declaration of a lien on behalf of all the equipment bonds, but there was a prayer for general relief (Record, p. 493).

The United States Circuit Court, of Indiana, however, in which this case was pending and which held and determined the case, gave a construction to this bill which is controlling in the determination of this feature of the case. It heard the case upon the bill filed by Ham and others in which they asked for an adjudication respecting these bonds and entered a decree on behalf of the entire $600,000 of equipment bonds of this class issued to all parties. This was necessarily a construction by the Court that this suit was a suit on behalf of all the holders of equipment bonds, and as such necessarily a representative suit, because if only a few were named to the bill, then they were necessarily representative of all other holders of the bonds, as the court determined in entering the decree for the entire issue of the bonds. This representative decree thus entered was presented to this court upon appeal, and this court reversed it without in any way indicating that the court below was in error in construing the allegations of the bill as it did, but reversed it upon the merits of the controversy.

In the brief, p. 69, it is further said that this decree in the Ham suit was pleaded as against Compton, and did not avail. This is correct, and yet incorrect in the inference left from the bald statement unexplained. It was not pleaded in the Compton suit before the final judgment entered in that suit in the State Court. It was pleaded by Jessup and Knox, trustees, in the Federal Court, when Compton was brought into the Federal Court, but that was after the final judgment in the Compton case in the State Court. This Judge JACKSON held to be too late.

We do not understand the reference in the brief to the position that the Ham suit could only be an adjudication as to the Indiana portion of the road. If it was a representative suit, as we have argued and maintained in our main brief, then it was a suit which determined the controversy as to the owners of all the bonds, and could be pleaded in any tribunal where those owners undertook to enforce the same claims.

The decision in 167 U. S., 1, with respect to the Compton decree has no application that we can discover to the questions involved in this branch of the case at bar. We are not greatly concerned with the question of the effect on Compton of the decision of the Circuit Court of Lucas County in this case. We simply suggest to the Court that we do not see how a reference in the decree in this case by the Lucas County Circuit Court to the judgment in the

Compton case, many years after the rendition of that judgment, can qualify or affect it.

We submit that the judgment in this case should be wholly reversed and set aside.

Respectfully,

RUSH TAGGART,

Attorney for Wabash Railroad Company.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY
CLERK

No. 40.

SUPREME COURT OF THE UNITED STATES

FOR THE OCTOBER TERM, 1896.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

versus

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS.

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SUPREME COURT OF THE UNITED STATES

FOR THE OCTOBER TERM, 1906.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

No. 303. *vs.*

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS.

STATEMENT.

In 1862 the Toledo & Wabash Railway Co. issued the equipment bonds which are the subject of this suit, to the total amount of $600,000 (Record, p. 225, par. 17). By a consolidation agreement made in the year 1865, between the above mentioned and other railroad companies, there was created the Toledo, Wabash & Western Railway Com-

pany (R., 225 [18]). By virtue of this consolidation agreement, and in interpreting a statute of the state of Ohio under which it was in part effected, the Supreme Court of Ohio has twice declared that a lien was created in favor of the equipment bonds (*Compton* v. *Ry. Co.*, 45 O. S., 592; *The Wabash Railroad Co.* v. *The Adelbert College of Western Reserve University et al*, 74 O. S., 483).

In May, 1878, the consolidated railway company having before such time defaulted on the payment of interest on the equipment bonds, David J. Tyson, Jr., began an action in an Indiana state court against the Wabash Railway Co. and certain trustees of mortgages, which suit was removed to the United States Circuit Court for the District of Indiana (R., 404). The opening paragraph of the bill is as follows (R., 404):

> "The plaintiff, David J. Tyson, saying herein for himself and other bondholders similarly situated, who may deserve to come into this suit and contribute to the expenses thereof, complains of the defendants, the Wabash Railway Company, Isaac H. Knox and James R. Jessup, trustees; Edwin D. Morgan, trustee; the Farmers' Loan & Trust Company, and George I. Seney, trustee and says:"

The prayer of the petition was that the equipment bondholders be entitled to share in the security of a general mortgage, for the appointment of a receiver, an injunction, and foreclosure (R., 416).

In June, 1878, said Tyson having been joined in the suit by nine others, filed an amended bill of complaint "* * * on their own behalf, as well as on behalf of all others having like interests who may come in and con-

tribute to the expenses of and join in the prosecution of this suit * * *" (R., 430). The prayer of this amended bill was substantially the same as that of the original bill (R., 448).

In July, 1879, the bill was dismissed as to Tyson and as to one Samuel J. Barton, one of the intervenors, but not as to any others of the complainants (R., 472).

In January, 1880, however, by an error, an entry was made dismissing the bill of the complainant and of all of the intervenors (R., 472).

In February, 1880, one James Compton, as owner of $150,000 of the $600,000 of equipment bonds, a part of which issue were the subject of the Tyson suit pending in Indiana, filed his petition in the Court of Common Pleas of Lucas County, Ohio (R., 282). That Compton sued for himself alone is evidenced from the prayer of the petition (R., 306-7). He prayed that the court will "ascertain and determine the amount due on the said bonds known as equipment bonds, held and owned by the plaintiff herein." He further prayed "that the defendant in this action, the Wabash, St. Louis & Pacific Railway Company, may be decreed to pay the amount due to the plaintiff upon the said bonds herein known as equipment bonds which he holds and owns, by a short day," or that in default thereof a portion of the road "be ordered and decreed to be sold for the payment of said indebtedness to this plaintiff, and the said bonds owned by him" (R., 306-7).

On the 1st day of June, 1880, defendants, the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, and the Wabash, St. Louis & Pacific Railway Company, answered Compton's petition (R., 323-4).

In this answer they made no attempt to assert that Compton was precluded by the Tyson suit from maintaining his action. The answer of Isaac H. Knox and James R. Jessup, as trustees of mortgages, filed in the same suit on the 7th of June, 1880 (R., 325-28), while it mentions the Tyson suit, does not attempt to plead such suit as a bar to the maintenance of a suit by Compton.

In July, 1880, Benjamin F. Ham, who had been one of the intervenors in the Tyson suit, and seven others, obtained an order of court setting aside the entry of dismissal which had been previously made, on the ground that such order had not been moved for or assented to by the persons named, and Ham and these persons filed a supplemental and amended bill. This bill was little, if any, different from the previous bills which had been filed by Tyson and the intervenors. It was filed by Ham and the others (R., 473) "* * * on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit." The prayer of the bill was even more modest than that of the preceding suit, asking only that new parties be made defendants, and that the "court may order, adjudge and decree that the equipment bonds held by your orators shall at their par value be exchanged for a like amount of their bonds secured by the consolidated mortgage aforesaid * * * and that the defendant make such change when requested so to do by your orators, or either of them, and pay to your orators the interest due upon their said bonds since the 1st day of November, 1874; that your orators may have such other and further or different relief in the premises as to your Honors may

seem meet and just, and in accordance with the rules of this court" (R., 493, bot., and 494).

In November, 1880, the Wabash, St. Louis & Pacific Railway Co. filed its answer to this amended and supplemental bill (R., 495).

In January, 1881 (R., 329), Compton filed an amended and supplemental petition in which he prayed that Messrs. Humphreys and Lindley, as mortgage trustees, be made parties to his suit.

In February, 1881 (R., 331), the Wabash, St. Louis & Pacific Railway Company answered Compton's amended and supplemental petition, but made no mention therein of the Tyson, or, as it will hereafter be called, the Ham suit. Humphreys and Lindley, also in February, 1881 (R., 334), answered Compton's petition, and made no mention of the Ham suit.

In March, 1882 (R., 340), Compton obtained a decree in which (R., 344) it was ordered that the defendant pay to the plaintiff the sum of $90,990.22, with interest, or in default thereof that a sale take place. This decree plainly shows that Compton's suit was for himself alone. If anything further were necessary to show this, it is placed beyond peradventure from the fact that after the defendants had appealed Compton's case to the district court the Adelbert College, one of the present defendants in error, moved (Apr. 12, 1883) for leave to be made a party defendant and file its answer in the Compton suit (R., 350), but it was refused such permission (R., 351).

Thereupon, on April 28, 1883 (R., 54), the Adelbert College filed its petition in the Court of Common Pleas of Lucas County, Ohio, against the various railway companies and trustees of mortgages (R., 14). The prayer

of the Adelbert College petition was among other things for (R., 40) an accounting, sale and an injunction. In November, 1883, the Wabash, St. Louis & Pacific Ry. Co. (R., 55) filed its answer to the Adelbert College petition, and while the answer is full (R., 55-8), it contains no mention of the Ham suit, to which this same railroad company had previously answered.

Reverting now to the Ham suit we see that on May 9, 1884 (R., 509), the holders of equipment bonds therein represented were given a decree finding that their equipment bonds were secured by a lien. The various defendants appealed to the Supreme Court of the United States, and there, in the case of *Wabash, St. Louis & Pacific Ry. Co.* v. *Ham* (114 U. S., 587), decided May 4, 1885, the opinion of the Indiana Circuit Court was reversed, and in May, 1888, a mandate was sent down to the Indiana Circuit Court with directions to dismiss the bill for want of equity (R., 519). At the time that this case was heard in the Supreme Court of the United States, Compton's case was then pending in the Supreme Court of Ohio, and his counsel filed a brief in the United States Supreme Court in support of the lien of the equipment bonds (See 114 U. S., 587, 594).

Compton's case was decided in his favor by the Supreme Court of Ohio in March, 1888 (*Compton* v. *Ry. Co.*, 45 O. S., 592), the Supreme Court saying, at p. 624, that respect for the Supreme Court of the United States had delayed the decision by the Ohio court, but that the court, in construing a statute of Ohio, deemed it their duty to adopt a construction which in their judgment most accurately expressed the intention of the legislature.

Meanwhile, in May, 1884, the Wabash, St. Louis & Pacific Ry. Co. went into the Federal courts in the various states through which its lines passed, and filed bills alleging its insolvency and asking that receivers be appointed (R., 227, bot., 228), and on the 27th of May, 1884, receivers were appointed. Neither the Adelbert College nor any of the other defendants in error in this cause were made parties to said proceedings. Trustees of various mortgages instituted foreclosure suits which were consolidated with the receivership suits just above mentioned, but none of the defendants in error were made parties to any of such suits or to the consolidated suits (R., 228). From May, 1884, until June 19, 1889 (R., 232), the properties, a part of which are sought to be subjected to the lien of the equipment bondholders herein, were in the hands of receivers appointed by the Federal courts. On or about 23d of March, 1889, there were similar decrees of sale in the consolidated foreclosure and receivership suits in the various circuit courts, and on the 15th of May, 1889, the property was sold under said decrees to a purchasing committee (R., 231). None of the defendants in error were parties or had any voice in such sale or purchase. Thereafter corporations were formed in the various states. On or about the first of July, 1889, the receiver, under orders of the Circuit Court for the Northern District of Ohio, entered June 18, 1889, turned over possession of the properties to the purchasing committee, and the receiver was thereupon discharged. The Wabash Railroad Company, the plaintiff in error, was formed as a consolidated corporation from the corporations above referred to in the various states on Au-

gust 1, 1889, and, as the agreed statement of facts in this case shows (R., 232 [47]), "the said Wabash Railroad Company as such grantee took possession of all said property immediately after its said formation by consolidation on the first day of August, 1889, and has ever since been and still is in possession thereof, under the terms of the said decree of March 23, 1889, and said order of June 18, 1889." The order of June 18, 1889, ordering the receiver to deliver possession, is exhibit "K" to the agreed statement of facts, and appears on pages 266-9 of the record. The decree for sale of March 23, 1889, appears on pages 131-184 of the record.

Prior to the entry of the above decrees of sale and termination of receivership, Compton was made a party defendant to the various causes in the Federal courts after obtaining his decree from the Supreme Court of Ohio (R., 235 [60]). He set up his claim as adjudicated by the Supreme Court, and in the entry of sale of March 23, 1889, above referred to, reservation was made of his rights (R., bot. 181-182). The issues relating to his claim were referred to a master. Exceptions were taken to the master's report and went in turn to the circuit court and thence to the circuit court of appeals (*Compton* v. *Jesup*, 68 Fed. Rep., 263, C.C.A. [6th]). Compton took the case to this court (*Compton* v. *Jesup*, 167 U. S., 1), which decided that he was entitled to a sale. The question of priorities was then referred to a special master, Hon. W. H. H. Miller, of Indianapolis, who reported to the Circuit Court for the Northern District of Ohio on the 11th of May, 1907, and his report is now pending on exceptions taken thereto.

After Compton had obtained his decree in the Supreme Court of Ohio and the cause was remanded for execution, the defendants in error sought again to be made parties to Compton's suit, and were again refused permission (R., 893-4).

During the time that the property was in the custody of the Federal court receivers, the suit of the Adelbert College, which it will be recalled had been begun in the Common Pleas Court of Lucas County, Ohio, before those receivers were appointed, namely, in April, 1883 (R., 54), lay quiescent until about the end of the year 1888. It will be remembered that a decision adverse to the equipment bond holders was given in the Ham suit and a mandate from this court sent down dismissing their bill in May, 1888. Shortly thereafter the Wabash, St. Louis & Pacific Railway Co., which in its original answer in 1883 had neglected to mention the Ham suit, filed an amended answer in which it pleaded the Ham suit in bar and also pleaded the receivership proceedings in the Federal court of 1884, which, at the time the answer was filed, had not yet terminated (R., 60, 61, 62). Thereafter the Adelbert College filed a supplemental and amended petiton. This petition was filed December 22, 1888. Having failed to get into the Compton suit both before and after Compton had obtained his decree, the Adelbert College in this supplemental and amended petition made Compton a party to its suit and prayed that he be treated not as a superior, but as an equal lienor with the college. By answer and cross-petition verified January 2, 1889 (R., 82, bot.), date of filing unknown, a large number of the defendants in error came into the Adelbert suit

and set up their claims as holders of bonds. They pleaded (R., 79) their attempts to get into the Compton suit and their failure, and asked that the trustees of mortgages and the various railroad companies and Compton be made parties. They asked, among other things (R., 80), that a receiver be appointed for the various properties, and "if and after the said Receivers now in possession thereof may have surrendered, or otherwise been divested of possession, that the said premises, franchises and property in Ohio and Indiana be sold at judicial sale by the sheriff of said county, or a Master Commissioner be appointed therefor by this Court, as an entirety, by a title free and clear from all incumbrances whatsoever; * * *."

Other cross-petitioners filed their answers and cross-petitions from time to time, a number of them, as is evident from the dates of verifications, long after the receivership had been lifted and the property conveyed under the decree of March 23, 1889, to the Wabash Railroad Company (R., 83-97).

By amendment, of which the verification is dated October 8, 1889, the cross-petitioners made the Wabash Railroad Company, on the ground that said "company has taken and is now in possession of the said railroad property, premises, equipment and franchises described in the said original answer and cross-petitions of these petitioners, * * *" a party, and asked that their lien be effectuated against this company.

Apparently no summonses were ever made on any of these cross-petitions until April 22, 1889 (R., 98), on which date the Toledo, Wabash & Western Railway Company was served. Other services were made in May, 1889 (R., 98 and 100), and service on Compton was had by

publication (R., 101). The Wabash Railroad Company was served with summons on the supplemental and amended petition and the second supplemental and amended petition October 24, 1889. The answer of the Wabash Railroad Company, verified (R., 192) December 11, 1889, contains (R., 191) among other things the statement that master commissioners appointed under the decrees of foreclosure sold on the 15th of May, 1889, to the purchasing committee. "That thereafter by decrees duly entered in all of said courts, said sale was duly confirmed," and the commissioners delivered their deed to the purchasing committee; and that the purchasing committee "duly complied with all the terms of said sale, and on or about the first day of July, 1889, were, by orders of said court, duly put in possession of said property as the purchasers at said foreclosure sale." After a recital of the formation of corporations and consolidation thereof, it is stated that "prior to said consolidation said Purchasing Committee duly conveyed to each of said companies the lines of railway within the said respective States, and that said defendant or said constituent corporations have been in possession of said properties under and pursuant to said deeds since the date of the execution and delivery thereof."

In the reply of the cross-petitioners to the answer of the purchasing committee (which was made a part of the Wabash answer by reference), verified April 26, 1889 (R., 204, bot.), the cross-petitioners admitted that the property was in possession of United States court receivers (R., 202), "which possession they have no intention or desire to disturb," but they say that they are not parties to any of those proceedings, and deny that any of the

courts in which they are pending has acquired jurisdiction and control of the cross-petitioners, "or has the exclusive or any other right to determine the right of these cross-petitioners, or that these cross-petitioners are required to seek relief in said proceedings and in said Courts; on the contrary, they aver that, by reason of the fact that one of these cross-petitioners resides in the State of Michigan, another in the State of Connecticut, others in the State of New York, and still others in the State of Ohio, the said Circuit Courts of the United States can not acquire, and are forbidden by law to acquire, jurisdiction over these cross-petitioners, or the right to control their interests in said property."

The replies of the Adelbert College and of the cross-petitioners to the answer of the Wabash Railroad Company were certainly not filed earlier than January, 1890 (see verifications, record, top 213, top 215), and the additional reply of the plaintiff and cross-petitioners was apparently not filed before January 4, 1894 (see verification, R., 217, bot.), so that the pleadings were not made up in the case at bar in the Lucas Common Pleas until long after the United States Court receiverships had been lifted, and the property sought to be subjected to a lien was admitted by the Wabash Railroad Company to be in its possession. The opinion of Pugsley, J., in the Lucas Common Pleas, supporting the claim of the equipment bondholders, was filed in July, 1894 (R., 943). The circuit court substantially affirmed the decree of the common pleas in April, 1896 (R., 5). The Supreme Court of Ohio affirmed the decree of the circuit court April, 1906 (R., 958), and the Wabash Railroad Company now brings the proceedings here by petition in error.

Properties Acquired with Notice of Claims and Lien of Defendants in Error.

Plaintiff in error, through its predecessors in title, acquired the Wabash properties with full notice:

(1) That $600,000, par value, of equipment bonds, were outstanding and unpaid.

(2) That the Supreme Court of Ohio had adjudged the bonds to be secured since 1865 by lien upon the Wabash properties then held in Ohio.

(3) That none of the holders of the bonds, except Compton, were parties to the foreclosure proceedings or sale, and, on the contrary, were maintaining this suit (begun prior to the foreclosure proceedings) in the Lucas Common Pleas to have their rights declared and ultimately enforced against the properties.

These facts may be shown by partial recapitulation: Foreclosure sale occurred May 15, 1889 (R., 231 [44]). The present action was commenced April 28, 1883, against the railroad company (Wabash, St. Louis & Pacific) then owning and operating the properties, and certain mortgage trustees, defendants (R., 54). The petition in that case shows the whole number of equipment bonds to be $600,000, face value (R., 15). The railroad company answered as early as November, 1883 (R., 58). After so filing its answer in the present case, the railroad company, on May 27, 1884, filed its bill setting up its insolvency and secured appointment of receivers of the railroad properties (R., 227-228). Judgment of Ohio Supreme Court sustaining Compton's claim and lien on Compton's portion of these equipment bonds, was rendered in May, 1888, and holding that the lien was of public record of which

purchasers were bound to take notice (R., 394, and Compton case, 45 O. S., 542; and prior to the entry of decrees in the foreclosure causes, to-wit, in 1888, "James Compton was made a party defendant in said causes" (R., 235, bot.); and in the decree of sale on March 23, 1889, Compton's rights under his lien were expressly reserved (R., 181, bot., and 182).

Thus the purchasing committee were put on notice of the existence of these equipment bonds and of the lien securing them. As before shown, the purchasing committee transferred the properties to state corporations, which in turn were consolidated under the name of the present plaintiff in error, whereupon it went into possession of the properties and has ever since operated and controlled them. Thus the plaintiff in error acquired the property with notice of the lien in favor of defendants in error, but, nevertheless, insists both on holding the property and refusing to pay the debt secured by the lien.

Issues in this Court.

The only attack made on the judgment of the Ohio Supreme Court sustaining the liens of defendants in error in this case, consists of two claims presented as Federal questions by plaintiff in error. One is that the jurisdiction of the Federal courts below was and still is exclusive in the sense that the present case could not be maintained in the Ohio courts. The other is, that the judgment in the Ham suit is a bar to the present suit. Thus the judgment of the Ohio Supreme Court is now to be treated, except only as to the questions so urged, as was the judgment of that court in the Compton case.

It is to be observed, however, that with Compton a party to the present action, and having filed his answer herein (R., 125), the judgment of the Ohio circuit court below as affirmed by the Supreme Court, protecting the rights of Compton and the parties to the present action, provides that Compton's rights under his judgment shall be—

> "without disparagement or prejudice to the claim of the said plaintiff" (Adelbert College) "and the said cross-petitioners" (defendants in error herein) "that his" (Compton's) "said right extend no further than to divide proportionately with them the proceeds of any sale of said railway property and franchises, * * *.
>
> "The object of this reservation of this decree is to save to the said Compton as well as to the said plaintiff and cross-petitioners, and to the Wabash Railroad Company as against said Compton, all their rights as between themselves in the premises" (R., 11).

The object of the Ohio courts manifestly was to require the proceeds derived from the properties covered by the lien of the equipment bonds to be applied for the equal benefit of all the holders of those bonds, and not merely for the benefit of the bonds held by Compton; and it is obvious that Compton is bound by this restriction placed upon his original judgment, since he was a party to this action as well as his own. Indeed, he allowed the judgment of the Ohio circuit court to become final in this regard, for he took no proceeding in error from that court to the Ohio Supreme Court. This alone ought to relieve the case of any difficulty touching a multiplicity of suits

or of sales of the properties covered by the lien of the equipment bonds.

ARGUMENT.

I.

No Federal Question.

Since this case is brought here upon a writ of error to the supreme court of a state, "there must be some fair ground for asserting the existence of a Federal question." It is not enough to show that the claim of a Federal question was set up.

New Orleans Water Works Co. v. *Louisiana*, 185 U. S., 336.

The Federal question asserted must have merit.

Swafford v. *Templeton*, *Id.*, 487.

One Federal question claimed is, that due effect was not accorded by the Ohio courts to the receivership and foreclosure proceedings concerning the Wabash properties in the Circuit Court of the United States. Apart from everything else, the record shows that none of the defendants in error were parties to that case. The railroad property was sold in the Federal proceedings mentioned, while the mortgagor railroad company, the Wabash, St. Louis & Pacific Ry. Co., was actually a party to the present case. The present suit was begun prior to the commencement of the Federal proceedings for receivership and foreclosure. The suit was not brought to trial until after the foreclosure proceedings and receivership had ended and the present plaintiff in error was put in pos-

session of the railroad property (see Statement, *supra*). The railroad company claims title under that case.

The defendants in error claim a lien on a portion of the railroad property through ownership of certain equipment bonds identical with those which were involved in the case of *Compton* v. *Railway Co.*, 167 U. S., 1. Defendants in error seek to enforce that lien in the present action. The controversy, therefore, is reducible to a difference between claimants, who, on one side, present a deed given in pursuance of a Federal court decree, while the other side present a lien adjudged by the court of last resort of Ohio to have been in existence long prior to and at the time the judicial order and sale were made. (See Statement, *supra*.)

No question was made by the lienors as to the validity of the foreclosure decree or the deed made in pursuance of it, or as to the regularity of the proceedings under which the order and deed were made, and it is admitted that the purchasers took all the title that the defendants in the foreclosure suit possessed. The judgments of the Ohio courts go no further than the claim so made by defendants in error. The most that was claimed or decided in Ohio was, that the Federal court decree could not be so made as to impair or affect the lien of defendants in error, because they were not parties to the suit.

Avery v. *Popper*, 179 U. S., 305, at 314, lays down a rule which we submit is applicable to this case and decisive of the present question. Say the court:

> "With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse

> claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented—in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of Rev. Stat., Section 709."

The Ohio courts therefore can not be said to have refused to give due effect to the Federal decree and deed; the Ohio judgments merely decide that the Federal court decree could not reach a matter like this, which was not before it.

It is also claimed on behalf of the railroad that by the decree of foreclosure and order of sale entered in the United States Court March 23, 1889, and the decree confirming the sale entered May 18, 1889, the court meant to keep this road in its exclusive jurisdiction and to prevent claims from being asserted against it in any other court. According to the agreed statement of facts, possession of the property was given to the purchasers July 1, 1889, more than seventeen years ago (R., 232, par. 47). The further fact is there agreed to, that the plaintiff in error, the Wabash Railroad Co., obtained possession through the purchasers and consolidation before mentioned on

August 1, 1889, and still further, that it "has ever since been and still is in possession thereof, under the terms of said decree of March 23, 1889, and said order of June 18, 1889" (*Id.*). In its answer the railroad company alleges that the purchasing committee "duly complied with all the terms of said sale" (R., 191). What, then, remained to be done either to pass whatever title was within the court's jurisdiction or to insure a continuance of possession?

In *Compton* v. *Jesup*, *supra*, (167 U. S., 1, 31), this court said:

> "The decree of March 23, 1889, under which the sale was made and confirmed on May 18, 1889, was, in all essential respects, the final decree in the case, the questions reserved being merely incidental to carrying the decree into full effect."

And at bot. p. 34:

> "* * * * * the direction that the proceeds of sale should be brought into court to abide its further order on the footing of the decree, is the order usually made when a sale is made by an officer appointed by the court."

Can it be, in spite of all this, that the decree is open to the interpretation which learned counsel places upon it? The decree itself plainly shows that such was not the court's intention. At the bottom of p. 180 of the record, the court reserves the right "to re-take and re-sell the said property." Can the word "re-take" be consistent with any other idea than that of giving up? At p. 181 the masters are to give a good and sufficient deed for the property, which, when delivered—

> "shall vest in the grantee or grantees all the right, title, estate, interest, property and equity of redemption, except as hereby reserved, of, in and to all and singular the real estate, property, premises and franchises therein described in fee simple forever, and shall entitle said grantee or grantees to the possession thereof."

The questions reserved in the decree (R., bot. 181), are those

> "arising under any of the pleadings or proceedings herein not hereby disposed of or determined * * *."

This can not refer to the claims of these defendants in error, because they were not parties to the proceeding, and, of course, filed no pleadings therein. They were not before the court and were not in the mind of the court.

When the court was to get rid of the property, however, is best determined by the paragraph, p. 183 of the record, which in substance says that the railroad shall remain subject to the jurisdiction of the court and in the custody of the receiver—

> "until such time as the Court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be re-taken and, if necessary, resold * * *"

if the sum charged is not paid.

Here again we have a limitation on the length of time that the court intended to retain jurisdiction of the property, and a condition upon which it might re-take the property. It is not contended that any occasion has

arisen, as provided in this paragraph, for re-taking the property by the Federal court. Such a contention would obviously be inconsistent with the agreed statement of facts and the allegations of the answer, that the purchasing committee "duly complied with all the terms of said sale," and that the railroad company has been in possession ever since.

The next paragraph of the decree (R., bot. 183) plainly refers to the provision of the decree just mentioned, inasmuch as it retains jurisdiction in the court "so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis & Pacific Railway Company or any part thereof, or said Receivers, by order of said courts, shall be fully paid and discharged."

Plainly this, as well as the next preceding portion of the decree, relates only to claims of persons then before the court, or to such incidental claims as might have been inadvertently omitted. It could not under the decisions have been intended to relate to liens on any portion of the property, like the lien now in question, held by strangers to the suit. The correctness of this is further manifested by the express provisions made in the decree in respect to Compton's claim; for if the decree had in its other portions been broad enough to include or affect the lien of the other holders of equipment bonds, it would also have included Compton and his bonds. It would be no answer to this to say that allusion was made to Compton for the purpose of making special provision as to his claim, because if the language we are considering is comprehensive enough to affect the lien of the equipment bonds at all, it

is also appropriate to vest in the court jurisdiction fully to determine his rights and carry them into execution. Furthermore, the fact that it was thought necessary to make Compton a party to the suit, shows that the language of the decree was not designed to retain jurisdiction of the property for the purpose of protecting the decree of sale as against existing liens held by persons not parties to the suit.

As to the contention of counsel that the reference to Compton's claim in the decree showed a purpose to retain jurisdiction for all purposes (B., 44-6), it is enough to say that this court, in passing on this question, decided that Compton's claim was really disposed of in the above mentioned decree. As said in the case of *Compton* v. *Jesup, supra*, at p. 31:

> "That portion of said decree which established Compton's rights was in its nature final; the only matter which was kept in reserve as repects Compton was the awaiting the determination of the validity and amount of his claim by the report of the special master. And it may well be doubted whether it was competent for the Circuit Court at a subsequent term to disturb the rights of Compton defined and adjudicated at a previous term in the final decree of sale."

The case of *Julian* v. *Central Trust Co.*, 193 U. S., 93, relied on by counsel (B. 49), is widely different in its facts from the case at bar. The Central Trust Co., trustee of two separate mortgages of the Western North Carolina R. Co., brought suit to foreclose in the United States Circuit Court for default on the second mortgage; the first mortgage not being in default (p. 94). The property was

sold in this foreclosure proceeding to the Southern Railway Co. which took possession and operated it as owner.

Thereafter two actions were brought in a state court of North Carolina, against the Western North Carolina R. Co., on account of the death of two persons in the employ of the Southern Railway Co. and alleged to have met their deaths through its wrongful act (p. 97). Recovery was allowed against the Western North Carolina Railroad Co. in each case. The Southern Railway Co. was not made a defendant to either suit, although its negligence was involved; it having purchased the road in 1894, and these suits having been commenced in 1897. After recovery of these judgments amounting to $20,000, a sheriff levied on the property of the Southern Railway Co. worth $5,000,000, but as belonging to the Western North Carolina Railroad Co. Thereupon the Central Trust Co. and the Southern Railway Co. filed a supplemental bill in the foreclosure suit aforesaid in the Federal circuit court, making the sheriff a party defendant and seeking to quiet title to the property. The sheriff was proceeding to sell the property and was enjoined.

A plain statement of the facts of that case ought alone sufficiently distinguish the case at bar. Not only were the judgments recovered and executions of orders of sale issued upon claims arising years after the sale and delivery of the railroad to the Southern Railway Co., but that company was not even given opportunity either to set up its defenses against the representatives of its own employes or to present in their suits its rights to the property so threatened to be sold.

The effect, then, of the judgments and orders of the state court in those cases, if carried into execution, was

to *annul* the Federal foreclosure decree; because the Supreme Court of North Carolina had held that since the Southern Ry. Co. was not a domestic corporation and so the successor in liability under the North Carolina statutes of the Western North Carolina Railroad Co., no title at all had passed to the Southern Ry. Co. under the Federal proceeding (p. 112). The Federal court was thus driven to a defense of its own decree.

But in the present case we recognize the Federal decree fully and frankly. In consequence of that decree we made the Wabash Railroad Co. (successors to the purchasers under the decree) a party to our suit. While we were not parties to the suit through which that company obtained title, yet we do not assail its title in the sense that it was void or that it should no have due effect. But what title could the court pass? What constitutes the giving of "due effect" to the decree? Is it not common knowledge that no interest in or title to property can be passed by judicial sale, except such as the parties to the cause have? Has any court jurisdiction or power, in any sort of action, to direct a sale of a substantial property right and interest belonging to persons who are neither actually nor constructively parties to the cause? We but repeat when we say that the predecessor in title to the plaintiff in error, the Wabash, St. Louis & Pacific Railway Co. (a party to the present action), and the other actors in the receivership and foreclosure proceedings, had actual knowledge of the prior and continuous pendency of the present suit. The purchasers had knowledge, either actual or constructive, of the same fact. Yet no effort was made to bring the defendants in error into the foreclosure suit until after the sale was made; and

then it was held by the late Mr. Justice Jackson, then circuit judge, that "the citizenship of the various parties" to this cause "is such that this court has no jurisdiction of the cause," and on that ground alone the court granted a motion to remand the case to the Lucas Common Pleas, from which an attempt had been made to remove it (*Joy* v. *Adelbert College*, 146 U. S., 355, 356). It was not possible for the Federal court, or any other court, under like circumstances, to direct a sale of the property rights and interests of these defendants in error in the foreclosure proceedings in question. Assuredly the saying of this is not questioning either the Federal decree or the title which the court had power to and to that extent did pass by the deed of its officers. Assuredly the seeking of a judgment and its rendition in a case like this, can not be treated as a failure to give "due effect" either to a foreclosure decree or the title passed in pursuance of it.

There is a manifest distinction between a judgment which was intended to and if executed would annul the decree of another court, and a judgment which was intended to and if carried out would recognize the decree of another court as having been rendered subject to an existing lien. The direct aim of the former is to nullify; the direct object of the latter is to acknowledge. The foundation of the distinction is that the independence of the two co-ordinate tribunals would in the one instance be destroyed and in the other conserved. The controlling reason for applying the distinction here is the inevitable alternative, either that vested property rights would be destroyed without the actual or constructive presence of the owners, or the denial to them of the choice of forums

even when its exercise is accompanied as here by an expressed intent not to interfere with the jurisdiction or decree of the other tribunal. Indeed, all that defendants in error seek is to have accorded to their securities the same judicial recognition that has been given to a portion of the same class of securities by the highest tribunals, both state and Federal, without in any manner endeavoring to discredit, much less nullify, the decree or sale of the United States Circuit Court. This was not true, in either intent or effect, of the course adopted by parties or state courts in *Julian* v. *Central Trust Co.*, and the decision in that case ought to be treated as—for it in fact is—totally irrelevant.

Counsel's position compels him to claim either that defendants in error must have voluntarily become parties to the receivership and foreclosure proceedings in the United States Circuit Court in order to work out their rights, or that they must still do so; because in view of the decisions in both the state and Federal courts in the Compton case, it is not conceivable that defendants in error could not or can not in some way recover upon their securities.

But this court held in *Central National Bank* v. *Stevens*, 169 U. S., 432, that holders of receiver's certificates, which had been issued and made a first lien on the property by order of a New York state court, in a railroad foreclosure proceeding, could, after sale and delivery of the road, recover on such receiver's certificates, and compel a second sale of the same road in the United States Circuit Court for the Northern District of New York. In a suit brought in the same state court in which the first foreclosure sale took place, the court enjoined

the holders of the receiver's certificates, who had prosecuted their suit to judgment in the Federal court, from proceeding to sale therein, and required such holders to set up their claims on such certificates before a referee in the state court; and the Court of Appeals of New York sustained this injunction and order. Upon error to this court, the judgment of the Court of Appeals was reversed on the ground that the holders of the receiver's certificates had a right to prosecute suit thereon in the United States Circuit Court to the point of judgment and sale, and were not required to re-litigate matters relating to their certificates before the referee of the state court. The result of this is, that the holders of the receiver's certificates could maintain their action, not only in a cause other than the original foreclosure proceeding, but in another court. Why, then, should not these defendants in error be permitted to do the same thing?

We ought to say that the action of the holders of certificates was originally brought in the state court, and was subsequently removed to the United States Circuit Court; but this is saying no more than that the cause might originally have been brought in the Federal as well as in the state court. The point is that the holders of the receiver's certificates were entitled to enforce their rights in an action other than the original foreclosure proceeding, and were entitled to work out and enforce those rights in another and different court. The analogy of such a decision is manifest, and its answer to the contention of learned counsel is complete.

The principle apparent in the decision in *Central National Bank* v. *Stevens*, that holders of liens have a choice of forums (their citizenship or other condition being such

as to enable them to exercise a choice), and that no court can adjudicate such liens or the rights thereunder without the presence, either actual or constructive, of the parties, was also declared by this court in *Boyce* v. *Chapman*, 119 U. S., 587, 599.

The other claim urged by plaintiff in error is, that a judgment rendered in what is known as the Ham suit, was not given due effect by the Ohio courts. That case was begun by one Tyson against the Wabash, St. Louis & Pacific Ry. Co. many years ago and removed to the United States Circuit Court for Indiana, upon certain equipment bonds held by Tyson, which were part of the series though not any of the particular bonds in question in the present case. Ham became a party to the case and Tyson withdrew. It was thereafter carried along in the name of Ham. That court decided in favor of Ham, and the case was subsequently brought to this court and reversed (114 U. S., 587). The cause was remanded and a decree entered in the court below dismissing the bill. Much controversy has arisen as to whether the Ham case was a class suit, or not (see pp. 59 to 71, *infra*).

Our contention is, that before any question could arise here as to what effect the Ohio courts in this cause gave to the judgment of dismissal in the Ham case, this court would have to determine whether the Ham suit was a class case. It is a question of general law, not a Federal matter, whether the Ham case was a class suit. If it was not, then the defendants in error could not be bound by it at all; nor were the courts of Ohio obliged to acquiesce in the judgment of dismissal of the Federal court in Indiana.

As said in *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S., 371, at 390, bot.:

> "The fact that the Supreme Court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the Circuit Court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a Federal court." Citing numerous decisions.

The only way, then, to make the judgment of the Federal court of Indiana effective in this cause, would be to show that it was a representative or class suit in the sense that it bound defendants in error under the rule of *res adjudicata*. Pugsley, J., of the Lucas County Common Pleas Court, of Ohio, decided in this case that the Ham suit was not representative (see opinion, R., 948, top). The Supreme Court of Ohio did not deliver an opinion, but affirmed the judgments of the common pleas and circuit courts without report (74 O. S., 483). We are bound, therefore, to conclude that the Supreme Court of Ohio determined that the Ham suit was not a class case. As we understand the decisions, this court will not attempt to determine the correctness of that conclusion, in order to ascertain whether any Federal question is lying back of it.

In *San Francisco City and County* v. *Itsell*, 133 U. S., 65, 67, it was held that where the only question decided against the plaintiff in error was as to whether a former

judgment rendered against it and in favor of the grantor of the defendant in error was a bar to the action, it "was a question of general law only, in nowise depending upon the Constitution, treaties or statutes of the United States. *Chouteau* v. *Gibson*, 111 U. S., 200." And the writ of error was dismissed for want of jurisdiction.

In *Chapman* v. *Goodnow*, 123 U. S., 540, at 548, bot., the court having occasion to consider whether a Federal question arose, and referring to another case there cited, said:

> "The Federal question involved in that decree lay behind the alleged new promise, and as the new promise was sustained and a judgment given against the defendants on that account, the effect of the decree did not necessarily enter into the determination of the cause."

In *Adams County* v. *Burlington & Mo. R. R. Co.*, 112 U. S., 123, two questions arose, one whether the county acquired title to land under the Swamp Land act, and the other whether it was estopped from setting up that title, concerning which the court said (p. 127):

> "It may be conceded that the first of these questions was Federal in its character, but we are clearly of opinion that the second was not. A consideration of no act of Congress was involved in its decision."

In *Israel* v. *Arthur*, 152 U. S., 355, certain Federal questions might have arisen if the court had been bound, first, to pass upon a question of fact, and next a question of estoppel, but the court declined to do so.

We therefore submit that the alleged Federal question as to effect being given or not to the judgment of dismissal in the Ham case, can not be reached, and that the motion to dismiss should be granted, as no Federal questions are presented by the record.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES

FOR THE OCTOBER TERM, 1906.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

No. 303. *vs.*

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY et al.,
Defendants in Error.

MOTION OF DEFENDANTS IN ERROR TO DISMISS.

The defendants in error move the court to dismiss the writ of error to the Supreme Court of the State of Ohio in this cause, on the ground that no Federal question is presented upon the record.

J. W. WARRINGTON,
JOHN C. F. GARDNER,
Counsel for Defendants in Error.

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Defendants in Error.

Brief for Defendants in Error.

STATEMENT.

The elaborate statement contained in the brief for plaintiff in error at pp. 1 to 23, admonishes us that further statement may be regarded as unnecessary; but we think it will be helpful to state, in chronological order, the salient facts to which the court's attention will necessarily be directed.

In 1862 the Toledo & Wabash Railway Co. issued the equipment bonds which are the subject of this suit, to the

total amount of $600,000 (Record, p. 225, par. 17). By a consolidation agreement made in the year 1865, between the above mentioned and other railroad companies, there was created the Toledo, Wabash & Western Railway Company (R., 225 [18]). By virtue of this consolidation agreement, and in interpreting a statute of the state of Ohio under which it was in part effected, the Supreme Court of Ohio has twice declared that a lien was created in favor of the equipment bonds (*Compton* v. *Ry. Co.*, 45 O. S., 592; *The Wabash Railroad Co.* v. *The Adelbert College of Western Reserve University et al*, 74 O. S., 483).

In May, 1878, the consolidated railway company having before such time defaulted on the payment of interest on the equipment bonds, David J. Tyson, Jr., began an action in an Indiana state court against the Wabash Railway Co. and certain trustees of mortgages, which suit was removed to the United States Circuit Court for the District of Indiana (R., 404). The opening paragraph of the bill is as follows (R., 404):

> "The plaintiff, David J. Tyson, saying herein for himself and other bondholders similarly situated, who may deserve to come into this suit and contribute to the expenses thereof, complains of the defendants, the Wabash Railway Company, Isaac H. Knox and James R. Jessup, trustees; Edwin D. Morgan, trustee; the Farmers' Loan & Trust Company, and George I. Seney, trustee and says:"

The prayer of the petition was that the equipment bondholders be entitled to share in the security of a general mortgage, for the appointment of a receiver, an injunction, and foreclosure (R., 416).

In June, 1878, said Tyson having been joined in the suit by nine others, filed an amended bill of complaint "* * * on their own behalf, as well as on behalf of all others having like interests who may come in and contribute to the expenses of and join in the prosecution of this suit * * *" (R., 430). The prayer of this amended bill was substantially the same as that of the original bill (R., 448).

In July, 1879, the bill was dismissed as to Tyson and as to one Samuel J. Barton, one of the intervenors, but not as to any others of the complainants (R., 472).

In January, 1880, however, by an error, an entry was made dismissing the bill of the complainant and of all of the intervenors (R., 472).

In February, 1880, one James Compton, as owner of $150,000 of the $600,000 of equipment bonds, a part of which issue were the subject of the Tyson suit pending in Indiana, filed his petition in the Court of Common Pleas of Lucas County, Ohio (R., 282). That Compton sued for himself alone is evidenced from the prayer of the petition (R., 306-7). He prayed that the court will "ascertain and determine the amount due on the said bonds known as equipment bonds, held and owned by the plaintiff herein." He further prayed "that the defendant in this action, the Wabash, St. Louis & Pacific Railway Company, may be decreed to pay the amount due to the plaintiff upon the said bonds herein known as equipment bonds which he holds and owns, by a short day," or that in default thereof a portion of the road "be ordered and decreed to be sold for the payment of said indebtedness to this plaintiff, and the said bonds owned by him" (R., 306-7).

On the 1st day of June, 1880, defendants, the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, and the Wabash, St. Louis & Pacific Railway Company, answered Compton's petition (R., 323-4). In this answer they made no attempt to assert that Compton was precluded by the Tyson suit from maintaining his action. The answer of Isaac H. Knox and James R. Jessup, as trustees of mortgages, filed in the same suit on the 7th of June, 1880 (R., 325-28), while it mentions the Tyson suit, does not attempt to plead such suit as a bar to the maintenance of a suit by Compton.

In July, 1880, Benjamin F. Ham, who had been one of the intervenors in the Tyson suit, and seven others, obtained an order of court setting aside the entry of dismissal which had been previously made, on the ground that such order had not been moved for or assented to by the persons named, and Ham and these persons filed a supplemental and amended bill. This bill was little, if any, different from the previous bills which had been filed by Tyson and the intervenors. It was filed by Ham and the others (R., 473) "* * * on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit." The prayer of the bill was even more modest than that of the preceding suit, asking only that new parties be made defendants, and that the "court may order, adjudge and decree that the equipment bonds held by your orators shall at their par value be exchanged for a like amount of their bonds secured by the consolidated mortgage aforesaid * * * and that the defendant make such change when requested so to do by your orators, or either of them, and pay to your orators the interest due

upon their said bonds since the 1st day of November, 1874; that your orators may have such other and further or different relief in the premises as to your Honors may seem meet and just, and in accordance with the rules of this court" (R., 493, bot., and 494).

In November, 1880, the Wabash, St. Louis & Pacific Railway Co. filed its answer to this amended and supplemental bill (R., 495).

In January, 1881 (R., 329), Compton filed an amended and supplemental petition in which he prayed that Messrs. Humphreys and Lindley, as mortgage trustees, be made parties to his suit.

In February, 1881 (R., 331), the Wabash, St. Louis & Pacific Railway Company answered Compton's amended and supplemental petition, but made no mention therein of the Tyson, or, as it will hereafter be called, the Ham suit. Humphreys and Lindley, also in February, 1881 (R., 334), answered Compton's petition, and made no mention of the Ham suit.

In March, 1882 (R., 340), Compton obtained a decree in which (R., 344) it was ordered that the defendant pay to the plaintiff the sum of $90,990.22, with interest, or in default thereof that a sale take place. This decree plainly shows that Compton's suit was for himself alone. If anything further were necessary to show this, it is placed beyond peradventure from the fact that after the defendants had appealed Compton's case to the district court the Adelbert College, one of the present defendants in error, moved (Apr. 12, 1883) for leave to be made a party defendant and file its answer in the Compton suit (R., 350), but it was refused such permission (R., 351).

Thereupon, on April 28, 1883 (R., 54), the Adelbert College filed its petition in the Court of Common Pleas of Lucas County, Ohio, against the various railway companies and trustees of mortgages (R., 14). The prayer of the Adelbert College petition was among other things for (R., 40) an accounting, sale and an injunction. In November, 1883, the Wabash, St. Louis & Pacific Ry. Co. (R., 55) filed its answer to the Adelbert College petition, and while the answer is full (R., 55-8), it contains no mention of the Ham suit, to which this same railroad company had previously answered.

Reverting now to the Ham suit we see that on May 9, 1884 (R., 509), the holders of equipment bonds therein represented were given a decree finding that their equipment bonds were secured by a lien. The various defendants appealed to the Supreme Court of the United States, and there, in the case of *Wabash, St. Louis & Pacific Ry. Co.* v. *Ham* (114 U. S., 587), decided May 4, 1885, the opinion of the Indiana Circuit Court was reversed, and in May, 1888, a mandate was sent down to the Indiana Circuit Court with directions to dismiss the bill for want of equity (R., 519). At the time that this case was heard in the Supreme Court of the United States, Compton's case was then pending in the Supreme Court of Ohio, and his counsel filed a brief in the United States Supreme Court in support of the lien of the equipment bonds (See 114 U. S., 587, 594).

Compton's case was decided in his favor by the Supreme Court of Ohio in March, 1888 (*Compton* v. *Ry. Co.*, 45 O. S., 592), the Supreme Court saying, at p. 624, that respect for the Supreme Court of the United States had

delayed the decision by the Ohio court, but that the court, in construing a statute of Ohio, deemed it their duty to adopt a construction which in their judgment most accurately expressed the intention of the legislature.

Meanwhile, in May, 1884, the Wabash, St. Louis & Pacific Ry. Co. went into the Federal courts in the various states through which its lines passed, and filed bills alleging its insolvency and asking that receivers be appointed (R., 227, bot., 228), and on the 27th of May, 1884, receivers were appointed. Neither the Adelbert College nor any of the other defendants in error in this cause were made parties to said proceedings. Trustees of various mortgages instituted foreclosure suits which were consolidated with the receivership suits just above mentioned, but none of the defendants in error were made parties to any of such suits or to the consolidated suits (R., 228). From May, 1884, until June 19, 1889 (R., 232), the properties, a part of which are sought to be subjected to the lien of the equipment bondholders herein, were in the hands of receivers appointed by the Federal courts. On or about 23d of March, 1889, there were similar decrees of sale in the consolidated foreclosure and receivership suits in the various circuit courts, and on the 15th of May, 1889, the property was sold under said decrees to a purchasing committee (R., 231). None of the defendants in error were parties or had any voice in such sale or purchase. Thereafter corporations were formed in the various states. On or about the first of July, 1889, the receiver, under orders of the Circuit Court for the Northern District of Ohio, entered June 18, 1889, turned over possession of the properties to the purchas-

ing committee, and the receiver was thereupon discharged. The Wabash Railroad Company, the plaintiff in error, was formed as a consolidated corporation from the corporations above referred to in the various states on August 1, 1889, and, as the agreed statement of facts in this case shows (R., 232 [47]), "the said Wabash Railroad Company as such grantee took possession of all said property immediately after its said formation by consolidation on the first day of August, 1889, and has ever since been and still is in possession thereof, under the terms of the said decree of March 23, 1889, and said order of June 18, 1889." The order of June 18, 1889, ordering the receiver to deliver possession, is exhibit "K" to the agreed statement of facts, and appears on pages 266-9 of the record. The decree for sale of March 23, 1889, appears on pages 131-184 of the record.

Prior to the entry of the above decrees of sale and termination of receivership, Compton was made a party defendant to the various causes in the Federal courts after obtaining his decree from the Supreme Court of Ohio (R., 235 [60]). He set up his claim as adjudicated by the Supreme Court, and in the entry of sale of March 23, 1889, above referred to, reservation was made of his rights (R., bot. 181-182). The issues relating to his claim were referred to a master. Exceptions were taken to the master's report and went in turn to the circuit court and thence to the circuit court of appeals (*Compton* v. *Jesup,* 68 Fed. Rep., 263, C.C.A. [6th]). Compton took the case to this court (*Compton* v. *Jesup,* 167 U. S., 1), which decided that he was entitled to a sale. The question of priorities was then referred to a special master, Hon. W. H. H. Miller, of Indianapolis, who reported to the

Circuit Court for the Northern District of Ohio on the 11th of May, 1907, and his report is now pending on exceptions taken thereto.

After Compton had obtained his decree in the Supreme Court of Ohio and the cause was remanded for execution, the defendants in error sought again to be made parties to Compton's suit, and were again refused permission (R., 893-4).

During the time that the property was in the custody of the Federal court receivers, the suit of the Adelbert College, which it will be recalled had been begun in the Common Pleas Court of Lucas County, Ohio, before those receivers were appointed, namely, in April, 1883 (R., 54), lay quiescent until about the end of the year 1888. It will be remembered that a decision adverse to the equipment bond holders was given in the Ham suit and a mandate from this court sent down dismissing their bill in May, 1888. Shortly thereafter the Wabash, St. Louis & Pacific Railway Co., which in its original answer in 1883 had neglected to mention the Ham suit, filed an amended answer in which it pleaded the Ham suit in bar and also pleaded the receivership proceedings in the Federal court of 1884, which, at the time the answer was filed, had not yet terminated (R., 60, 61, 62). Thereafter the Adelbert College filed a supplemental and amended petiton. This petition was filed December 22, 1888. Having failed to get into the Compton suit both before and after Compton had obtained his decree, the Adelbert College in this supplemental and amended petition made Compton a party to its suit and prayed that he be treated not as a superior, but as an equal lienor with the

college. By answer and cross-petition verified January 2, 1889 (R., 82, bot.), date of filing unknown, a large number of the defendants in error came into the Adelbert suit and set up their claims as holders of bonds. They pleaded (R., 79) their attempts to get into the Compton suit and their failure, and asked that the trustees of mortgages and the various railroad companies and Compton be made parties. They asked, among other things (R., 80), that a receiver be appointed for the various properties, and "if and after the said Receivers now in possession thereof may have surrendered, or otherwise been divested of possession, that the said premises, franchises and property in Ohio and Indiana be sold at judicial sale by the sheriff of said county, or a Master Commissioner be appointed therefor by this Court, as an entirety, by a title free and clear from all incumbrances whatsoever; * * *."

Other cross-petitioners filed their answers and cross-petitions from time to time, a number of them, as is evident from the dates of verifications, long after the receivership had been lifted and the property conveyed under the decree of March 23, 1889, to the Wabash Railroad Company (R., 83-97).

By amendment, of which the verification is dated October 8, 1889, the cross-petitioners made the Wabash Railroad Company, on the ground that said "company has taken and is now in possession of the said railroad property, premises, equipment and franchises described in the said original answer and cross-petitions of these petitioners, * * *" a party, and asked that their lien be effectuated against this company.

Apparently no summonses were ever made on any of these cross-petitions until April 22, 1889 (R., 98), on

which date the Toledo, Wabash & Western Railway Company was served. Other services were made in May, 1889 (R., 98 and 100), and service on Compton was had by publication (R., 101). The Wabash Railroad Company was served with summons on the supplemental and amended petition and the second supplemental and amended petition October 24, 1889. The answer of the Wabash Railroad Company, verified (R., 192) December 11, 1889, contains (R., 191) among other things the statement that master commissioners appointed under the decrees of foreclosure sold on the 15th of May, 1889, to the purchasing committee. "That thereafter by decrees duly entered in all of said courts, said sale was duly confirmed," and the commissioners delivered their deed to the purchasing committee; and that the purchasing committee "duly complied with all the terms of said sale, and on or about the first day of July, 1889, were, by orders of said court, duly put in possession of said property as the purchasers at said foreclosure sale." After a recital of the formation of corporations and consolidation thereof, it is stated that "prior to said consolidation said Purchasing Committee duly conveyed to each of said companies the lines of railway within the said respective States, and that said defendant or said constituent corporations have been in possession of said properties under and pursuant to said deeds since the date of the execution and delivery thereof."

In the reply of the cross-petitioners to the answer of the purchasing committee (which was made a part of the Wabash answer by reference), verified April 26, 1889 (R., 294, bot.), the cross-petitioners admitted that the property was in possession of United States court receivers

(R., 202), "which possession they have no intention or desire to disturb," but they say that they are not parties to any of those proceedings, and deny that any of the courts in which they are pending has acquired jurisdiction and control of the cross-petitioners, "or has the exclusive or any other right to determine the right of these cross-petitioners, or that these cross-petitioners are required to seek relief in said proceedings and in said Courts; on the contrary, they aver that, by reason of the fact that one of these cross-petitioners resides in the State of Michigan, another in the State of Connecticut, others in the State of New York, and still others in the State of Ohio, the said Circuit Courts of the United States can not acquire, and are forbidden by law to acquire, jurisdiction over these cross-petitioners, or the right to control their interests in said property."

The replies of the Adelbert College and of the cross-petitioners to the answer of the Wabash Railroad Company were certainly not filed earlier than January, 1890 (see verifications, record, top 213, top 215), and the additional reply of the plaintiff and cross-petitioners was apparently not filed before January 4, 1894 (see verification, R., 217, bot.), so that the pleadings were not made up in the case at bar in the Lucas Common Pleas until long after the United States Court receiverships had been lifted, and the property sought to be subjected to a lien was admitted by the Wabash Railroad Company to be in its possession. The opinion of Pugsley, J., in the Lucas Common Pleas, supporting the claim of the equipment bondholders, was filed in July, 1894 (R., 943). The circuit court substantially affirmed the decree of the common pleas in April, 1896 (R., 5). The Supreme Court of

Ohio affirmed the decree of the circuit court April, 1906 (R., 958), and the Wabash Railroad Company now brings the proceedings here by petition in error.

Properties Acquired with Notice of Claims and Lien of Defendants in Error.

Plaintiff in error, through its predecessors in title, acquired the Wabash properties with full notice:

(1) That $600,000, par value, of equipment bonds, were outstanding and unpaid.

(2) That the Supreme Court of Ohio had adjudged the bonds to be secured since 1865 by lien upon the Wabash properties then held in Ohio.

(3) That none of the holders of the bonds, except Compton, were parties to the foreclosure proceedings or sale, and, on the contrary, were maintaining this suit (begun prior to the foreclosure proceedings) in the Lucas Common Pleas to have their rights declared and ultimately enforced against the properties.

These facts may be shown by partial recapitulation: Foreclosure sale occurred May 15, 1889 (R., 231 [44]). The present action was commenced April 28, 1883, against the railroad company (Wabash, St. Louis & Pacific) then owning and operating the properties, and certain mortgage trustees, defendants (R., 54). The petition in that case shows the whole number of equipment bonds to be $600,000, face value (R., 15). The railroad company answered as early as November, 1883 (R., 58). After so filing its answer in the present case, the railroad company, on May 27, 1884, filed its bill setting up its insolvency and secured appointment of receivers of the railroad prop-

erties (R., 227-228). Judgment of Ohio Supreme Court sustaining Compton's claim and lien on Compton's portion of these equipment bonds, was rendered in May, 1888, and holding that the lien was of public record of which purchasers were bound to take notice (R., 394, and Compton case, 45 O. S., 542; and prior to the entry of decrees in the foreclosure causes, to-wit, in 1888, "James Compton was made a party defendant in said causes" (R., 235, bot.); and in the decree of sale on March 23, 1889, Compton's rights under his lien were expressly reserved (R., 181, bot., and 182).

Thus the purchasing committee were put on notice of the existence of these equipment bonds and of the lien securing them. As before shown, the purchasing committee transferred the properties to state corporations, which in turn were consolidated under the name of the present plaintiff in error, whereupon it went into possession of the properties and has ever since operated and controlled them. Thus the plaintiff in error acquired the property with notice of the lien in favor of defendants in error, but, nevertheless, insists both on holding the property and refusing to pay the debt secured by the lien.

Issues in this Court.

The only attack made on the judgment of the Ohio Supreme Court sustaining the liens of defendants in error in this case, consists of two claims presented as Federal questions by plaintiff in error. One is that the jurisdiction of the Federal courts below was and still is exclusive in the sense that the present case could not be maintained in the Ohio courts. The other is, that the judgment in the

Ham suit is a bar to the present suit. Thus the judgment of the Ohio Supreme Court is now to be treated, except only as to the questions so urged, as was the judgment of that court in the Compton case.

It is to be observed, however, that with Compton a party to the present action, and having filed his answer herein (R., 125), the judgment of the Ohio circuit court below as affirmed by the Supreme Court, protecting the rights of Compton and the parties to the present action, provides that Compton's rights under his judgment shall be—

> "without disparagement or prejudice to the claim of the said plaintiff" (Adelbert College) "and the said cross-petitioners" (defendants in error herein) "that his" (Compton's) "said right extend no further than to divide proportionately with them the proceeds of any sale of said railway property and franchises, * * *.
>
> "The object of this reservation of this decree is to save to the said Compton as well as to the said plaintiff and cross-petitioners, and to the Wabash Railroad Company as against said Compton, all their rights as between themselves in the premises" (R., 11).

The object of the Ohio courts manifestly was to require the proceeds derived from the properties covered by the lien of the equipment bonds to be applied for the equal benefit of all the holders of those bonds, and not merely for the benefit of the bonds held by Compton; and it is obvious that Compton is bound by this restriction placed upon his original judgment, since he was a party to this action as well as his own. Indeed, he allowed the judgment of the Ohio circuit court to become final in this re-

gard, for he took no proceeding in error from that court to the Ohio Supreme Court. This alone ought to relieve the case of any difficulty touching a multiplicity of suits or of sales of the properties covered by the lien of the equipment bonds.

ARGUMENT.

I.

No Federal Question.

Since this case is brought here upon a writ of error to the supreme court of a state, "there must be some fair ground for asserting the existence of a Federal question." It is not enough to show that the claim of a Federal question was set up.

New Orleans Water Works Co. v. *Louisiana*, 185 U. S., 336.

The Federal question asserted must have merit.

Swafford v. *Templeton, Id.*, 487.

One Federal question claimed is, that due effect was not accorded by the Ohio courts to the receivership and foreclosure proceedings concerning the Wabash properties in the Circuit Court of the United States. Apart from everything else, the record shows that none of the defendants in error were parties to that case. The railroad property was sold in the Federal proceedings mentioned, while the mortgagor railroad company, the Wabash, St. Louis & Pacific Ry. Co., was actually a party to the present case. The present suit was begun prior to the commencement of the Federal proceedings for receivership and foreclosure. The suit was not brought to trial until

after the foreclosure proceedings and receivership had ended and the present plaintiff in error was put in possession of the railroad property (see Statement, *supra*). The railroad company claims title under that case.

The defendants in error claim a lien on a portion of the railroad property through ownership of certain equipment bonds identical with those which were involved in the case of *Compton* v. *Railway Co.*, 167 U. S., 1. Defendants in error seek to enforce that lien in the present action. The controversy, therefore, is reducible to a difference between claimants, who, on one side, present a deed given in pursuance of a Federal court decree, while the other side present a lien adjudged by the court of last resort of Ohio to have been in existence long prior to and at the time the judicial order and sale were made. (See Statement, *supra.*)

No question was made by the lienors as to the validity of the foreclosure decree or the deed made in pursuance of it, or as to the regularity of the proceedings under which the order and deed were made, and it is admitted that the purchasers took all the title that the defendants in the foreclosure suit possessed. The judgments of the Ohio courts go no further than the claim so made by defendants in error. The most that was claimed or decided in Ohio was, that the Federal court decree could not be so made as to impair or affect the lien of defendants in error, because they were not parties to the suit.

Avery v. *Popper*, 179 U. S., 305, at 314, lays down a rule which we submit is applicable to this case and decisive of the present question. Say the court:

> "With respect to writs of error from this court to judgments of state courts in actions be-

tween purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented—in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of Rev. Stat., Section 709."

The Ohio courts therefore can not be said to have refused to give due effect to the Federal decree and deed; the Ohio judgments merely decide that the Federal court decree could not reach a matter like this, which was not before it.

It is also claimed on behalf of the railroad that by the decree of foreclosure and order of sale entered in the United States Court March 23, 1889, and the decree confirming the sale entered May 18, 1889, the court meant to keep this road in its exclusive jurisdiction and to prevent claims from being asserted against it in any other court. According to the agreed statement of facts, possession of the property was given to the purchasers July 1, 1889, more than seventeen years ago (R., 232, par. 47). The further fact is there agreed to, that the plaintiff in error,

the Wabash Railroad Co., obtained possession through the purchasers and consolidation before mentioned on August 1, 1889, and still further, that it "has ever since been and still is in possession thereof, under the terms of said decree of March 23, 1889, and said order of June 18, 1889" (*Id.*). In its answer the railroad company alleges that the purchasing committee "duly complied with all the terms of said sale" (R., 191). What, then, remained to be done either to pass whatever title was within the court's jurisdiction or to insure a continuance of possession?

In *Compton* v. *Jesup, supra,* (167 U. S., 1, 31), this court said:

> "The decree of March 23, 1889, under which the sale was made and confirmed on May 18, 1889, was, in all essential respects, the final decree in the case, the questions reserved being merely incidental to carrying the decree into full effect."

And at bot. p. 34:

> "* * * * * the direction that the proceeds of sale should be brought into court, to abide its further order on the footing of the decree, is the order usually made when a sale is made by an officer appointed by the court."

Can it be, in spite of all this, that the decree is open to the interpretation which learned counsel places upon it? The decree itself plainly shows that such was not the court's intention. At the bottom of p. 180 of the record, the court reserves the right "to re-take and re-sell the said property." Can the word "re-take" be consistent with any other idea than that of giving up? At p. 181 the mas-

ters are to give a good and sufficient deed for the property, which, when delivered—

> "shall vest in the grantee or grantees all the right, title, estate, interest, property and equity of redemption, except as hereby reserved, of, in and to all and singular the real estate, property, premises and franchises therein described in fee simple forever, and shall entitle said grantee or grantees to the possession thereof."

The questions reserved in the decree (R., bot. 181), are those

> "arising under any of the pleadings or proceedings herein not hereby disposed of or determined * * *."

This can not refer to the claims of these defendants in error, because they were not parties to the proceeding, and, of course, filed no pleadings therein. They were not before the court and were not in the mind of the court.

When the court was to get rid of the property, however, is best determined by the paragraph, p. 183 of the record, which in substance says that the railroad shall remain subject to the jurisdiction of the court and in the custody of the receiver—

> "until such time as the Court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be re-taken and, if necessary, re-sold * * *"

if the sum charged is not paid.

Here again we have a limitation on the length of time that the court intended to retain jurisdiction of the prop-

erty, and a condition upon which it might re-take the property. It is not contended that any occasion has arisen, as provided in this paragraph, for re-taking the property by the Federal court. Such a contention would obviously be inconsistent with the agreed statement of facts and the allegations of the answer, that the purchasing committee "duly complied with all the terms of said sale," and that the railroad company has been in possession ever since.

The next paragraph of the decree (R., bot. 183) plainly refers to the provision of the decree just mentioned, inasmuch as it retains jurisdiction in the court "so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis & Pacific Railway Company or any part thereof, or said Receivers, by order of said courts, shall be fully paid and discharged."

Plainly this, as well as the next preceding portion of the decree, relates only to claims of persons then before the court, or to such incidental claims as might have been inadvertently omitted. It could not under the decisions have been intended to relate to liens on any portion of the property, like the lien now in question, held by strangers to the suit. The correctness of this is further manifested by the express provisions made in the decree in respect to Compton's claim; for if the decree had in its other portions been broad enough to include or affect the lien of the other holders of equipment bonds, it would also have included Compton and his bonds. It would be no answer to this to say that allusion was made to Compton for the purpose of making special provision as to his claim, be-

cause if the language we are considering is comprehensive enough to affect the lien of the equipment bonds at all, it is also appropriate to vest in the court jurisdiction fully to determine his rights and carry them into execution. Furthermore, the fact that it was thought necessary to make Compton a party to the suit, shows that the language of the decree was not designed to retain jurisdiction of the property for the purpose of protecting the decree of sale as against existing liens held by persons not parties to the suit.

As to the contention of counsel that the reference to Compton's claim in the decree showed a purpose to retain jurisdiction for all purposes (B., 44-6), it is enough to say that this court, in passing on this question, decided that Compton's claim was really disposed of in the above mentioned decree. As said in the case of *Compton* v. *Jesup, supra,* at p. 31:

> "That portion of said decree which established Compton's rights was in its nature final; the only matter which was kept in reserve as repects Compton was the awaiting the determination of the validity and amount of his claim by the report of the special master. And it may well be doubted whether it was competent for the Circuit Court at a subsequent term to disturb the rights of Compton defined and adjudicated at a previous term in the final decree of sale."

The case of *Julian* v. *Central Trust Co.,* 193 U. S., 93, relied on by counsel (B. 49), is widely different in its facts from the case at bar. The Central Trust Co., trustee of two separate mortgages of the Western North Carolina R. Co., brought suit to foreclose in the United States Cir-

cuit Court for default on the second mortgage; the first mortgage not being in default (p. 94). The property was sold in this foreclosure proceeding to the Southern Railway Co. which took possession and operated it as owner.

Thereafter two actions were brought in a state court of North Carolina, against the Western North Carolina R. Co., on account of the death of two persons in the employ of the Southern Railway Co. and alleged to have met their deaths through its wrongful act (p. 97). Recovery was allowed against the Western North Carolina Railroad Co. in each case. The Southern Railway Co. was not made a defendant to either suit, although its negligence was involved; it having purchased the road in 1894, and these suits having been commenced in 1897. After recovery of these judgments amounting to $20,000, a sheriff levied on the property of the Southern Railway Co. worth $5,000,000, but as belonging to the Western North Carolina Railroad Co. Thereupon the Central Trust Co. and the Southern Railway Co. filed a supplemental bill in the foreclosure suit aforesaid in the Federal circuit court, making the sheriff a party defendant and seeking to quiet title to the property. The sheriff was proceeding to sell the property and was enjoined.

A plain statement of the facts of that case ought alone sufficiently distinguish the case at bar. Not only were the judgments recovered and executions of orders of sale issued upon claims arising years after the sale and delivery of the railroad to the Southern Railway Co., but that company was not even given opportunity either to set up its defenses against the representatives of its own employes or to present in their suits its rights to the property so threatened to be sold.

The effect, then, of the judgments and orders of the state court in those cases, if carried into execution, was to *annul* the Federal foreclosure decree; because the Supreme Court of North Carolina had held that since the Southern Ry. Co. was not a domestic corporation and so the successor in liability under the North Carolina statutes of the Western North Carolina Railroad Co., no title at all had passed to the Southern Ry. Co. under the Federal proceeding (p. 112). The Federal court was thus driven to a defense of its own decree.

But in the present case we recognize the Federal decree fully and frankly. In consequence of that decree we made the Wabash Railroad Co. (successors to the purchasers under the decree) a party to our suit. While we were not parties to the suit through which that company obtained title, yet we do not assail its title in the sense that it was void or that it should not have due effect. But what title could the court pass? What constitutes the giving of "due effect" to the decree? Is it not common knowledge that no interest in or title to property can be passed by judicial sale, except such as the parties to the cause have? Has any court jurisdiction or power, in any sort of action, to direct a sale of a substantial property right and interest belonging to persons who are neither actually nor constructively parties to the cause? We but repeat when we say that the predecessor in title to the plaintiff in error, the Wabash, St. Louis & Pacific Railway Co. (a party to the present action), and the other actors in the receivership and foreclosure proceedings, had actual knowledge of the prior and continuous pendency of the present suit. The purchasers had knowledge, either actual or constructive, of the same fact. Yet

no effort was made to bring the defendants in error into the foreclosure suit until after the sale was made; and then it was held by the late Mr. Justice Jackson, then circuit judge, that "the citizenship of the various parties" to this cause "is such that this court has no jurisdiction of the cause," and on that ground alone the court granted a motion to remand the case to the Lucas Common Pleas, from which an attempt had been made to remove it (*Joy* v. *Adelbert College*, 146 U. S., 355, 356). It was not possible for the Federal court, or any other court, under like circumstances, to direct a sale of the property rights and interests of these defendants in error in the foreclosure proceedings in question. Assuredly the saying of this is not questioning either the Federal decree or the title which the court had power to and to that extent did pass by the deed of its officers. Assuredly the seeking of a judgment and its rendition in a case like this, can not be treated as a failure to give "due effect" either to a foreclosure decree or the title passed in pursuance of it.

There is a manifest distinction between a judgment which was intended to and if executed would annul the decree of another court, and a judgment which was intended to and if carried out would recognize the decree of another court as having been rendered subject to an existing lien. The direct aim of the former is to nullify; the direct object of the latter is to acknowledge. The foundation of the distinction is that the independence of the two co-ordinate tribunals would in the one instance be destroyed and in the other conserved. The controlling reason for applying the distinction here is the inevitable alternative, either that vested property rights would be

destroyed without the actual or constructive presence of the owners, or the denial to them of the choice of forums even when its exercise is accompanied as here by an expressed intent not to interfere with the jurisdiction or decree of the other tribunal. Indeed, all that defendants in error seek is to have accorded to their securities the same judicial recognition that has been given to a portion of the same class of securities by the highest tribunals, both state and Federal, without in any manner endeavoring to discredit, much less nullify, the decree or sale of the United States Circuit Court. This was not true, in either intent or effect, of the course adopted by parties or state courts in *Julian* v. *Central Trust Co.*, and the decision in that case ought to be treated as—for it in fact is—totally irrelevant.

Counsel's position compels him to claim either that defendants in error must have voluntarily become parties to the receivership and foreclosure proceedings in the United States Circuit Court in order to work out their rights, or that they must still do so; because in view of the decisions in both the state and Federal courts in the Compton case, it is not conceivable that defendants in error could not or can not in some way recover upon their securities.

But this court held in *Central National Bank* v. *Stevens*, 169 U. S., 432, that holders of receiver's certificates, which had been issued and made a first lien on the property by order of a New York state court, in a railroad foreclosure proceeding, could, after sale and delivery of the road, recover on such receiver's certificates, and compel a second sale of the same road in the United States Circuit Court for the Northern District of New

York. In a suit brought in the same state court in which the first forecloseure sale took place, the court enjoined the holders of the receiver's certificates, who had prosecuted their suit to judgment in the Federal court, from proceeding to sale therein, and required such holders to set up their claims on such certificates before a referee in the state court; and the Court of Appeals of New York sustained this injunction and order. Upon error to this court, the judgment of the Court of Appeals was reversed on the ground that the holders of the receiver's certificates had a right to prosecute suit thereon in the United States Circuit Court to the point of judgment and sale, and were not required to re-litigate matters relating to their certificates before the referee of the state court. The result of this is, that the holders of the receiver's certificates could maintain their action, not only in a cause other than the original foreclosure proceeding, but in another court. Why, then, should not these defendants in error be permitted to do the same thing?

We ought to say that the action of the holders of certificates was originally brought in the state court, and was subsequently removed to the United States Circuit Court; but this is saying no more than that the cause might originally have been brought in the Federal as well as in the state court. The point is that the holders of the receiver's certificates were entitled to enforce their rights in an action other than the original foreclosure proceeding, and were entitled to work out and enforce those rights in another and different court. The analogy of such a decision is manifest, and its answer to the contention of learned counsel is complete.

The principle apparent in the decision in *Central National Bank* v. *Stevens*, that holders of liens have a choice of forums (their citizenship or other condition being such as to enable them to exercise a choice), and that no court can adjudicate such liens or the rights thereunder without the presence, either actual or constructive, of the parties, was also declared by this court in *Borer* v. *Chapman*, 119 U. S., 587, 599.

The other claim urged by plaintiff in error is, that a judgment rendered in what is known as the Ham suit, was not given due effect by the Ohio courts. That case was begun by one Tyson against the Wabash, St. Louis & Pacific Ry. Co. many years ago and removed to the United States Circuit Court for Indiana, upon certain equipment bonds held by Tyson, which were part of the series though not any of the particular bonds in question in the present case. Ham became a party to the case and Tyson withdrew. It was thereafter carried along in the name of Ham. That court decided in favor of Ham, and the case was subsequently brought to this court and reversed (114 U. S., 587). The cause was remanded and a decree entered in the court below dismissing the bill. Much controversy has arisen as to whether the Ham case was a class suit, or not (see pp. 59 to 71, *infra*).

Our contention is, that before any question could arise here as to what effect the Ohio courts in this cause gave to the judgment of dismissal in the Ham case, this court would have to determine whether the Ham suit was a class case. It is a question of general law, not a Federal matter, whether the Ham case was a class suit. If it was not, then the defendants in error could not be bound by it at all; nor were the courts of Ohio obliged to acquiesce

in the judgment of dismissal of the Federal court in Indiana.

As said in *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S., 371, at 390, bot.:

> "The fact that the Supreme Court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the Circuit Court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a Federal court." Citing numerous decisions.

The only way, then, to make the judgment of the Federal court of Indiana effective in this cause, would be to show that it was a representative or class suit in the sense that it bound defendants in error under the rule of *res adjudicata*. Pugsley, J., of the Lucas County Common Pleas Court, of Ohio, decided in this case that the Ham suit was not representative (see opinion, R., 948, top). The Supreme Court of Ohio did not deliver an opinion, but affirmed the judgments of the common pleas and circuit courts without report (74 O. S., 483). We are bound, therefore, to conclude that the Supreme Court of Ohio determined that the Ham suit was not a class case. As we understand the decisions, this court will not attempt to determine the correctness of that conclusion, in order to ascertain whether any Federal question is lying back of it.

In *San Francisco City and County* v. *Itsell*, 133 U. S., 65, 67, it was held that where the only question decided against the plaintiff in error was as to whether a former judgment rendered against it and in favor of the grantor of the defendant in error was a bar to the action, it "was a question of general law only, in nowise depending upon the Constitution, treaties or statutes of the United States. *Chouteau* v. *Gibson*, 111 U. S., 200." And the writ of error was dismissed for want of jurisdiction.

In *Chapman* v. *Goodnow*, 123 U. S., 540, at 548, bot., the court having occasion to consider whether a Federal question arose, and referring to another case there cited, said:

> "The Federal question involved in that decree lay behind the alleged new promise, and as the new promise was sustained and a judgment given against the defendants on that account, the effect of the decree did not necessarily enter into the determination of the cause."

In *Adams County* v. *Burlington & Mo. R. R. Co.*, 112 U. S., 123, two questions arose, one whether the county acquired title to land under the Swamp Land act, and the other whether it was estopped from setting up that title, concerning which the court said (p. 127):

> "It may be conceded that the first of these questions was Federal in its character, but we are clearly of opinion that the second was not. A consideration of no act of Congress was involved in its decision."

In *Israel* v. *Arthur*, 152 U. S., 355, certain Federal questions might have arisen if the court had been bound,

first, to pass upon a question of fact, and next a question of estoppel, but the court declined to do so.

We therefore submit that the alleged Federal question as to effect being given or not to the judgment of dismissal in the Ham case, can not be reached, and that the motion to dismiss should be granted.

II.

THE RECEIVERSHIP AND FORECLOSURE PROCEEDINGS IN THE FEDERAL COURTS FROM 1884 TO JULY, 1889, HAVE NO EFFECT UPON THE CASE AT BAR, WHICH WAS BEGUN IN THE OHIO COURTS PRIOR THERETO, AND THE ISSUES WERE NOT FINALLY MADE UP OR TRIAL HAD OF THE CASE IN THE STATE COURT UNTIL AFTER THE RECEIVERSHIP AND FORECLOSURE PROCEEDINGS HAD ENDED AND THE PROPERTY BEEN CONVEYED AND DELIVERED TO THE PLAINTIFF IN ERROR.

The contention of plaintiff in error is that the Federal circuit court acquired prior and exclusive jurisdiction of all the properties involved in this case, from the time of the appointment of and taking possession by the receivers in May, 1884, and that the Federal court has never relinquished such jurisdiction; and so the state court could not acquire jurisdiction to determine the questions involved and at the same time give due effect to the decree of foreclosure entered in the Federal court March 23, 1889 (Br. Plff. in Err., 27). The first observation to be made upon this contention is, that Compton prosecuted his suit to judgment in the Supreme Court of Ohio while this same receivership was pending in the United States court, and this court recognized and gave full effect, nevertheless,

to his judgment so obtained in the Ohio Supreme Court (*Compton* v. *Jesup,* 167 U. S., 1). Indeed, Compton claimed that his suit, begun in the state court, excluded the Federal court, as Compton's suit was one *in rem* impounding the property (*Compton* v. *Jesup,* 68 Fed., 263, 283). The Circuit Court of Appeals disallowed this contention, but recognized that Compton's proceedings in the state court were valid to establish his lien.

The next comment to be made upon the contention of plaintiff in error is, that according to the rule prevailing in the Federal courts, the Lucas County Common Pleas first obtained jurisdiction of the property in question in this cause; that is, the common pleas court acquired jurisdiction prior to the Federal court. The petition in the present case was filed and summons issued a year before the receivership proceedings in the Federal court were begun. The petition in this case was filed, as before shown, April 28, 1883 (R., 54); the receivership proceedings not having been commenced until May, 1884 (R., 227-8). The present action was brought against the Wabash, St. Louis & Pacific Ry. Co. (the company then owning and operating the Wabash system) and the trustees of existing mortgages on the properties, as defendants. Summons was served on the railway company, but not on the trustees. The lien securing the equipment bonds was set up in the petition, and the relief prayed was in substance that the court determine the amount due and adjudge such bonds a lien upon the railway property in Ohio and Indiana, and fix the relative priority of liens; also for an accounting; also that the equipment bonds be regarded as secured by the consolidated mortgage; that defendants pay the amount due, and in default that the

road be sold and the proceeds of sale distributed between the equipment bondholders and the mortgagees; also for an injunction against transferring, selling, incumbering, or otherwise disposing of any of the property covered by the lien, and for further and proper relief (R., 39-41). As stated before, the Wabash, St. Louis & Pacific Ry. Co. filed its answer to this petition as early as November, 1883 (R., 55-58); it thus appearing that the railway company did not commence its receivership proceedings until six months later.

Considering the nature of the present case and the dates of commencement of actions, first, in the Lucas Common Pleas, and, second, in the Federal court, it would seem plain under the decisions that the present action was maintainable not only for having the lien declared, but for seizing and selling the property covered by the lien. The very nature of the action contemplated this very thing, and issue was joined upon it. It might well have been claimed that the railway company and the trustees of the mortgages were bound to try all the questions in the present action, instead of going into the Federal court later to secure receiverships and foreclose the mortgages.

Farmers' Loan, etc., Co. v. *Lake Street, etc., Co.*, 177 U. S., 51, 61.

Louisville Trust Co. v. *Knott* (1904), 130 Fed. Rep., 820, at p. 824, per Lurton, Severens and Richards, JJ.

Zimmerman v. *SoRelle* (1897), 80 Fed. Rep., 417, at 420, per Sanborn, Thayer and Lochren, JJ.

But it has not been insisted in the present action that the jurisdiction of the Lucas Common Pleas should be

enforced as exclusive. The effort in this action has been to avoid any unseemly conflict between the two classes of tribunals, Federal and state, exercising concurrent jurisdiction over the same territory. But surely this does not militate against our insistence that the Lucas Common Pleas obtained jurisdiction rightfully and reasonably to adjudicate the rights of plaintiff and cross-petitioners below, and ultimately to enforce them. When we consider the action of the Federal courts below and of this court in the Compton case alone (167 U. S., 1), it is impossible to escape this conclusion.

The late Judge Hoadly tried this cause in the Lucas Common Pleas and Circuit Courts of Ohio, and prepared and filed his written brief in the case in the Supreme Court of Ohio, where upon the present point he stated (as set forth from this point to page 52, *infra*):

> *"The fact that the cross-petitioners originally filed their cross-petition after the suits had been brought, in which a receiver was appointed, does not constitute a bar to the recovery of judgment by them against the Wabash Railroad Company.*
>
> "It was objected, at the oral argument before Judge Pugsley, and repeated in the circuit court, that the court of common pleas was without jurisdiction, because the property at the time of the commencement of the suit was in possession of the receiver of the Federal court, but this objection fails to reach the plaintiff, the Adelbert College, because its suit was brought on April 28, 1883 (R., 54),* whereas the earliest date suggested as the beginning of the receivership

* Pages of record as given in Judge Hoadly's brief have been changed to the proper pages of record in this court.

is May 29, 1884 (R., 227-8). This is also a perfect answer on behalf of the cross-petitioners, who appeared in the plaintiffs' suit, and whose rights date back to its initiation,† but it fails to control this case for other reasons, namely: Another answer is that the cross-petitioners could not have been made parties to the litigation in the Federal court. Some one or more of them, as the record shows, resided in each state in which the complainants in that cause lived.

"*First.* This is an objection, not to jurisdiction over the subject-matter, but over the person, and has been waived by omitting to demur or answer on this ground.

"Revised Statutes, Section 5063.

"*Steamboat General Buell* v. *Long,* 18 Ohio St., 521.

"At page 533 Judge White says:

"'This is not a case where the court has jurisdiction of the subject-matter of the suit by law, but the defendant is exempt from being required to submit to the jurisdiction of the court. In such case, the exemption pertains to the defendant as a personal privilege which he may waive. In this case, the want of jurisdiction grows out of the subject-matter of the suit. And where it appears upon the face of the record that the court has no jurisdiction of the cause, as it does here, the failure to set up the want of jurisdiction by plea is no waiver of the objection.'

"*Secondly.* The pleadings show (R., 80) that, in the original cross-petition, the prayer, among other things, was—

† In support of the above statement of Gov. Hoadly, we add the case of *Stewart* v. *Dunham,* 115 U. S., 61, 64.

"'that a Receiver may be appointed to take possession thereof and operate and manage the same; if and after the said Receivers now in possession thereof may have surrendered, or otherwise been divested of possession.'

"This prayer relieves the case of the objection, that we sought to interfere with the possession of a Receiver appointed by another Court.

"We insist that it is not the law that when an action has been brought, in which a Receiver has been appointed and put in charge of the property, persons who have not been made parties to the cause are precluded from seeking the liquidation of their claims or the adjustment of their rights by judicial action in other Courts. The thing forbidden to them is, to disturb the possession of the Receiver; they may at least go on and litigate and settle their rights *inter sese* until final decree or judgment, and then enforce such judgment by sale or change of possession, but not until after the receivership has ceased. This is precisely what we originally sought to do in this case.

"*Wiswell* v. *Sampson,* 14 How., 52, doubtless forbids interference with the possession of one Court or its Receivers by the process of another, but it does not go so far as to exclude the power of the latter to decree, adjudge and execute in favor of persons, not parties to the litigation in which the Receiver was appointed, upon matters which do not interfere with his possession, or the Court's authority over the property for the purposes of the suit.

"The plea of another action pending is not to the jurisdiction, but in abatement only.

"*Thirdly.* The objection is not now true in point of fact. We are trying this case now upon an issue made up after the receivership had ceased, and after the Wabash Railroad Company had taken possession of the property, and when the property was no longer in *custodia legis.* It surely is not an objection to proceeding in this cause now, that there had once been a receivership. The Receiver was directed to surrender possession on the first day of July, 1889 (R., 232). And the Wabash Railroad Company was organized August 1, 1889 (R., 232), and has ever since had possession.

"On the 16th day of October, 1889, the plaintiff filed its second supplemental and amended petition, in which it averred that the Wabash Railroad Company is—

" 'now in possession of the said railroad property, premises, equipment and franchises' (R., 109-10).

"Upon this pleading, process was issued and served upon the Wabash Railroad Company, and it was brought into court for the first time (R., 105). On the same day (October 16, 1889) the cross-petitioners filed a like amended answer and cross-petition against the Wabash Railroad Company described as 'now in possession.'

"Upon this pleading a summons was issued the same day and served (R., 85).

"On the 18th day of December, 1889 (R., 185), the Wabash Railway Company answered the petition and supplemental and amended petition of the college and the cross-petition of William F. Redmond and others, cross-petitioners, without setting up the defense of want of jurisdiction. How could it when the record (191) states its admission that, after August 1, 1889, it—

"'has ever since been and still is in possession thereof'?

"On the 7th day of January, 1890, the plaintiff and the defendants severally replied to such answer (R., 210, 213). Thus was made a complete issue in the cause.

"It is proper to add that, in answer to the cross-petition of Henry F. James, filed April 30, 1890 (R., 87), Joy, Ashley, Hubbard and Wells, as purchasing committee, and Joy individually, and the Wabash Railroad Company, severally, on the 5th day of June, 1890, answered (R., 194, 195). In these answers there is no trace of the claim of want of jurisdiction now made.

"Whether, therefore, the litigation was originally begun without jurisdiction or not, before the Receiver surrendered possession to the Wabash Railroad Company, this certainly became a pending case, without any possibility of successful objection on this ground, after the Wabash Railroad Company had taken possession, and pleadings just described had been filed and issue joined.

"A pertinent question would be: if the Wabash Railroad Company, in possession of and operation of its own railroad, enjoys immunity from suit, because it was once managed and operated by and in the control of Receivers appointed by a Federal court, how long will such immunity continue? Our view is (*a*) that there is no such immunity to protect the possession and absolute and exclusive control of the Federal court (*Shields* v. *Coleman*, 157 U. S., 168). Surely a deed or mortgage made by one of the parties to the litigation would, subject to the priorities lawfully asserted in the Federal court, be valid. It would not be *void*. And (*b*)

whether this be so or not, there can be no doubt that the exclusive powers of the Federal court cease when it has finished its work, has confirmed sale and delivered possession, and the property once within its protecting control has re-entered the great mass of property subject to the control of the state courts.

"This suit was begun, so far as most of the cross-petitioners are concerned, on January 2, 1889 (R., 82); so far as Charles G. Peters, one of the cross-petitioners is concerned, it was begun on April —, 1889 (R., 84). But as to the cross-petitioners, James, Hampton, Pierce and Henry, the litigation did not begin until after the Wabash Railroad Company had taken possession, and the receivership was at an end.

"We may safely admit, for the sake of argument, and the result of the investigation indeed may be, that, so far as these two pleadings are concerned, having been brought at a time when the Federal court had not yet parted with possession, if the attention of the Common Pleas had been directed to the subject by a proper pleading, they might have excluded such cross-petitioners from further prosecution. Then the cross-petitioners might and probably would have discontinued their suit, renewing it in August. The only effect of this would have been upon costs, except possibly as to one coupon upon each bond, namely, that due in May, 1874; but as that coupon was paid when it matured, this discontinuance would have wrought no effect whatever by way of defense of the statute of limitations.

"On July 1, 1889, the Purchasing Committee were, by orders of the Circuit Court of the Unit-

ed States for the Northern District of Ohio, 'duly put in possession of said property as the purchasers at said foreclosure sale (R., 191).'

"Thereupon corporations were formed in Ohio, Michigan, Indiana and Illinois, which, by consolidation with the Wabash Western Railway Company of Missouri, formed the Wabash Railroad Company.

"Prior to the said consolidation the Purchasing Committee duly conveyed to each of said companies the lines of railway within the said respective States,

"'and said defendants or said constituent corporations have been in possession of said property under and in pursuance of said deeds since the date of the execution and delivery thereof.'

"This is an extract from the record of the Wabash Railroad Company in this case (R., 191).

"The agreed statement of facts shows (R., 234, paragraphs 54, 55, 56) that this possession was in pursuance of a plan of reorganization under which all the outstanding prior bonds and coupons were canceled.

"The agreed statement of facts (paragraph 47, R., 232) states—

"'The said Wabash Railroad Company as such grantee took possession of all said property immediately after its said formation by consolidation, on the first day of August, 1889, and has ever since been and still is in possession thereof, under the terms of the said decree of March 23, 1889, and said order of June 18, 1889.'

"It thus follows that after the two pleadings of the cross-petitioners hereinbefore referred to, viz., their original answer and cross-petition, filed January 2, 1889, and the answer and cross-

petition of Charles G. Peters, filed April —, 1889, but before the amended and supplemental pleadings filed in behalf of the cross-petitioners generally, against the Wabash Railroad Company, on which the case was tried and judgment was rendered, which made the Wabash Railroad Company (practically) sole defendant, viz., October 8th, 1889, answer and cross-petition of Henry F. James, filed April 28th, 1899 (R., 89); executors of Maria C. Henry, October 16th, 1891 (R., 92); Wilson H. Pierce, October 20, 1891 (R., 94); Louis G. Hampton (R., 96), February 21, 1893, James, Henry, Pierce and Hampton were not parties to the case until after the proceedings in the Federal court had ended by the delivery of possession to the Wabash Railroad Company. The Wabash Railroad Company had been made a party defendant to this cause, had been averred to be in possession, and substantially the progress of the original cause was arrested and the proceedings ceased as against all other defendants in October, 1889.

"The second supplemental and amended petition of the plaintiff, which made the Wabash Railroad Company defendant, was filed October 16th, 1889 (R., 111); the answer of the Wabash Railroad Company to the cross-petition of William F. Redmond and others, which made the issue so far as that company is concerned, was filed December 11th, 1889 (R., 185-192).

"The answer of the Wabash Railroad Company to the cross-petition of Henry F. James, is to be found at pages 195 to 198 of the Record. It was filed June 2, 1890. The amendment to the answer and cross-petition of the Wabash Railroad Company (pp. 199 to 201) was filed February 11th, 1896.

"The reply of William F. Redmond and others to the answer of the Wabash Railroad Company (R., 210-213) was filed January 4th, 1890. The reply of the plaintiff to the answer of the Wabash Railroad Company (R., 213-215) was filed January —, 1890. The further and additional reply of the plaintiff and cross-petitioners, William F. Redmond and others, to the answer of the Wabash Railroad Company (R., 215-217), was filed January 4th, 1894.

"The reply of the plaintiff and all the cross-petitioners to the amendment of the answer of the Wabash Railroad Company (R., 218-219) was filed March 9th, 1896.

"It thus appears that, with the exception of two pleadings, the entire body of the litigation in this case, so far as the present parties are concerned, viz., the plaintiff, cross-petitioners and the Wabash Railroad Company, was initiated and carried out after litigation in the Federal court had ceased, and after possession had been taken by the Wabash Railroad Company.

"The filing of the second supplemental and amended petition (R., 65), and the amended answer and cross-petition of William F. Redmond and others (R., 85), with the replies, constituted a waiver or abandonment of the claim made against the Receiver or the property in his hands, and the substitution of an effort to subject the Wabash Railroad Company and the property in its hands to liability to pay the debt due to plaintiff and the cross-petitioners.

"This radical change in the pleadings converted this case into an action which in no degree infringed upon or interfered with the powers of the Federal court.

"*Dunlap* v. *Robinson*, 12 O. S., 530.

"*Bank* v. *Telegraph Co.*, 30 O. S., 555.

"*N. Y. Insulated Wire Co.* v. *Westinghouse Electric Mfg. Co.*, 84 Hun., 269.

"See, also,

"*Penniman* v. *Fuller & Warren Co.*, 133 N. Y., 442.

"In the latter case Judge Maynard says, upon page 444:

"'The defendant had a right to serve an amended answer, as of course, and when so served it became the answer in the action and superseded all his former pleadings.'

"The first period in this case, during which it might, perhaps, be fairly objected that the litigation was proceeding during the pendency of the controversy in the Federal court, lasted from January to October, 1889, and the discontinuance of it, if it had been required and carried out in 1889 would have involved a payment of a very small sum by way of costs by the cross-petitioners, but in August, 1889, they became absolutely free to begin and prosecute this litigation against the Wabash Railroad Company without any let or hindrance of the Federal courts, for the reason that all controversies in the Federal court having reference to the liens on this property had ceased.

"From that time the plaintiff and cross-petitioners were free. The only exaction which could have been made of them was the payment of costs. The only exaction that can be made of them now, in consequence of these facts, is the payment of costs. If they were now to discontinue or even be defeated on the ground that they brought their suit, and it was pending dur-

ing the pendency of the litigation in the Federal court, the only consequence would be that they would be compelled to start their action over again. Under Section 4991 of the Revised Statutes of Ohio this can be done at any time within one year after the termination of such suit without any effect of the statute of limitations upon the controversy.

"'*'If, in an action commenced in due time a judgment for the plaintiff be reversed, or the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after such date, and this provision shall apply to any claim asserted in any pleading by a defendant.'

"Certainly a decision that the court has no jurisdiction of the cause is a failure of the plaintiff 'otherwise than upon the merits.'

"The 47th paragraph of the agreed statement of facts (R., 232) avers in so many words that—

"'on or about the first day of July, 1889, in pursuance of orders of the Circuit Court of the United States for the Northern District of Ohio, made and entered June 18, 1889, true copies whereof are hereto attached marked "Exhibit K," and he, the said Receiver, was then discharged, and the said purchasing committee and its grantee have been in possession of said railway property and premises since the said first day of July, 1889. The said Wabash Railroad Company as such grantee took possession of all said property immediately after its said forma-

* The statute has since been amended, by adding after the word "commenced" in line one, the words, "or attempted to be commenced."

tion by consolidation on the first day of August, 1889, and has ever since been and still is in possession thereof, under the terms of the said decree of March 23, 1889, and said order of June, 18, 1889.'

"The cases relied on by Mr. Taggart to sustain his proposition are fatal to him, especially the case of

Heidritter v. *Elizabeth Oil-Cloth Co.*, 112 U. S., 294.

"As Mr. Taggart himself states it, the case has no application against, but is rather in our favor. On page 70 of his brief Mr. Taggart says:

" 'The real question was as to their validity;' (that is the validity of the proceedings in the state court) 'as against the proceedings had in the United States Court, in view of the fact that these proceedings were carried on at a time when the Federal Court had the premises within its exclusive jurisdiction by having possession of the same.'

"But in the present case the jurisdiction of the Federal Court over the proceedings ceased in July, when possession was delivered to the Purchasing Committee, or, at latest, in August of 1889, when possession was taken by the Wabash Railroad Company, which thereafter continued and still continues in possession of the same.

"Again, Judge Matthews says, in a portion of his opinion which is italicized on page 71 of Mr. Taggart's brief:

" 'In either view, and for either purpose, the court had taken possession of the property itself, and that possession was necessarily exclusive. The *res* was thereby drawn into the exclusive jurisdiction and dominion of the United States;

and, for the purposes of that suit, it was, at the same time withdrawn from the jurisdiction of the courts of New Jersey. *Any proceeding against it, involving the control and disposition of it, in the latter, while in that condition, was as if it were a proceeding against property in another state.'*

"But the proceedings against the property, after possession was taken by the Wabash Railroad Company, which were begun in 1889, and upon which there was no action whatever of the court, until the decision of Judge Pugsley and the judgment in the Court of Common Pleas, at the September Term, 1894, did not involve the control and disposition of the property while in the exclusive jurisdiction and dominion of the United States, but after the exclusive dominion and control of the United States had been parted with.

"Again, Judge Matthews, as quoted by Mr. Taggart, on page 72 of his brief, refers to the case of *Wiswell* v. *Sampson,* 14 Howard, 52, and gives as a reason for excluding the exercise of any jurisdiction on the part of the state (although it did not interfere with the position of the receiver), that—

"'The property is a fund in court * * * to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.'

"To which Judge Matthews adds:

" 'It is sufficient to say that the sale under the judgment, *pending the equity suit*, and while the Court was * * * in possession of the estate without the leave of the Court, was illegal and void.' (Italic's Gov. Hoadly's.)

"It is manifest that this has no application whatever to the case in hand, for no sale has as yet taken place and the equity suit was disposed of in August, 1889. Judge Matthews proceeds:

" 'And the same conclusion must prevail here, for although the sale under the judgments in the state court was not *made* until after the property had passed from the possession of the District Court by delivery to the purchaser at the sale under the decree, yet, the initial step on which the sheriff's sale depended—the commencement of the proceedings to enforce the mechanic's lien, asserting the jurisdiction and control of the State Court over the property sold—took place when that property was in the exclusive custody and control of the District Court: and by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. * * * The substantial violation of the jurisdiction of the District Court consisted, in the control over the property * * *.'

"But this has no application to the case in hand, because, while there was, perhaps, a threatened invasion of the jurisdiction (not the possession), of the Federal Court between January and August, 1889, it resulted in nothing. It was not until October, 1889, when the Wabash Railroad Company was brought into the Court of Common Pleas that this invasion amounted to anything more than a possible contempt, verbal or threatened, of the Federal Court, or to a state of facts which might have resulted in a

judgment for costs against the plaintiff and cross-petitioners.

"The same is true of the decision of Mr. Justice Gray of the Supreme Court in—

"*Porter* v. *Sabin*, 149 U. S., 473.

"Mr. Justice Gray (as quoted by Mr. Taggart on page 75 of his brief [Italics ours]):

"'*Until* the administration of the estate has been *completed* and the receivership *terminated*, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other.'

"We admit this proposition as fully as it is stated. It applies directly to this case in this way. The administration of the estate was completed and the receivership terminated by the delivery of the property out of the hands of the Receiver, Gen. John McNulta, to the Purchasing Committee in July, 1889, and by them to the Wabash Railroad Company, on the 1st day of August, 1889. If '*until* the administration of the estate had been *completed* and the receivership *terminated*,' the 'exclusive jurisdiction and control' of the Federal Courts could be disturbed by litigation in the State Courts, then, surely, after termination of the receivership, the State Courts resumed their power.

"Up to that date the Court of Common Pleas of Lucas County had not assumed to deal with any part of the estate within the exclusive jurisdiction and control of the Federal Courts. What had been done was by parties who supposed the law to be otherwise, and that they were safe in proceeding, subject to the possession of the Receivers, and who had withdrawn any claim as

against the Receivers, and sought relief only subject to the rights of the Receivers, but such proceedings had not ripened into a condition entitling the plaintiff or the cross-petitioners to relief in the State Court, when the Federal Court voluntarily, without any intervention of the plaintiff or the cross-petitioners, surrendered the property and restored it to the mass of property of the State, as to which the jurisdiction of the State Court is complete.

"If the petition and answer and cross-petition had been filed as new and original pleadings against the Wabash Railroad Company on the date they were interposed in this suit, there is no question whatever that the point which Mr. Taggart now seems to make would be vain and fruitless, because after the discharge of the Receivers and the delivery to the purchasing committee and by them to the Wabash Railroad Company, under the proceedings in the Federal Court, it became proper for the plaintiff and cross-petitioners to begin their actions, and they did begin them, by an amended answer and cross-petition, making the Wabash Railroad Company defendant, upon which that company answered to the merits without suggesting a want of jurisdiction.

"The proposition that want of jurisdiction was pleaded by it, because its answer recited the previous history of the case, amounts to nothing. The Wabash Railroad Company was within the jurisdiction of the court, unless it be held that when a party has taken title under a Federal proceeding, to which others were not parties, it continues immune forever against the prosecution of the rights of those others by independent action. And, finally, the whole debate seems to

be closed by one of the authorities cited by Mr. Taggart, on page 75 of his brief, namely:

"*Attleborough Nat. Bank* v. *Northwestern Mfg. & Car Co.*, 28 Fed. Rep., 113.

in which Judge Nelson, sitting in the Circuit Court for the District of Minnesota (Mr. Justice Miller concurring), says [Italics ours]:

"'To entertain this suit not only involves a review of the judgment of the district court of the state, but is a direct interference with property in *custodia legis*, by authority of a court having jurisdiction over the parties thereto and the subject-matter of the controversy. Such interference can not be tolerated. *After a court of competent jurisdiction, having possession of the res, has let go its hold, a suit could be brought in another court of concurrent jurisdiction, in which it might be the duty of the court, if fraud was alleged and proven in obtaining a decree, to prevent the parties who obtained it, and who are before the court, and claim the property by virtue of a sale with knowledge of the fraud, from appropriating the property. Sahlgard* v. *Kennedy*, 2 Fed. Rep., 295, cited by complainant's counsel, and decided in this court, was of that character; also *Johnson* v. *Waters*, 111 U. S., 640.

"And again the question came directly before the Supreme Court of the United States in *Shields* v. *Coleman*, 157 U. S., 168, in which, at page 178, Mr. Justice Brewer, reporting the unanimous opinion of the Supreme Court, says [Italics ours]:

"'While the validity of the appointment made by the Circuit Court on June 6, 1892, can not be doubted, yet, when that court thereafter accepted a bond in lieu of the property, *discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was*

made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property.

" 'It is true that the Circuit Court had the power to thereafter set aside its order accepting security in place of the property and enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill so as to invalidate action taken by other courts in the meantime. *Accepting a bond and directing the receiver to return the property to the owner was not simply the transfer of the possession from one officer of the court to another.* The bond which was given was not a bond to return the property if the judgment to be rendered against the contractors was not paid, but a bond to pay whatever judgment should be rendered. It was, therefore, in no sense of the term a forthcoming bond. *The property ceased to be in custodia legis. It was subject to any rightful disposition by the owner or to seizure under process of any court of competent jurisdiction.'*

"The only plaintiff in error is the Wabash Railroad Company, which was made party defendant as already shown after the receivership had terminated, and when it was in sole and exclusive possession of the railroad property unhampered by any Receivership or other control of the Federal Courts. It would, under these circumstances, be absurd to reverse on the ground that the Court of Common Pleas and Circuit Court had no jurisdiction because of the proceedings pending in the Federal Court before the Wa-

bash Railroad Company was a party to the case, or even existed as a corporation. Such a proceeding in error can only be brought by a party damnified or injured by the decree of the Circuit Court. If we had proceeded to take the decree against the parties originally made defendants; made defendants during the period when the Receivers of the Federal Court were in possession, there might be some ground for *their* petition in error. They do not complain. But for a party made defendant at a later date and practically becoming sole defendant after delivery of possession by the Receivers of the Federal Court to sue out a writ of error would be equivalent to permitting any stranger or person not interested to reverse a decree upon a complaint which might have been made by others, but the reason for which had passed away before such stranger became connected with the cause."

NONE OF THE HOLDERS OF THE EQUIPMENT BONDS WERE PARTIES TO THE RECEIVERSHIP OR FORECLOSURE SUITS.

It is not claimed that any of the holders of the equipment bonds in question were parties to the case begun in May, 1884, by the Wabash, St. Louis & Pacific Railway Co. in the Federal Circuit Courts along the lines of the road, setting up its insolvency and securing the appointment of receivers, or to any of the suits or proceedings in foreclosure subsequently brought either in that court or in state courts and removed to the Federal courts and thereafter consolidated; and, moreover, the record shows that none of such bondholders were so made parties.

The principle upon which the Ohio courts proceeded in holding that the owners of these equipment bonds obtained an equitable lien upon certain of the railroad properties, etc., was, that under the Ohio consolidating act and the agreement of consolidation of 1865, the railroad property was transferred upon the condition that the grantee should protect, in other words, pay the debt represented by those bonds, to their holders, and that the consolidation and agreement were matters of public record.

The lien was available to the holders of the bonds against all persons deriving title from the consolidated company (*Compton* v. *Ry. Co.*, 45 O. S., 592). This court, as before stated, recognized the validity of the judgment in that case (*Compton* v. *Jesup*, 167 U. S., 1). The judgment in the present case is the same in principle as that in the Compton case, so far as the Ohio courts are concerned. The result is that the equipment bonds were, in 1865, secured by a statutory mortgage which was then and still is as effectual and binding as if it had been executed and delivered as a mortgage in the usual form by the railroad company itself. So far then, as concerns the question whether the Ohio courts gave due effect to the proceedings in the Federal courts, the defendants in error are entitled to have the question considered the same as if the bonds had been secured by an ordinary railroad mortgage, save only that no trustee was named through whom the bondholders could be represented.

In *Pittsburgh, etc., Ry. Co.* v. *Loan & Trust Co.*, 172 U. S., 493, it was held that where railroad mortgage bonds were purchased, pending foreclosure proceedings upon other mortgage instruments of the same railroad company but the trustee of the mortgage securing the bonds so

purchased was not made a party to such foreclosure proceedings, neither the trustee nor those holding the bonds were bound by the decree; and, on the contrary, such purchaser of the bonds acquired a good title to them and also the right to claim the benefit of the mortgage securing them. In that case the purchaser of the bonds acquired them while the road was in the hands of receivers.

If we compare the facts in that case with the facts in the present case, there can be no more room for objection here than was found there, that due respect was not paid by the state court to the Federal court. Here the action was commenced in the state court prior to the Federal proceeding, while there the purchase was made pending receivership. Here the state case was allowed to slumber until the Federal receivership and foreclosure proceedings were ended, the right to claim the benefit of the statutory mortgage being postponed until the time of the judgment of the Lucas Common Pleas in 1894; while there the benefit of the mortgage securing the bonds purchased pending receivership was subsequently claimed and reduced to judgment in the state courts. True, as pointed out by Judge Hoadly, some pleadings were filed in this case shortly before the receivership was lifted; but what difference, so far as regards due effect to be given to the decree of a Federal court, is there between acquiring title to railroad mortgage bonds pending receivership and foreclosure under other mortgages upon the same road, with the right to enforce the mortgage securing the purchase bonds, on the one hand, and the mere filing of pleadings in a state suit begun before the Federal suit, with the right and intent after expiration of the Federal receivership to enforce the lien securing the bonds described in

the pleadings so filed, on the other? The state court is not brought into activity in the one case any more than in the other; it is merely the acts of individuals in both cases. But there remains the ultimate point of the decision in *Pittsburgh, etc., Ry. Co.* v. *Loan & Trust Co., supra,* which is common to both that case and the one at bar: it is, that the failure to make either the trustee of the mortgage securing the bonds purchased or the bondholders themselves parties to the foreclosure and receivership proceeding, was to exonerate him as well as the bondholders, from any binding effect respecting the suit and receivership. Hence it can not be said here, any more than it could there, that the bondholders in asserting their lien after the lifting of the Federal receivership, failed, or that the state courts in upholding the lien, failed, to give due effect to the title of the plaintiff in error derived under the Federal decree of foreclosure.

As said by this court in *United Lines Tel. Co.* v. *Boston, etc., Trust Co.*, 147 U. S., 431, at 448:

> "It is well settled that a sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings."

See also:

Stewart v. *Johnson*, 30 O. S., 24, 30.

It should not escape notice that the late Mr. Justice Jackson, when a circuit judge and sitting with Judge Gresham, in passing upon the question of Compton's remedy after securing his judgment in the Ohio Supreme Court and being made a party to the Jesup case in the United States Circuit Court, had occasion among other things to say:

"It is also clear that Compton's suit and decrees therein did not in any way prevent or interfere with the foreclosure proceeding in this court under mortgages prior, as well as subsequent in dates and right to his equipment bonds. Notwithstanding these foreclosure proceedings, Compton after obtaining his decree in the Supreme Court of Ohio, could have proceeded with the execution thereof, by a sale of the Ohio property covered by his lien. This court declined to restrain him from so doing. He could have executed his decree as against the road in Ohio, without interfering with or disturbing this court's custody and possession of the same * * *." (R., 707).

It is also to be observed that in January and February, 1885, the Central Trust Company and James Cheney, trustees under a certain mortgage, instituted suits for foreclosure in the state courts of six states, against the Wabash, St. Louis & Pacific Railway Company and others (R., 228, paragraph 30). No objection was made to such foreclosure, although at this time the road was in the hands of receivers appointed by the Federal courts in those states, but the actions were removed by the defendants to the Federal courts and consolidated with the receivership action.

We think it safe to say, that all the decisions cited by counsel for plaintiff in error on the subject of alleged failure of the Ohio courts to give due effect to the proceedings pending in the Federal court, involved instances of judicial action during actual possession of property in courts through receivers, or else were cases where the persons litigating in other courts were also parties to

the receivership proceedings. We think the argument for plaintiff in error fails to observe the distinction between judicial action concerning property then in the actual custody of other judicial tribunals, and judicial action taken after such custody has ceased; fails also to note the distinction between judicial action in effect an aggression upon the jurisdiction of a co-ordinate court, and mere action of parties, like filing pleadings in a pending suit, without intent to urge or in fact urging judicial action therein until after jurisdiction of the other tribunal has ended.

Indeed, the defendants in error might have pressed their cause to judgment in the state court prior to the foreclosure sale and transfer of the property to the purchasers; certainly this is true if they had thereupon desisted from carrying their judgment into execution until after the Federal proceedings had ended.

Central National Bank v. *Stevens*, 169 U. S., 432.

United States v. *Eisenbeis* (C. C. A.), 112 Fed. Rep., 190, 196-7.

Gates v. Bucki (C. C. A.), 53 Fed. Rep., 961, at 968.

As said by this court in *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S., 294, at 304 (a case erroneously, we think, relied on so much by counsel for plaintiff in error):

> "But it is to be understood, as a qualification of what has been said, that we do not mean to decide that the plaintiffs in the actions in the State court might not, without prejudice to the jurisdiction of the District Court, commence their actions, so far as that was a step required by the mechanics' lien law of New Jersey, for the

mere purpose of fixing and preserving their rights to a lien, provided, always, they did not prosecute their actions to a sale and disposition of the property, which, by relation, would have the effect of avoiding the jurisdiction of the District Court under its seizure."

If we were to ignore the distinctions thus pointed out, there would be no room even for the settled doctrine that two suits for the same cause of action between the same parties, can be brought and maintained at the same time, one in a Federal court and the other in a state court.

Stanton v. *Embry, Admr.*, 93 U. S., 548, 554, 2d syl.

Insurance Co. v. *Brune's Assignee*, 96 U. S., 588, 592-3.

Gordon v. *Gilfoil*, 99 U. S., 168, 178.

Beekman v. *Hudson, etc., Ry.* Co., 35 Fed. Rep., 3, 10,

holding, that where trustees of a mortgage for bondholders were suing to foreclose in a state court, and refused at the request of a bondholder also to sue in the Federal court, the bondholder having made such request might himself sue for foreclosure in the Federal court.

Weaver v. *Field*, 16 Fed. Rep., 22, of which the syllabus is:

"The pendency of a suit in the courts of a state for the foreclosure of a mortgage will not bar a suit in this court between the same parties for the foreclosure of the same mortgage," citing *Stanton* v. *Embry, supra.*

THE POSSESSION AND EXCLUSIVE CONTROL OF THE WABASH PROPERTY ENDED IN THE UNITED STATES COURTS WHEN THE PROPERTY WAS CONVEYED BY THE MASTER COMMISSIONERS TO THE PURCHASING COMMITTEE AND THE RECEIVERS WERE DISCHARGED.

This heading has already been discussed under I., pp. 18 to 28, *supra*.

III.

THE ADELBERT COLLEGE AND THE CROSS-PETITIONERS, DEFENDANTS IN ERROR, WERE NOT PARTIES TO THE HAM SUIT; SAID SUIT WAS NEVER A REPRESENTATIVE SUIT, AND THE RESULT OF SAID SUIT IS NOT A BAR TO THE ASSERTION AND VALIDITY OF THE CLAIMS OF DEFENDANTS IN ERROR.

The same claim made in this behalf by plaintiff in error, was made by it and its predecessors in the Compton suit; but the contention was disallowed, from the master commissioner all the way to this court. See Record, p. 692, where it is said by the master commissioner, in the course of the opinion:

> "The dominant fact, as a conclusion both from the evidence and the law, is that Compton was never either an actual or *quasi* party to the record of the Tyson-Ham suit in the Federal courts."

For similar finding in circuit court decree, see R., 529. For opinion of Judges Jackson and Gresham, see R., 704.

The circuit court of appeals had indeed some doubt as to the remedy open to Compton to enforce his rights, but it had no doubt that he was not concluded by the Ham suit

(*Compton* v. *Jesup*, 68 Fed., 263). At p. 285 it is said the decree in the Tyson or Ham suit did not bind Compton, as the bill made only those equipment bondholders parties who chose to come in and contribute to the expenses of the suit, and Compton did not do either. And at pp. 285-6 the reasons of the judges of the court below why the Ham suit did not bind Compton are stated to be (1) that he was not a party to it; (2) that it was not a representative suit, and (3) that it was not pleaded in bar, and are adopted by the court.

This question must also have been presented to this court, since, in the statement of facts in Compton's case, it is said that the appeal presents, among others, the question:

> "3d. Was Compton estopped to assert a lien for his bonds, by a decree of the United States Circuit Court for Indiana, denying it for bonds of the same kind in what was claimed to be a representative suit?" *Compton* v. *Jesup*, 167 U. S., 1, 4.

It is sought to avoid the effect of these holdings, that the Ham suit was not a bar to the Compton suit, by contending that the pendency of the Ham suit was not pleaded in bar of the Compton suit, whereas it is claimed that it was pleaded in bar to the claims of the defendants in error. This contention is answered, however, not merely by saying that the Ham suit was not a representative suit, and therefore it is immaterial whether it was pleaded or not, as, not being representative, it could be no bar to the rights of these defendants in error not parties to it, but by the further considerations that in some stages of the Compton suit the Ham suit was pleaded and

that in the initial stages of the case at bar the Ham suit was not pleaded by the predecessors of the plaintiff in error.

THE HAM SUIT NEVER WAS A REPRESENTATIVE SUIT.

At the risk of repetition, we shall mention the distinctive features of the various bills in the Ham case, which seem to us to indicate clearly that it was not a representative suit at its inception and never because such, in the sense that it could estop persons who did not become parties to it.

The original bill was filed in the state court in Indiana in May, 1878:

> "The plaintiff David J. Tyson, saying herein for himself and other bondholders similarly situated, who may deserve to come into this suit and contribute to the expenses thereof, complains of the defendants, the Wabash Railway Company,"

and various trustees of mortgages (R., 404).

The plaintiff mentions the $600,000 equipment bonds, and says that he is the holder and owner of "divers of said equipment bonds together with all the coupons unpaid belonging thereto issued by the Toledo and Wabash Railway Company," and says that "such indebtedness is in equity fully entitled to share ratably with the holders of the consolidated bonds precisely as though they held the new bonds in exchange for the said equipments, whereas the said Wabash Railway Company wholly refused to recognize the said equipment bonds in any manner, or to make payment thereon" (R., 406).

Plaintiff, after alleging an unsuccessful refunding scheme to which the equipment bondholders had not consented, and charging negligence on the part of trustees of the mortgages (R., 414), prays (R., 416) for foreclosure of the mortgages, appointment of a receiver, injunction, removal of the mortgage trustees, and an account; "that a decree may be enrolled declaring the right of such equipment bonds to share in the security of said consolidated mortgage."

In May, 1878 (R., 423-4), certain holders of equipment bonds, referred to in the bill of complaint, joined in the suit. They allege, among other things (R., 424), that the equipment bonds were intended to be secured by the consolidated mortgage. They pray, among other things (R., 425), a foreclosure of the consolidated mortgage; that "an account may be taken of the amount due to your petitioners and to the other holders of the bonds of the said Wabash Railway Company, and that the sums so found to be due may be declared liens upon said property."

In June, 1878 (R., 429), the complainants filed an amended bill of complaint (R., 430) "on their own behalf as well as on behalf of all others having like interests who may come in and contribute to the expenses of and join in the prosecution of this suit." They recite the issue by the Toledo & Wabash Railway Company in 1862 of the $600,000 of equipment bonds and their purchase of part of said issue (R., 435). They allege, among other things, the failure of directors of the Toledo, Wabash & Western Railway Co. to provide for the manner of exchanging these equipment bonds for the bonds of the consolidated mortgage (R., 436). They recite (R., 438, top) the organization of "a corporation duly formed under

the statutes of the several states of Ohio, Indiana and Illinois, by the consolidation" of the Toledo & Wabash Railway Company and others. This consolidation of 1865 is also recited in an earlier part of the bill (R., 433), with the statement that the "Wabash & Western Railway Company has dissolved, and is not now a corporation."

After repetition and amplification of much of the matter contained in the two previous bills, they pray, among other things (R., 448), "that an account may be taken of the amount due to your orators and to the other holders of the bonds herein described, and that the sums so found to be due may be declared liens upon said property," and in default of payment, for a sale.

All of the foregoing had been filed before Compton began his suit. It therefore appears that the facts upon which the lien of the equipment bonds were predicated, namely, the statutes of the states under which a consolidation was had and the constituent corporations dissolved, were recited, and it was alleged that a lien was created before Compton brought his suit. We mention this in rebuttal of the contention of counsel, that the Ham suit was not representative when Compton filed his suit, but became so afterwards.

In July, 1880 (R., 472), the complainants filed a supplemental and amended bill "on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit" (R., 473). They recite (R., 475) the consolidation of 1865, substantially as recited in the amended bill. The prayer of this bill (bot. 493) asks only that the equipment bonds be exchangeable for a like

amount of bonds of the consolidated mortgage, and for other and further relief.

This is the only one of the complainants' bills or amendments which was filed after the Compton suit. It is plain that the character of the Ham suit was not therefore changed in any wise after the Compton suit had been instituted. The facts of the consolidation and lien had been set up before the Compton suit. The Ham suit never purported, from first to last, to be brought for all bondholders, but expressly reserved the right to fruits of the action to those who might choose to come in and contribute to the expense of bringing the suit. There are no differences, then, in the Ham suit before and after the Compton case was filed, to detract from the force of the holdings of the Federal courts in Compton's case, that the Ham suit was not a representative suit.

In *Pugh* v. *Fairmount Gold, etc., Co.*, 112 U. S., 238, 244, it is said:

> "* * * It requires no authority to show that a sale of the mortgaged premises, upon a judgment recovered on a part of the notes secured by the mortgage, does not preclude the holder of other notes secured by the same mortgage from proceeding to foreclose it. A sale on such a judgment * * * would leave the rights of the holder of other notes secured by the mortgage unaffected."

A well-reasoned case is that of *Brooks* v. *Vermont Central R. Co. et al*, 14 Blatch. (C. C. Rep.), 463, where it was held that a plea by a railroad company to a bill for foreclosure by holders of mortgage bonds, that another foreclosure suit by other holders of similar bonds was pending

in a state court, was insufficient, on the ground that the previous suit was not between the same parties or those fully authorized to represent the same parties, in the same behalf and for the same relief. At p. 466 it is said by the learned judge:

> "The suit pleaded was instituted in behalf of all who would come in as complainants. The plea alleges, that it was instituted by the bondholders who joined in it, in behalf of themselves and all other bondholders, without confining it to those who would come in; but those bondholders, clearly, were not agents for the rest, so they could institute a suit for them without they would come in. So, it is to be taken that it was in effect a suit in behalf of the bondholders who did, and all others who would, join in it. There is no doubt but that they could become parties to that proceeding, but they were not obliged to do so. If that suit had proceeded to a decree and an accounting to ascertain the sum due in equity, no one but the orators could present their bonds to be reckoned. If the accounting had been had and a final decree passed without their bonds having been reckoned, they would not have lost their rights. * * * here, each bond is distinct and separate."

In summing up this branch of the case, the learned judge said, at bot. p. 467, and 468:

> "From all these considerations it seems apparent that the suit pleaded was not the suit of the orators. They never brought it, nor joined in it, could not discontinue it, and can not be barred by it."

See, also, *Factors', etc., Ins. Co.* v. *Murphy*, 111 U. S., 738.

We quote in this connection extracts from the brief filed in the Supreme Court of Ohio by the late Governor Hoadly:

> "It has been uniformly held, without exception, as far as we know, that the estoppels of decrees in such suits as the Ham case, only bind those who have accepted the invitation to partake of its benefits by joining in its prosecution, unless there has been general notice given by the Court and an opportunity for them to present their claims, which they did not embrace.
>
> * * * * * * *
>
> "This principle is carried into equity rule 48, prescribed by the Supreme Court of the United States for the government of the Circuit Courts of the United States in equity, which rule, as a matter of course, enters into and binds the parties to the decree in the Ham case.
>
> "Rule 48 is in these words (italics ours):
>
> "'Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly brought before it. *But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.*'
>
> "See, also—
>
> *"Coann* v. *Atlanta Cotton Factory Co.*, 14 Fed. Rep., 4.

"In conformity with the principles of the American rule, Lord Langdale said, in *Powell* v. *Wright*, 7 Beavan, 444, at 449:

"'The court, in conformity with the principles of equity, has adopted a general rule not to dispose of any matter, not to bind any man's interest, or make any declaration of any man's right in his absence.'

* * * * * * *

"'In *Stevens* v. *Brooks*, 22 Wis., 695, it is held that unless the "others similarly situated" elect to come in as parties, they are not entitled to any benefit of a judgment in favor of the plaintiff, nor liable for any part of the expenses of the litigation.'"

Even after the decree in the circuit court, there was no advertisement or attempt to give notice to bondholders to come in and prove their claims. This we insist answers the contention of opposite counsel, that the present holders of equipment bonds would have been entitled to share in the benefits of a favorable decision. These bonds are several obligations. There is, of course, no trustee for bondholders, and the holders of the bonds are scattered throughout the country. It is difficult to see how a bondholder could claim the benefit of a successful decree, when he was never advised and perhaps never knew of its existence.

In opposition to the cases cited by counsel for plaintiff in error, we need add nothing to the concise and excellent statement of Pugsley, J., in his decision, which, so far as relevant to this point, appears on pp. 945 to 948 of the record. He therein shows inapplicable the cases cited by plaintiff in error, which with few exceptions are the cases cited in his present brief, as being either—

(1) Cases where a stockholder sues in behalf of himself and all other stockholders to prevent an *ultra vires* act by the corporation, in which case he represents the corporation, and his suit is therefore a bar to the suit of any other stockholder who would necessarily represent the same rights. This court's equity rule 94 shows very clearly, if it can be necessary to mention the matter at all, that a stockholder can act only through the right of the corporation;

(2) Cases where a tax-payer sues on behalf of a municipal corporation, and therefore is in a situation similar to that of a stockholder suing on behalf of a private corporation; and

(3) Where there are trustees of a mortgage securing bonds, the trustees represent all of the stockholders; that is the idea and purpose of having trustees of mortgages. But in the case at bar there was no mortgage, the lien arising by operation of law alone, and each of the bondholders is entitled to bring a separate suit on his bonds independent of what any other bondholder may do or have done.

If the contention of counsel is correct, Compton could never have maintained his independent suit on his bonds. He would necessarily have had to be a party to the Ham suit. Yet the fact remains that he prosecuted his suit, filing his petition two years after the Ham suit had been begun, and was prosecuting it while the Ham suit was pending. The decision in the Ham case in the circuit court was rendered in April, 1883 (R., 505). Compton got his decree in the common pleas court in March, 1882 (R., 340).

The other horn of the dilemma upon which the Compton suit places counsel for plaintiff in error is, that if Compton could maintain his suit then, although he sued for himself alone, he in fact represented all holders of equipment bonds, and the adjudication in his favor works a *res adjudicata* against the railroad in favor of all holders of equipment bonds.

Ham Suit Pleaded Against Compton.

Jesup and Knox, trustees, filed an amendment to their amended and supplemental ancillary bill, in which they not only pleaded the Ham suit against Compton (R., 615, 617), but alleged (R., 618) as well, that Compton appeared and was represented by counsel on the appeal from the circuit court for the district of Indiana to the Supreme Court of the United States, "and filed arguments and briefs for the sole purpose of sustaining said decree so appealed from," and that he thereby became a *quasi* party to said action, "and is forever barred and precluded by virtue of the decision of the said Supreme Court of the United States * * * from claiming any lien or charge, equitable or otherwise, upon the said railroads and property and appurtenances in Ohio and Indiana."

Humphreys and Lindley, trustees, as amendment to their cross-bill, on December 3, 1888 (R., 620), make the same claim against Compton.

The failure to plead earlier the pendency of the Ham suit as a representative suit against Compton, was not due to want of opportunity. It is true that the Ham suit was dismissed, by decree erroneously entered when Compton began his suit, but the entry setting aside the dismissal was made in July, 1880 (R., 472), and the supplemental

and amended bill was filed at the same time (R., 473). An amendment to this bill was filed as late as January, 1881 (R., 329), and as the railway company evidently contends (since it did not plead the pendency of the Ham suit in the case at bar in its initial answer) that such a defense may be made at any time before judgment, it had every opportunity to plead the pendency of the Ham suit against Compton. But its answer (R., 331-3) makes no mention of the Ham suit, and this answer was filed long before the decision of the United States Circuit Court in favor of the lien of the equipment bonds.

EVEN IF A REPRESENTATIVE SUIT, WHICH IS DENIED, THE HAM SUIT WAS NOT PLEADED IN THE FIRST INSTANCE BY THE PREDECESSORS OF PLAINTIFF IN ERROR.

The answer of the Wabash, St. Louis & Pacific Ry. Co. (R., 55-58), filed (probably) in November, 1883 (R., bot. 58), makes no mention of the Ham suit as a *res adjudicata*, doubtless, because at that time the decision was inimical to the railroad company. The decision in the Ham case was rendered April 9, 1883 (R., 509). At all events, if the claim could be made successfully that the Ham suit is a bar to the maintenance of this suit, such fact should have been pleaded at once; and not having been pleaded, the point is waived.

IF, DESPITE ALL THE FOREGOING, THE COURT SHOULD BE OF OPINION THAT THE HAM SUIT WAS A REPRESENTATIVE SUIT, ITS BINDING EFFECT AGAINST THESE DEFENDANTS IN ERROR COULD APPLY ONLY TO THE INDIANA DIVISION.

The decree of the Ohio circuit court shows that the plaintiff and cross-petitioners relinquished all claim to lien upon the Indiana portion of the road, and "expressed the desire to confine their prayer and to limit the effect of the judgment of this court to the railway property and franchises within the limits of the state of Ohio and the jurisdiction of this court" (R., 9). In *Compton* v. *Jesup, supra*, one of the questions certified by the Circuit Court of Appeals to this court, was as to whether the decree in the circuit court of the United States for Indiana, declaring that Compton had only a right of redemption and not of sale, from which decree he had taken no appeal, constituted a *res judicata* as to him in his appellate proceedings from the Federal circuit court of Northern Ohio. It was held that it did not (167 U. S., 1, 36), and that its effect must be limited to the portion of the road in Indiana and in the jurisdiction of the Indiana court.

CONCLUSION.

We are in doubt as to whether it is either incumbent upon us or appropriate at this stage of the case, to discuss anything relating to the enforcement of the judgment complained of herein. If we are right in our belief either that the motion to dismiss this writ of error should be allowed, or that the propositions urged on behalf of plaintiff in error are without merit, then, as it seems to

us, the judgment of the Ohio Supreme Court in this case does not differ in validity from the judgment rendered by the Ohio Supreme Court or the judgment rendered thereon by this court in the Compton case. It is true that the learned justice announcing the opinion in that case made an expression in the course of his opinion (p. 34) which would indicate that he thought no holders of equipment bonds except Compton would have any right to enforce their lien. We have at great length in this brief pointed out decisions of this court, which seem to us clearly and indisputably to establish the right of these defendants in error to enforce their lien. It does not seem to us that it was necessary to the establishment of Compton's rights to make any ruling, and we do not understand that any was intended to be made, concerning the rights of other holders of the same class of bonds, like the defendants in error. It ought to follow, we submit, that the rights of defendants in error should be determined upon the merits of their particular claims, and not upon any "apprehension" of counsel for the railroad company, that if Compton's claim were allowed other persons having exactly similar claims might also ask to have them allowed.

It is to be observed, further, as already shown in the statement (p. 9, *supra*), that Compton is a party to this cause, and that the judgment of the Lucas County Circuit Court, affirmed by the Ohio Supreme Court in this case, made express reference to the judgment theretofore obtained by Compton, and also express provision that his recovery, no matter where or how made, should be—

> "without disparagement or prejudice to the claim of the said plaintiff and the said cross-

petitioners, that his said right extend no further than to divide proportionately with them the proceeds of any sale of said railway property and franchises, without prejudice to the right of the Wabash Railroad Company to claim that said Compton has no interest in said premises except an equity to redeem the same from the lien of said mortgages on terms prescribed in a decree on (of) the Circuit Court of the United States and now pending in the Supreme Court of the United States.

"The object of this reservation of this decree is to save to the said Compton as well as to the said plaintiff and cross-petitioners, and to the Wabash Railroad Company as against said Compton, all their rights as between themselves in the premises" (R., 11).

Compton has practically acquiesced in this judgment, because he has never taken any proceedings in error to the Ohio Supreme Court, where, as before said, the judgment was affirmed. The justice of this explanation, if not modification, of the first Compton judgment in the Ohio Supreme Court, is obvious. It in terms permits both Compton and defendants in error to recover alike upon instruments identical in every particular, against the property in Ohio which is charged with the lien securing those instruments alike. When we consider the present case and the date of its commencement, the date of its trial, the parties to it, in connection with the actual notice and means of knowledge touching its pendency which all persons interested in the Wabash properties or their sale and purchase had, as pointed out in this brief, it is hard to see why these defendants in error should not be

accorded the same rights that have been extended to Compton. No distinction in this regard is pointed out in the brief for plaintiff in error, and, indeed, we do not know that any claim in this respect will be made. But we feel justified in saying this much in view of what we conceive to have been a mistaken impression of the learned justice who wrote the opinion in the Compton case.

Another observation to be made upon the judgment of the Ohio courts in this case is in reference to the portion just quoted, which pays special deference to the proceedings and decree of the United States Circuit Court. It is difficult to conceive of how the state courts could in any other way have done justice to Compton and the defendants in error, as holders of a class of securities identical in all respects, and at the same time have given due effect to the decree and proceedings of the United States Circuit Court.

We submit that the motion to dismiss the writ of error should be allowed; or, if that can not in the opinion of the court be done, that the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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Of Counsel.

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SUPREME COURT U. S.

Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 40.

THE WABASH RAILROAD COMPANY, *Plaintiff in Error*,

vs.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, et al., *Defendants in Error*.

In Error to the Supreme Court of the State of Ohio.

PETITION FOR RE-HEARING.

JOHN W. WARRINGTON,
JOHN C. F. GARDNER,
MURRAY SEASONGOOD,
Counsel for Defendants in Error.

THOMAS B. PAXTON, JR.,
Of Counsel.

THE BARCLAY PRINTING COMPANY, 1019-1029 Elm Street, Cincinnati, O.

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THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, et al., *Defendants in Error*.

In Error to the Supreme Court of the State of Ohio.

PETITION FOR RE-HEARING.

To the Supreme Court of The United States:

Your petitioners, the defendants in error in the above entitled cause, respectfully pray for an order directing a re-hearing of said cause, with a view of this Court specifically directing that the judgment of the Supreme Court of Ohio be modified, instead of reversed, in substance and effect as follows: that said Court shall affirm so much of the judgment of the Circuit Court for Lucas County, Ohio, as finds and adjudicates the rights of these defendants in error and each of them as against the property and parties in said cause, as set forth in the judgment entry (R. 5, et seq.), respecting the equities of the cause and right of recovery,

the ownership and the lien of the equipment bonds, and the sums due thereon to the parties respectively with interest and costs, and shall reverse the judgment of said Circuit Court so far as it directs a seizure and sale of the property held by the plaintiff in error in Ohio and affected by such lien, and limit the rights of the defendants in error to recovery on such modified judgment in the Federal Circuit Court, found by this Court to have jurisdiction of the property.

The grounds of this petition are:

First,—The doctrine announced against the defendants in error, is one of present absorbing interest and grave importance, as well as far-reaching in its effect; and applied to a case brought to issue in a State court prior to the commencement of any action in a Federal court, is novel and, we think, affords reasonable excuse for the failure of the argument of counsel for defendants in error, as such argument did fail, to anticipate the real grounds which have led to the decision.

Second,—The commencement in the State court of the Adelbert College case, looking to the ultimate seizure and sale of the property to enforce the lien set up, and the filing of the answer therein prior to the beginning of the receivership proceedings in the Federal Circuit Court, seemed to us to be so far within the settled rule of decision as to render argument in support of the rights of that particular defendant in error unnecessary. It is submitted, with deference, that its rights do not seem from the opinion to have been specially considered by the court.

Third,—The defendants in error other than the Adelbert College, having, as holders of bonds of the same class, come into the case as cross-petitioners after the Federal receiver-

ship, are to be treated the same as if they had been made co-plaintiffs with the Adelbert College at the commencement of its case.

Fourth,—The prior jurisdiction of the State court can not have been waived, either because the property was not taken into its possession, or because the predecessor of plaintiff in error chose afterward to have its property placed in possession of the Federal court, at least so far as concerns the power of the State court to hear and determine the rights of the parties respecting the validity and ownership of the equipment bonds and of the lien alleged; otherwise actual seizure would be necessary to give jurisdiction in every case.

Fifth,—It is manifestly appropriate, where a lien is created as the lien of these equipment bonds was under State statutes, that the State courts should construe those statutes to the extent at least of passing upon the rights of the parties and the lien they claim.

This is strengthened by the facts:

(1) That for want of requisite diversity of citizenship, this cause could not be removed to the Federal court (146 U. S. 355, at 356); and,

(2) That the complainants in the Federal court did not see fit to avail themselves of section 8 of the Act of March 3, 1875 (1 U. S. Comp. Stat. 1901, p. 513), which prescribes a mode through special service or publication, for bringing in and binding absent lienors, wherever it is sought "to enforce any legal or equitable lien upon * * * real or personal property." There is no pretense that the mode so provided was in anywise observed in the Federal receivership and foreclosure case.

Sixth,—The large amount involved, the time that would

be added to that already consumed in this case, the expenses borne and to be incurred, can not fail to impress the Court with the importance of the cause and of the need of bringing it to a speedy end; and although it is stated in the opinion that if defendants in error pursue their remedy in the Federal Circuit Court, that court "doubtless will consider the decisions of the State courts on questions of State law with the respect which the decisions of this Court require" (p. 12 top), yet there are decisions of this Court showing that the defendants in error, if unaided by a judgment of the State court, will be met with persistent opposition as to the binding effect of the decisions of the State court.

Seventh,—Modifying and limiting the judgment as requested, there can be no rational distinction stated between the right now sought to be enforced and the principle of the Compton case (167 U. S., 1), sustaining Compton's right upon the very class of bonds here involved, notwithstanding the decision in the Ham case (114 U. S. 587).

Eighth,—The portion of the opinion holding that "This sweeping language of the decree, colored as it is by the last paragraph quoted, with its reference to claims which have liens prior in right to the mortgages, must be held to include claims under the equipment bonds" (p. 9), is consistent, we think, with according to defendants in error the privilege of having their rights found and reduced to judgment in the State court, subject to enforcement in the Federal Circuit Court.

Ninth,—The questions and difficulties stated in the opinion (p. 11) would all be avoided in the present case by modification of the judgment of the Supreme Court of Ohio as herein requested.

The petitioners respectfully urge a consideration of

the reasons stated and citations given below, wherein it is sought more fully to support the grounds above mentioned; and they pray that the cause be set down for re-argument before the court, upon some day by it to be appointed.

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THOMAS B. PAXTON, JR.,
Of Counsel.

We certify that, in our opinion, the foregoing petition for re-hearing is well founded.

JOHN W. WARRINGTON,
JOHN C. F. GARDNER,
MURRAY SEASONGOOD,
Counsel for Defendants in Error.

THOMAS B. PAXTON, JR.,
Of Counsel.

REASONS AND AUTHORITIES SUBMITTED IN SUPPORT OF THE PRAYER FOR RE-ARGUMENT.

First Ground.

If what we have said in the first ground is not obvious, its correctness will, we think, be made plain by the authorities cited and commented on below.

There can be no question of the power of this court to modify the judgment of the Supreme Court of Ohio (1 U. S. Comp. Stat. 1901, Sec. 709, page 575, last par.).

Second Ground.

The opinion states the fact that the Adelbert College commenced its action in the State court prior to the beginning of the receivership proceedings in the Federal court and

also states the nature of the Adelbert College case: we think these facts, and the further fact that the answer therein was filed prior to the Federal proceeding, are entitled to special consideration as regards the question of modification of the judgment of the Ohio Supreme Court.

Mr. Justice Moody states, p. 4:

"The suit was begun on April 28, 1883, by Adelbert College alone, which was the owner of two of the equipment bonds, each of the value of $500, and prayed for the decree, which, with some variations, not material to be stated, was finally given."

The decree provides for seizure and sale of the property (R. 10, bot.), and so characterizes the nature of the action as originally brought.

As we understand the settled rule of decision of this Court, it was not necessary in order to vest the State court with jurisdiction in the Adelbert College case to hear and determine the questions which might arise in the course of the proceedings, that the property should have been actually seized and taken into its possession prior to the commencement of the receivership proceedings in the Federal court. Assuredly we are well within that rule when we ask only, as we now do, that the judgment of the State court shall be allowed to stand, in so far as it adjudicates the rights of the parties to the lien of their bonds and the amounts due thereon.

In Peck et al. vs. Jenness, 7 How. 612, at 624, bot., it was said:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the

right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity."

In Farmers' Loan, etc., Co. vs. Lake, etc., Rd. Co., 177 U. S. 51, at page 61, after stating a phase of the rule touching possession of the *res* and the power of the court in respect thereto, states:

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to Federal and State courts. Peck vs. Jenness, 7 How. 612; Freeman vs. Howe, 24 How. 450; Moran vs. Sturges, 154 U. S. 256; Central Bank vs. Stevens, 169 U. S. 432; Harkrader vs. Wadley, 172 U. S. 148."

In Wallace vs. M'Connell, 13 Pet. 136, at 151, it is said:

"The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, that right could not be arrested or taken away by any proceedings in another Court. This would produce a collision in the jurisdiction of Courts, that would extremely embarrass the administration of justice. * * * . The rule must be reciprocal; and where the suit in one Court is commenced prior to the institution of proceedings under attachment in another Court, such proceedings can not arrest the suit; and the maxim qui prior est tempore, potior est jure, must govern the case."

Many other familiar decisions, both of this Court and the Federal circuit courts, might be adduced if it were neces-

sary, to show the consensus of judicial opinion to be as thus stated. We can not believe that it is intended to change this rule. It is respectfully submitted that the Congress itself could not under the Federal constitution take away jurisdiction of a State court so obtained, any more than a State legislature could sweep away jurisdiction of a Federal court obtained in like manner.

Third Ground.

The jurisdiction so vested in the State court of the case of the Adelbert College, applied to and embraced the other defendants in error as holders of bonds of the same class and rank. Where persons come into a suit after its commencement, their rights relate back to the beginning of the action, and are treated as if the parties had been made plaintiffs originally.

In Richmond vs. Irons, 121 U. S. 27, bot. 54, Justice Matthews in the course of the opinion said:

"Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such a claim then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stock-holder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a co-complainant."

In Stewart vs. Dunham, 115 U. S. 61, 64, it is said that where a bill has been filed by original complainants on behalf of themselves and all creditors choosing to come in and share the expenses of the litigation, the filing of the original bill is what gives the court jurisdiction, and whether the

creditors come into the suit as co-complainants or appear before a master and set up their claims is immaterial, as their right to appear is fixed by the jurisdiction acquired on the filing of the original bill.

In the case at bar there can be no question of the right of the cross-petitioners to come into the Adelbert College suit, because the court permitted them to do so, and its action in this respect is not and can not be the subject of review here. So we respectfully urge for the cross-petitioners the same consideration which we think should have been accorded the Adelbert College.

Fourth Ground.

Was the jurisdiction, which was so acquired by the State court lost? If it be borne in mind that our present claim is that the jurisdiction of the State court embraced the power to hear and determine the rights of the parties as to the existence of the lien claimed under the equipment bonds and the amounts due thereon, subject to the right of enforcement only in the Federal circuit court, plainly we are far within the rule as illustrated by the above quotation from Farmers Loan, etc., Co. vs. Lake St. Rd. Co., supra, when we urge that the failure to seize the property through judicial process of the State court did not operate as a waiver of jurisdiction of the State court, and did not operate to vest power in the Federal circuit court to take away such jurisdiction. A contrary holding, as it seems to us, would in the end inevitably cause the "unseemly conflict between courts," which the rule as to priority of jurisdiction was intended to prevent.

Such a ruling would also be in conflict with decisions of this Court holding that possession of property by one court does not prevent another court of co-ordinate jurisdiction from ascertaining and preserving the rights of parties con-

cerning the property so in custody, provided enforcement of such rights be allowed only in the tribunal having possession of the property.

In Byers vs. McAuley, 149 U. S. 608, Mr. Justice Brewer delivered the opinion of the court to the effect that proceedings pending in a State probate court for the administration of an estate, did not prevent non-resident creditors having their rights established in the Federal court, provided they should thereafter come for enforcement of them into the State tribunal having custody of the property. At p. 614, the learned Justice quoted from the opinion of Justice Matthews in Covell vs. Heyman, 111 U. S. 176, 179, to the effect that all remedies to which a person may be entitled, "not involving the withdrawal of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject-matter." And at p. 617, he quotes from the case of Payne vs. Hook, 7 Wall. 425, where "it was decided that the jurisdiction of the Circuit Court of the United States, in a case for equitable relief, was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; * * * ." He also quotes at bottom of p. 617 from the case of Borer vs. Chapman, 119 U. S. 587, 600, that

"the only qualification in the application of this principle is, that the courts of the United States, in the exercise of their jurisdiction over the parties, can not seize or control property while in the custody of a court of the State."

Does not the logic of such decisions, to the effect that although State statutes may have vested exclusive jurisdiction in their courts to administer estates, a Federal Court is not precluded from determining the validity of claims—not enforcing them—, lead equally to the conclusion

that if a Federal court by decree reserve the right to enforce against property only such claims as may there be allowed, a State court may go to the same extent of determining the validity and amount of such claims. In other words, is not the true rule that neither State legislatures nor State courts can limit jurisdiction of the Federal courts, and that neither the Congress nor the Federal courts can take away the jurisdiction of the State courts, to proceed to judgment where they have jurisdiction over the subject-matter and the parties, so long as neither attempts to interfere with the custody of the other. Can this be doubted where either court, as the State court here, obtained jurisdiction first?

In Byers vs. McAuley, supra, at p. 619, the learned Justice, reasoning from the fact that by Act of Congress, Federal court receivers may be sued in courts of the States, said:

"While the validity of a claim against the receiver may be established in the State court, the administration of the property in the hands of the receiver remains with the Federal court whose officer he is, and the amount the claimant will receive from the proceeds of the property in the hands of the receiver is not settled by the State court, which only determines the validity and extent of the demand, but rests upon the result of the administration, as ordered by the Federal court. The fact that the Federal court entertaining the suit of one claimant against an estate may entertain a different view of the law controlling the rights of that claimant, from that entertained by the court of the State in a suit brought by a claimant, citizen of the State, holding a like character of claim, is no ground for enlarging the jurisdiction of the Federal court beyond that given to it by the Constitution of the United States."

We respectfully call the Court's attention to the judgment in that case, appearing on pages 621, bot., and 622, top, whereby the United States Circuit Court was ordered to enter a decree in favor of citizens of states other than

Pennsylvania, and an order that they recover from the administrator sums found to be due.

See, also, Brun vs. Mann, 151 Fed. 145 (C. C. A. 8) per Sanborn, C. J., at p. 151, and cases there cited.

In Security Trust Company vs. Black River National Bank, 187 U. S. 211, 227, Mr. Justice Shiras, delivering the unanimous opinion of the Court, says:

"Some general principles have become so well settled as to require only to be stated. One of these is that a foreign creditor may establish his debt in the courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the State relative to the administration and settlement of decedents' estates do in terms limit the right to establish such demands to a proceeding in the probate courts of the State." Citing Byers vs. McAuley, supra, and other cases.

And at p. 230, the learned Justice finds that a non-resident creditor in that case might, had not the statute of limitations intervened, have obtained a Federal judgment against the administrator, and that "undoubtedly such a judgment, when presented to a probate court within the time fixed by its order, must have been received by that court as a claim against the unadministered estate."

The principle of that decision is the same as that announced in Heidritter vs. Elizabeth Oil-Cloth Co., 112 U. S. 294, where this Court declined to pronounce as invalid, proceedings brought in a State court "for the purpose of declaring and establishing the lien" (a mechanics lien), but held "that they are not good for the purpose of enforcing it, as was attempted, by a sale and conveyance of the premises in controversy" (p. 305).

So in Buck vs. Colbath, 3 Wall. 334, 345, Mr. Justice Miller had occasion to comment upon an inference which had been drawn by counsel from the decision in Freeman vs. Howe, and in the course of his remarks, said:

"But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, *requiring the decision of the same questions exactly.*" (Italics ours).

The above cases should be supplemented by Gumbel vs. Pitkin, 124, U. S. 131, and Yonley vs. Lavender, 21 Wall. 276, cited in the opinion of this Court in the case at bar, and commented on *infra* p. 20.

Now, as we understand the opinion of this Court in the present case, the vice of the judgment below consisted in the order for seizure and sale of the property to enforce the lien of the equipment bonds. But nothing can be clearer, as it seems to us, than that reversal of that portion alone of the judgment will bring the case well within the decisions just cited. To give the judgment of reversal of this Court any broader effect, would treat the commencement and seizure of the property in the Federal circuit court as an ouster of the whole jurisdiction which the State court had obtained prior thereto. The mistake made by defendants in error, was not by delaying the trial of their cause as they did out of deference to the Federal receivership and foreclosure suit, but failing to observe the scope and effect of the decree of sale in that court as it is now construed in this Court's recent opinion; but we insist that it does not attempt to forbid the State court to adjudicate the rights of holders of the equipment bonds, subject to being required to intervene in the Federal court suit to enforce their judgment. We repeat, that it is this error which we wish to have corrected through modification of the judgment of the Ohio Supreme Court.

Fifth Ground.

In view of what we have just said and cited in support of the Fourth Ground of the present petition, it is sufficient in support of the Fifth Ground, to call attention to the rule recognized by this Court in its opinion in the present case, that decisions of the State courts on questions of State law are respected by Federal courts. Especially should this be true when the judgment of the Federal courts prevented removal of this cause to the Federal Circuit Court for lack of diversity of citizenship among these defendants in error. (Joy vs. Adelbert College, 146 U. S. 355 at 356).

There was, however, a Federal act which in express terms gave the right to force defendants in error to come into the Federal foreclosure suit on penalty of having their lien and rights thereunder foreclosed. We refer to Section 8 of the Act of March 3, 1875 (1 U. S. Comp. Stat. 1901, p. 513). But complainants in that suit chose to ignore that remedy and to continue combatting the defendants in error in the State court.

The plaintiff in error became the ultimate purchaser of the property, with full knowledge of all this. It is true that among other defenses it relied upon the claim that the Federal court retained exclusive jurisdiction to allow and enforce all claims against the property, in spite of the discharge of the receiver and the delivery of the property to the purchaser. But there is far more reason for holding that this conduct of the complainants in the foreclosure suit and of the plaintiff in error, operated as a waiver on their part, if not an estoppel against them, to claim that the defendants in error were bound to surrender their right to proceed in the State court, at least to the extent of having their rights found and adjudicated, than there would be to hold that the defendants in error, by showing deference to the Federal jurisdiction, waived or otherwise lost *all* their

rights in the State court. Indeed, such failure to bring defendants in error into the foreclosure suit according to the mode prescribed by the Act of March 3, 1875, should and we submit does, subject them to the rule that persons not made parties to a cause are not bound by its judgment—at least to the extent of the right to have their lien and the amounts due them declared in the State court, subject only to enforcement by intervention in the Federal court. (Pittsburgh, etc., Ry. vs. Loan & Trust Co., 172 U. S. 493, 515).

Furthermore, the real object of the Act of Congress just cited, was to provide a remedy whereby property could be cleared of liens and clouds upon the title, and placed in a single ownership. This object is in accord with that theory so frequently expressed in judicial decisions, including the opinion of this Court in the present case, that railroad foreclosure proceedings should place the property as soon as may be in the control of a single responsible owner, and so enable the public to deal with it and reap the benefits it was designed to furnish, better than can be done if the road be encumbered with all sorts of liens and claims or operated through a receivership.

Similar legislation to that of the Act of March 3, 1875, is to be found in the States, and is upheld upon the theory that a State may provide means of clearing property of encumbrances and of clouds on the title, so that it may be transferred and conveyed freely. Why should not such a remedy be treated as exclusive, rather than cumulative? If it be to the interest of the owners and the public alike that lines of railroad shall be kept and maintained in the hands of responsible owners, it is difficult to see why it would not be better than in any other manner, to require the remedy enacted by the legislative branch of the Government which affords easy and speedy means of accomplishing the end sought and setting the property free, to be followed.

The aggregate of the judgments rendered by the Ohio Circuit Court in January, 1896, was more than $800,000. (R. 8, 9). The action was commenced nearly a quarter of a century ago. No question has ever been made of the validity of the bonds, or of the amount found to be due upon them, or of the fact that a predecessor in title of the plaintiff in error received the full value in money for them. Should this portion of the judgment below be reversed?

The lien securing the bonds arose under an agreement of consolidation made in pursuance of Ohio statutes. The court of last resort of Ohio, not to speak of subordinate courts, has twice held that a lien was created under those statutes. This Court allowed recovery upon this very class of bonds, when it decided the Compton case (167 U. S. 1). If the whole judgment be reversed, every matter will have to be tried over again, and it is impossible to state when the end will be reached. It is true that the Court stated at the top of page 12 of its opinion in the present case, that the Federal Circuit Court would doubtless "consider the decisions of the State Courts on questions of State law, with the respect which the decisions of this Court require." But it would be vain for us to overlook the claims that would probably be made under the decision in Great Southern Hotel Company vs. Jones, 193 U. S. 532.

Seventh Ground.

Modifying and limiting the judgment of the State Supreme Court as we now request, would place the suit in the same situation as that in which the Compton case was put when enforcement of his judgment was sought in the State court. It will be remembered that at that juncture, Compton was brought into the Federal Circuit Court and required to intervene and present his claim there. (R. 235 (60)). It would seem from the manner in which he was

brought into the Federal Circuit Court and served with a copy of the order in the District of Columbia, that resort was had to the Act of Congress, before cited, of March 3, 1875. (R. 629). The result was to deny him the privilege which the judgment of the Ohio court in terms gave him to conduct proceedings for enforcement through the State court, and to compel him to conduct them in the Federal court. This was done without formally revising and modifying the judgment of the State court. What we now ask is to have our judgment modified so as to provide and require that we shall pursue the same course which Compton was forced to take. This would give to defendants in error the same right and remedy, as has been accorded to Compton by sanction of this Court.

Eighth Ground.

What we have said in support of the Seventh Ground is applicable to this one.

Ninth Ground.

Enough has been stated, we think, to show that the difficulties suggested at page 11 of the opinion would be avoided in the present case by the modification we seek. Reflection upon this can not but strengthen our insistence, when it is considered that we are presenting this petition with respect only to a case begun and brought to issue before commencement of any Federal proceeding. We do not maintain that actions can be rightfully brought in either a State or Federal court to enforce a lien upon property through its seizure and sale, as distinguished from the right to have its validity determined and preserved, where the property is at the time in the custody of the other court. Nor do we contend that an action can be brought, like the State case involved in the Julian case, for the obvious purpose of nullifying a judgment of either a State or

Federal court. What we undertake to show is, that under the rule announced in the opinion in the present case, no conflict can arise between courts of coördinate jurisdiction through a judgment restricted in the manner now sought.

Cases cited in the opinion of the Court.

None of the cases cited on page 10 of the opinion would, we think, prevent proceeding to judgment in one court in a suit brought to issue before seizure proceedings in another.

The purport of the decisions there cited, is, as stated by the court, that conflict of jurisdiction between State and Federal courts must be prevented. In a majority of the cases cited, the conflict arose from attempted seizure of property in the actual or constructive possession of another court: thus,

Hagan vs. Lucas, 10 Pet. 400, 402, holds that where one court has levied on property, another court can not by levy interfere with its possession.

Williams vs. Benedict, 8 How. 107, enjoined execution by a marshal on assets which the Mississippi Orphans Court had in process of distribution.

Wiswall vs. Sampson, 14 How. 52, held a sale on execution of goods previously taken into custody of another court void.

Taylor vs. Carryl, 20 How. 583, held void the sale by a marshal of a vessel which had been previously attached in a Pennsylvania State court.

Freeman vs. Howe, 24 How. 450, holds a State court can not replevy goods previously attached in a Federal court.

Buck vs. Colbath, 3 Wall. 334, holds that a marshal may be sued in a State court for trespass by a third person who claims his seizure was wrongful, as this does not interfere with the property in custody of the court.

Peoples Bank vs. Calhoun, 102 U. S. 256, holds attachment in a State court void while receivership and foreclosure proceedings are pending in a Federal court.

Krippendorf vs. Hyde, 110 U. S. 276, decided a replevin suit was not maintainable in a State court for property previously attached in a United States court.

Covell vs. Heyman, 111 U. S. 176, holds property attached by a Federal court can not be replevied by a State court.

Heidritter vs. Elizabeth Oil-Cloth Co., 112 U. S. 294, sale under foreclosure of mechanics lien begun in State court after seizure by marshal, held void.

Other cases cited in the opinion of the Court, show that persons having claims against property in the possession of a Federal court, may intervene there irrespective of citizenship:

Pacific Railroad of Mo. vs. Missouri Pacific Ry. 111 U. S. 505, 521, bot., 522, held a bill to impeach a foreclosure decree for fraud ancillary to the foreclosure proceeding, and maintainable irrespective of citizenship.

Johnson vs. Christian, 125 U. S. 642, 646, held a bill to enjoin enforcement of judgment in ejectment in Federal court, on equitable grounds not pleadable in the law action, ancillary to jurisdiction acquired by such action, and maintainable irrespective of citizenship.

Morgan's Co. vs. Texas Central Railway, 137 U. S. 171, 201, cross-bill maintainable irrespective of citizenship.

In Barton vs. Barbour, 104 U. S. 126, and Porter vs. Sabin, 149 U. S. 473, it was held that a court appointing a receiver, may protect him to the extent of forbidding suit against him in another jurisdiction.

In Peale vs. Phipps, 14 How. 368, 374, it was attempted to sue in a United States court after the claim had been presented to and rejected by the officer appointed, and ad-

ministering the assets, in the State court.

Finally, two of the cases expressly sanction proceeding as we now ask the Court for permission to do:

In Gumbel vs. Pitkin, 124 U. S. 131, it is decided that even if property is first attached in a Federal court, rights to the property may be established in a State court, and then presented in the Federal court having custody of the property, and there recognized and enforced. Justice Matthews, in delivering the opinion of the court, at p. 155. finds authority for "constructive levy by attaching creditors under state process upon the property in possession of the marshal, and their intervention in proceedings in the Circuit Court of the United States." And in the last paragraph of the page he says, that the creditor making constructive levy in the State court "would have thereby acquired the right, *after establishing his claim by judgment in the state court and presenting proper proof thereof, to appear in the Circuit Court as an intervenor and secure his right to a share in the proceeds of the sale of the attached property in his proper order.*" (Italics ours).

In Yonley vs. Lavender, 21 Wall. 276, it is decided that a non-resident creditor can not, after obtaining judgment in the Federal court, levy execution on assets in process of distribution in a State probate court; if he does his execution and sale are void. But it is expressly decided that he may get a judgment in the Federal court and present it in the State probate court, where it will be recognized and allowed.

Respectfully submitted,

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MURRAY SEASONGOOD,
Counsel for Defendants in Error.

THOMAS B. PAXTON, JR.,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 40.

THE WABASH RAILROAD COMPANY, *Plaintiff in Error,*

vs.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, et al., *Defendants in Error.*

In Error to the Supreme Court of the State of Ohio.

MOTION TO MODIFY JUDGMENT.

The Adelbert College of the Western Reserve University, and the other defendants in error, respectfully move the Court, in case the petition for a re-hearing filed in this cause shall be refused, to modify the judgment of reversal rendered herein on January 6, 1908, in substance as follows: by specifically directing that the Supreme Court of Ohio affirm so much of the judgment of the Circuit Court for Lucas County, Ohio, as finds and adjudicates the rights of these defendants in error and each of them against the property and parties in said cause, as set forth in the judgment entry (Record 5 et seq.), respecting the equities of the cause and right of recovery, the ownership and the lien

of the equipment bonds, and the sums due thereon to the parties respectively, with interest and costs; and by further specifically directing that said Ohio Supreme Court reverse the judgment of said Circuit Court so far as it directs a seizure and sale of the property held by the plaintiff in error in Ohio and affected by such lien, and limit the rights of the defendants in error to recovery on such modified judgment in the Federal Circuit Court, found by this Court to have jurisdiction of the property.

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MURRAY SEASONGOOD,
Counsel for Defendants in Error.

THOMAS B. PAXTON, JR.,
Of Counsel.

MEMORANDUM IN SUPPORT OF THE MOTION.

There can, of course, be no question of the power of this Court to modify its judgment at the term in which the judgment was rendered.

In Maguire vs. Tyler, 8 Wall. 650, 658, 662, the Court, upon motion of counsel, modified a judgment of reversal so as to remand the cause for further proceedings in conformity to the opinion of the Court, instead of remanding with directions to enter a decree affirming the decree of an inferior court of the State whence the cause came. This action of the court is mentioned by Justice Gray, delivering the opinion, in Stanley vs. Schwalby, 162 U. S. 255, 280, bot.

See, also, Supervisors vs. Stanley, 105 U. S. 305, 316, where, in the October Term, 1881, Justice Miller delivering the opinion of the court, modified an absolute order of judgment, upon a suggestion made by counsel after the opinion had been delivered, so as to remand the case to the Circuit

Court to permit a trial there on issues not previously presented or decided in the lower court.

For the grounds of our motion and argument in support of it, we respectfully ask the Court to consider the reasons and authorities submitted in support of the petition for reargument filed in the cause simultaneously with this motion.

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JOHN C. F. GARDNER,
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Counsel for Defendants in Error.

THOMAS B. PAXTON, JR.,
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THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, et al., *Defendants in Error.*

In Error to the Supreme Court of the State of Ohio.

Brief for Defendants in Error on Motion to Modify Judgment.

The motion to modify the judgment of this Court and also that of the Supreme Court of Ohio, in support of which this brief is filed by permission of the Court, is as follows:

"The Adelbert College of the Western Reserve University, and the other defendants in error, respectfully move the Court, in case the petition for a re-hearing filed in this cause shall be refused, to modify the judgment of reversal rendered herein on January 6, 1908, in substance as follows: by specifically directing that the Supreme Court of Ohio affirm so much of the judgment of the Circuit Court for Lucas County, Ohio, as finds and adjudicates the rights of these defendants in error and each of them against the

property and parties in said cause, as set forth in the judgment entry (Record 5 et seq.), respecting the equities of the cause and right of recovery, the ownership and the lien of the equipment bonds, and the sums due thereon to the parties respectively, with interest and costs; and by further specifically directing that said Ohio Supreme Court reverse the judgment of said Circuit Court so far as it directs a seizure and sale of the property held by the plaintiff in error in Ohio and affected by such lien, and limit the rights of the defendants in error to recovery on such modified judgment in the Federal Circuit Court, found by this Court to have jurisdiction of the property."

ARGUMENT.

I.

Power of this Court to Modify its own Judgment.

There can, of course, be no question of the power of this Court to modify its judgment at the term in which the judgment was rendered. The present motion was filed within the period of thirty days fixed for issuing mandate as of course under Rule 39.

In Maguire vs. Tyler, 8 Wall. 650, 668, 672, the Court, upon motion of counsel, modified its judgment of reversal so as to remand the cause for further proceedings in conformity to the opinion of the Court, instead of remanding with directions to enter a decree affirming the decree of an inferior Court of the State whence the cause came.

This action of the Court is mentioned with approval by Justice Gray, delivering the opinion, in Stanley vs. Schwalby, 162 U. S. 255, 280, bot.

See, also, Supervisors vs. Stanley, 105 U. S. 305, 316, where, in the October Term, 1881, Justice Miller, delivering the opinion of the Court, modified an absolute order of judgment, upon a suggestion made by counsel after the

opinion had been delivered, so as to remand the case to the Circuit Court to permit a trial there on issues not previously presented or decided in the lower Court.

II.

Power of this Court to Modify Judgment of State Court.

Congress has expressly provided, Rev. Stat. Sec. 709, second par. (1 Comp. U. S. Stat. Ed. 1901, page 575),

"The Supreme Court may reverse, *modify*, or affirm the judgment or decree of such State Court, and may, at their discretion, award execution, or remand the same to the Court from which it was removed by the writ." (Italics ours).

This language is too plain to require either interpretation or argument to show power in this Court to modify judgments of State Courts.

In Stanley vs. Schwalby (162 U. S. at p. 281, bot.) cited *supra*, after alluding to an amendment striking out a portion of Revised Statute, Section 709, Justice Gray, speaking for the Court, expressed the broad power of this Court over judgments of State Courts:

"The repeal of this provision may not have revived that provision of the Act of 1789, which had been superseded by the Act of 1867. Rev. Stat., Sec. 12. But it did not affect the general power, conferred by Section 709 of the Revised Statutes, as by all former acts, by which the judgment of the State Court may be 're-examined and reversed or affirmed' by this Court, and in the exercise of which this Court, in Fairfax vs. Hunter and Martin vs. Hunter above cited, ***ordered the proper judgment to be entered in the State Court.***" (Italics ours).

Again, in the same decision (at pages 280 bot. and 281 top) the learned justice called attention to the fact that this Court first remanded the cause for further proceedings "in conformity to the opinion," and subsequently upon

a second writ of error entered final judgment, quoting the language of this court in the second proceeding in Maguire vs. Tyler, 17 Wall. 253, and stating it to be clear that this court "possesses the power to remand the cause or *to proceed to a final decision.*" (Italics ours).

Surely, power to enter final judgment in this court in a cause coming on error from a State Supreme Court and causing it to be carried into execution as was done in Tyler vs. Maguire, 17 Wall. at page 293 bot., includes power to modify the judgment of a State Court by affirming it in part and reversing it in part.

III.

THE STATE COURT HAVING OBTAINED JURISDICTION OF THIS CAUSE BY ISSUE JOINED ON QUESTION OF EXISTENCE OF LIEN OF EQUIPMENT BONDS, LOOKING TO ITS ULTIMATE ENFORCEMENT THROUGH SALE OF THE RAILROAD PROPERTY, ETC., PRIOR TO COMMENCEMENT OF THE FEDERAL RECEIVERSHIP PROCEEDING, SUCH STATE JURISDICTON COULD NOT BE OUSTED BY SUBSEQUENT FEDERAL PROCEEDING SO FAR AT LEAST AS CONCERNED POWER TO ADJUDICATE WITHOUT ENFORCING THE RIGHTS OF THE PARTIES.

On April 28, 1883 (R. 54), the Adelbert College filed its petition in the Court of Common Pleas of Lucas County, Ohio, against certain defendants: three railway companies by name (R. 14), predecessors in title of plaintiff in error, one of them being the Wabash, St. Louis and Pacific Railway Company, then owning and operating the railroad in question (R. 227 bot.); also trustees of mortgages (R. 14), representing as we understand all of the mortgages except only those prior in date to the issue of the equipment bonds, including the consolidated mortgage of 1867, the purpose of which was among other things, to consolidate and refund the equipment bonds and other bonds recited therein into one mortgage debt (R. 39).

The petition names the company which issued the equipment bonds and describes the line of railroad it then owned (R. 14). It recites the amount, date and mode of issue of the equipment bonds and sets forth a copy of one, and thereupon continues a narrative of facts showing the purchase by plaintiff below of its bonds, also the consolidations of railroads and creation of successors in ownership, including the consolidation under the Statute and agreement protecting the equipment bonds and so creating the lien securing their payment (R. 17 et seq); also described certain mortgages made both before and after the issue of the equipment bonds (R. 27-8) giving the dates and amounts of bonds issued, etc.; and states the defaults in payment of interest upon the equipment bonds (R. 33).

The petition states the facts constituting the lien of the equipment bonds thus (R. p. 38-9):

"That said plaintiff further says, that upon the transfer of the property and franchises of the said Toledo and Wabash Railway Company to the said Toledo, Wabash and Western Railway Company, as hereinbefore set forth, part of the consideration for such transfer was the agreement on the part of the said Toledo, Wabash and Western Railway Company to pay the said bonds known as equipment bonds, and that such transfer and agreement constituted said bonds known as equipment bonds and all the moneys to become due thereon, a lien on the said property and franchises of said Toledo and Wabash Railway Company transferred by the last named company to the said Toledo, Wabash and Western Railway Company in favor of the holders of such bonds.

That thereafter, and on the first day of February, A. D. 1867, said Toledo, Wabash and Western Railway Company, recognizing the lien of said bonds known as equipment bonds, executed as hereinbefore set forth, the consolidated mortgage for the purpose of consolidating said equipment bonds and the other bonds recited in said consolidated mort-

gage into one and the same mortgage debt, and thereby secured to the holders of said equipment bonds not only a lien in equity on the road and property of said Toledo and Wabash Railway Company, so transferred to said consolidated company for such unpaid purchase price thereof, but also the right in equity to have said bonds further secured by said consolidated mortgage upon all the property and franchises of said consolidated company on an equality with all other bonds issued under said mortgage."

The petition thereupon prays, among other things (R. p. 39), that the court shall adjudge the equipment bonds to be a lien on the railroad property situated in Ohio and Indiana, so far as it was owned by the Toledo and Wabash Railway Company at the time of its transfer to the Toledo, Wabash and Western Railway Company, that this lien shall have priority over all liens excepting the liens created by the mortgages earlier in date, to wit: one for $900,000, one for $1,000,000 upon the Ohio railroad property, and two others, one for $2,500,000 and the other for $1,500,000 upon the Indiana property*; also that the company be decreed to pay the amount due plaintiff upon its equipment bonds, "and in default thereof that the railroad, and all the property, and the appurtenances thereto originally owned by the Toledo and Wabash Railway Company situated in the states of Ohio and Indiana and which is now in the possession of said Wabash, St. Louis and Pacific Railway Company may be ordered and decreed to be sold for the payment of said indebtedness to this plaintiff and the said bonds owned by it, subject, however, to the said mortgage liens thereunder which are prior to the lien of said plaintiff as the owner of said bonds known as equipment bonds, and that the money realized from such sale after deducting all

*It should be borne in mind that during the progress of the case the action was so changed as to exclude the Indiana property and restrict the action to the Ohio property alone (R. 9).

such allowances for the disbursements and expenses of such sale, be distributed in accordance with the equities of the parties entitled thereto, and that the said defendants above named, or either of them, may be forever barred and foreclosed of any and from all equity of redemption, in and to the said mortgaged premises so decreed to be sold."

The petition further prays that the equipment boads may be declared to be secured by the consolidated mortgage of 1867, that an account be taken of all debts secured thereby and their relative priorities and in default of payment all the property covered by the mortgage may be sold under a decree of the court and the proceeds thereof distributed "in accordance with the equities of the parties entitled to the same as ascertained by this court."

The petition further asks for an injunction to restrain the transfer, sale and incumbrance, etc., of any of the property.

No one can read the foregoing abstract of the petition, or the petition itself, without observing its purpose to set up the lien of the equipment bonds with all other liens, also, to have the amount found due on the equipment bonds sued on and to enforce payment through sale of the property, subject only to the liens of the two prior Ohio mortgages and two prior Indiana mortgages; also, to have an accounting and marshalling of liens and a distribution of the proceeds. Plainly then the action contemplated the ultimate seizure and sale of all the property now in question, subject only to two underlying mortgage liens.

This Court must have understood the nature of the action to be as claimed; for in speaking of the date of the filing of the Adelbert College petition and of the petition itself Mr. Justice Moody states (opinion p. 4):

"The suit was begun on April 28, 1883, by the Adelbert College alone, which was the owner of two of the equipment

bonds, each of the value of $500, and prayed for the decree, which, with some variations, not material to be stated, was finally given."

Besides the express provision of the prayer asking for sale of the property, the decree (R. 10 bot.), provides for sale, and so characterizes the nature of the action as originally brought.

In November, 1883, after service and return of summons, the defendant then owning and operating the railroad, viz: the Wabash, St. Louis and Pacific Railway Company filed its answer (R. 55) to the petition aforesaid.

It was not until May, 1884, that is, six months later, that the railway commenced its proceedings for appointment of receivers in the Federal Court (R. 227, bot. 228). It was still later that certain mortgage foreclosure proceedings were begun in State Courts, removed to the Federal Courts and consolidated (R. 228) with the receivership suits.

Now, as we understand the settled rule of decision of this Court, it was not necessary in order to vest the State Court with power to hear and decide every question that might arise in the progress of the cause and to vest in the plaintiff the right there to prosecute his cause, that the property should have been actually seized and taken into the State Court's possession prior to commencement of the receivership proceedings in the Federal Court.

Assuredly we are well within that rule when we ask only, as we now do, that the judgment of the State Court shall be allowed to stand, in so far as it adjudicates the rights of the parties to the lien of their bonds and the amounts due thereon.

In Peck et al. vs. Jenness, 7 How. 612, at 624, bot., it was said:

"It is a doctrine of law too long established to require a citation of authorities, that, where a Court has jurisdiction,

it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other Court; and that, where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another Court. These rules have their foundation, not merely in comity, but on necessity."

Farmers' Loan, etc., Co. vs. Lake, etc., Rd. Co., 177 U. S. 51, at page 61, after stating a phase of the rule touching possession of the *res* and the power of the Court in respect thereto, states:

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to Federal and State Courts. Peck vs. Jenness, 7 How. 612; Freeman vs. Howe, 24 How. 450; Moran vs. Sturges, 154 U. S. 256; Central Bank vs. Stevens, 169 U. S. 432; Harkrader vs. Wadley, 172 U. S. 148."

In Wallace vs. M'Connell, 13 Pet. 136, at 151, it is said:

"The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, that right could not be arrested or taken away by any proceedings in another Court. This would produce a collision in the jurisdiction of Courts, that would extremely embarrass the administration of justice. * * * . The rule must be reciprocal; and where the suit in one Court is commenced prior to the institution of proceedings under attachment in another Court, such proceedings can not arrest the suit; and the maxim qui prior est tempore, potior est jure, must govern the case."

In Christmas vs. Russell, 14 Wall. 69, at 81-2, the Court had occasion to comment on Freeman vs. Howe, where it appeared that possession of property previously taken by a marshal under an attachment proceeding begun in a Circuit Court of the United States was wrested from him by a writ of replevin issued from a State Court. The judgment of the State Court was reversed on the ground that the Circuit Court, "having first acquired possession of the *res*, could not be deprived of that possession until the litigation there was brought to a close." Although the action of the State Court could not be defended so far as the seizure under its writ of replevin was concerned, yet it was not held that the State Court could acquire no jurisdiction at all. There was abundant room for adjudicating the *rights* of the parties in the State Court, without attempting to enforce them except in the Federal Court or against the property after the Federal jurisdiction had been surrendered.

In Louisville Trust Company vs. Knott, 130 Fed. 820 (C. C. A. 6th), before Lurton, Severens and Richards, Circuit Judges, it appeared that proceedings had been begun in a State Court to wind up a corporation and to seize and distribute its assets and while such action was pending but before possession was taken by the State Court, a creditor of the corporation obtained a collusive judgment in a Federal Court by confession and filed a creditors' bill for appointment of a receiver who, when appointed, took possession of the assets. The Federal Court refused to surrender to the receiver subsequently appointed by the State Court. It was held that the State Court had first acquired jurisdiction, though it had not first taken physical control of the assets, and hence was entitled to their surrender by the receiver of the Federal Court. (Petition for writ of certiorari denied, 195 U. S. 631).

In Williams vs. Neely, 134 Fed. 1, 15 (C. C. A. 8), it is said:

"The court which first acquires jurisdiction of specific property by the issue and service of process in a suit to enforce a lien upon it, where in the subsequent proceedings it may find it necessary or convenient to take possession or control of it, is entitled to retain that jurisdiction to the end, without interference by any court of co-ordinate power. Gates vs. Bucki, 53 Fed. 961, 969, 4 C. C. A. 116, 128, 129; Memphis Savings Bank vs. Houchens, 115 Fed. 96, 110, 52 C. C. A. 176, 190, 191, ..."

See also numerous cases decided in this Court and other Federal Courts cited in Memphis vs. Houchens, *supra*, at bottom of page 110 and top of 111.

We think it safe to say that the rule laid down in these decisions is expressive of a consensus of judicial opinion, which always prevailed. We can not believe that it is intended to change this rule. It is respectfully submitted that the Congress itself could not under the Federal constitution take away jurisdiction of a State Court so obtained, any more than a State legislature could sweep away jurisdiction of a Federal Court obtained in like manner.

IV.

THE DEFENDANTS IN ERROR OTHER THAN THE ADELBERT COLLEGE HAVING COME INTO THIS CASE LATER BY CROSS-PETITION, ARE ENTITLED TO HAVE THEIR RIGHTS DETERMINED AS IF THEIR PETITION HAD BEEN FILED SIMULTANEOUSLY WITH THAT OF THE ADELBERT COLLEGE.

The jurisdiction so vested in the State Court of the case of the Adelbert College, applied to and embraced the other defendants in error as holders of bonds of the same class and rank. Where persons come into a suit after its commencement, their rights relate back to the beginning of the action,

and are treated as if the parties had been made plaintiffs originally.

In Richmond vs. Irons, 121 U. S. 27, bot. 54, Justice Matthews in the course of the opinion said:

"Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such a claim then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stock-holder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a co-complainant."

In Stewart vs. Dunham, 115 U. S. 61, 64, it is said that where a bill has been filed by original complainants on behalf of themselves and all creditors choosing to come in and share the expenses of the litigation, the filing of the original bill is what gives the Court jurisdiction, and whether the creditors come into the suit as co-complainants or appear before a master and set up their claims is immaterial, as their right to appear is fixed by the jurisdiction acquired on the filing of the original bill.

In the case at bar there can be no question of the right of the cross-petitioners to come into the Adelbert College suit, because the State Court permitted them to do so, and its action in this respect is not and can not be the subject of review here. So we respectfully urge for the cross-petitioners the same consideration which we think should have been accorded the Adelbert College.

V.

THE STATE COURT IS ENTITLED TO RETAIN THE JURISDICTION SO ACQUIRED, AT LEAST TO THE EXTENT OF DECLARING AND PRESERVING THE RIGHTS OF THE PARTIES.

If it be borne in mind that our present claim is that the jurisdiction of the State Court embraced the power to hear and determine the rights of the parties as to the existence of the lien claimed under the equipment bonds and the amounts due thereon, subject to the right of enforcement only in the Federal Circuit Court, plainly we are far within the rule illustrated by the above quotation from Farmers Loan, etc., Co. vs. Lake St. Rd. Co., p. 9. *supra*, and kindred cases cited in connection with it, when we urge that the failure to seize the property through judicial process of the State Court did not operate as a waiver of jurisdiction of the State Court, and did not operate to vest power in the Federal Circuit Court to take away such jurisdiction. A contrary holding, as it seems to us, would in the end inevitably cause the "unseemly conflict between Courts," which the rule as to priority of jurisdiction was intended to prevent.

Such a ruling would also be in conflict with decisions of this Court holding that possession of property by one Court does not prevent another Court of co-ordinate jurisdiction from ascertaining and preserving the rights of parties concerning the property so in custody, provided enforcement of such rights be allowed only in the tribunal having possession of the property.

In Byers vs. McAuley, 149 U. S. 608, Mr. Justice Brewer delivered the opinion of the court to the effect that proceedings pending in a State Probate Court for the administration of an estate, did not prevent non-resident creditors from

having their rights established in the Federal Court, provided they should thereafter seek enforcement of them in the State tribunal having custody of the property. At p. 614, the learned Justice quoted from the opinion of Justice Matthews in Covell vs. Heyman, 111 U. S. 176, 179, to the effect that all remedies to which a person may be entitled, "not involving the withdrawal of the property or its proceeds, from the custody of the officer and the jurisdiction of the Court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject-matter." And at p. 617, he quotes from the case of Payne vs. Hook, 7 Wall. 425, where "it was decided that the jurisdiction of the Circuit Court of the United States, in a case for equitable relief, was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its Probate Courts; * * * ." He also quotes at bottom of p. 617 from the case of Borer vs. Chapman, 119 U. S. 587, 600, that

"the only qualification in the application of this principle is, that the Courts of the United States, in the exercise of their jurisdiction over the parties, can not seize or control property while in the custody of a Court of the State."

Does not the logic of such decisions, to the effect that although State statutes may have vested exclusive jurisdiction in their Courts to administer estates, a Federal Court is not precluded from determining the validity of claims—not enforcing them,— lead equally to the conclusion that if a Federal Court by decree reserve the right to enforce against property only such claims as may there be allowed, a State Court may go to the same extent of determining the validity and amount of such claims. In other words, is not the true rule that neither State legislatures nor State Courts can limit jurisdiction of the Federal Courts, and that neither the Congress nor the Federal

Courts can take away the jurisdiction of the State Courts, to proceed to judgment where they have jurisdiction over the subject-matter and the parties, so long as neither attempts to interfere with the custody of the other. Can this be doubted where either court, as the State Court here, obtained jurisdiction first?

In Byers vs. McAuley, supra, at p. 619, the learned Justice, reasoning from the fact that by Act of Congress, Federal Court receivers may be sued in Courts of the States, said:

"While the validity of a claim against the receiver may be established in the State Court, the administration of the property in the hands of the receiver remains with the Federal Court whose officer he is, and the amount the claimant will receive from the proceeds of the property in the hands of the receiver is not settled by the State Court, which only determines the validity and extent of the demand, but rests upon the result of the administration, as ordered by the Federal Court. The fact that the Federal Court entertaining the suit of one claimant against an estate may entertain a different view of the law controlling the rights of that claimant, from that entertained by the Court of the State in a suit brought by a claimant, citizen of the State, holding a like character of claim, is no ground for enlarging the jurisdiction of the Federal Court beyond that given to it by the Constitution of the United States."

We respectfully call the Court's attention to the judgment in that case, appearing on pages 621, bot., and 622, top, whereby the United States Circuit Court was ordered to enter a decree in favor of citizens of states other than Pennsylvania, and an order that they recover from the administrator sums found to be due.

In Security Trust Company vs. Black River National Bank, 187 U. S. 211, 227, Mr. Justice Shiras, delivering the unanimous opinion of the Court, says:

"Some general principles have become so well settled as to require only to be stated. One of these is that a foreign creditor may establish his debt in the Courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the State relative to the administration and settlement of decedents' estates do in terms limit the right to establish such demands to a proceeding in the Probate Courts of the State." Citing Byers vs. McAuley, supra, and other cases.

And at p. 230, the learned Justice finds that a non-resident creditor in that case might, had not the statute of limitations intervened, have obtained a Federal judgment against the administrator, and that "undoubtedly such a judgment, when presented to a Probate Court within the time fixed by its order, must have been received by that Court as a claim against the unadministered estate."

The principle of that decision is the same as that announced in Heidritter vs. Elizabeth Oil-Cloth Co., 112 U. S. 294, where this Court declined to pronounce as invalid, proceedings brought in a State Court "for the purpose of declaring and establishing the lien" (a mechanics lien), but held "that they are not good for the purpose of enforcing it, as was attempted, by a sale and conveyance of the premises in controversy" (p. 305).

On page 304, after citing Wiswall vs. Sampson, and almost all of the other cases cited on page 10 of the opinion in the case at bar, Justice Matthews said:

"But is to be understood as a qualification of what has been said that we do not mean to decide that the plaintiff in the actions in the State Court might not without prejudice to the jurisdiction of the District Court, commence their actions, so far as that was a step required by the mechanics' lien law of New Jersey for the mere purpose of fixing and preserving their rights to a lien, provided, always, they did not prosecute their actions to a sale and disposition of the property, which, by relation, would have the effect of avoid-

ing the jurisdiction of the District Court under its seizure . . . ."

And it is observable that the action to preserve and declare the lien which the Justice says might be begun, was here begun *after the seizure by the marshal.*

So in Buck vs. Colbath, 3 Wall. 334, 345, Mr. Justice Miller had occasion to comment upon an inference which had been drawn by counsel from the decision in Freeman vs. Howe, and in the course of his remarks, said:

"But it is not true that a Court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first Court, and, in some instances, *requiring the decision of the same questions exactly.*" (Italics ours).

The above cases should be supplemented by Gumbel vs. Pitkin, 124, U. S. 131, and Yonley vs. Lavender, 21 Wall. 276, cited in the opinion of this Court in the case at bar, and commented on *infra* pp. 32-3.

In Guaranty Trust Company vs. North Chicago St. R. Co. 130 Fed. 801 (C. C. A. 7), a question analagous to the one now under discussion was involved and decided. It may be briefly stated by quoting the third syllabus:

"The fact that a bill filed in a state court incidently prays for relief which, if granted, might interfere with the constructive possession of property by receivers of a Federal Court, does not authorize the latter Court to enjoin the prosecution of the suit, where the principal relief sought therein does not trench upon its jurisdiction."

The foregoing case was cited with approval in Frank vs. Vollkommer (1906), 205 U. S. 521, at page 529.

In Louisville Trust Company vs. Knott cited above (130 Fed. 820, C. C. A. 6), the principle for which we contend was upheld as appears substantially in the second syllabus:

"The fact that the plaintiff in a suit in the federal court, by reason of diverse citizenship, was entitled to sue therein for the establishment of his claim, did not entitle him to have the assets of the corporation administered in such court, since it would be presumed that full recognition would be accorded to the judgment by the state court."

(Petition for writ of certiorari denied, 195 U. S. 631).

See, also, Brun vs. Mann, 151 Fed. 145 (C. C. A. 8), 151, and cases there cited.

See, also, the twelfth syllabus of Boatmens' Bank of St. Louis vs. Fritzlen, 135 Fed. 650, 651 (C. C. A. 8), and 667, where it is in substance held that although property has been seized by one Court, a suit in another Court relating to that property need not be dismissed, "but it should proceed as far as may be without creating a conflict concerning the possession of the property," and then be stayed until the proceedings have been concluded or ample time for their termination has elapsed. (Petition for writ of certiorari denied, 198 U. S. 586).

In United States vs. Eisenbeis, et al., 112 Fed. 190, pages 196-7 (C. C. A. 9), is is decided that a condemnation suit in one court, need not interfere with a suit in another court involving title of the land.

Ramsey vs. Towne, 20 Fed. 558, at p. 562.

It is to be observed, although not necessary to our argument, that the decisions above cited would have entitled the cross-petitioners, instead of joining by cross-petitions as they did with the Adelbert College in its case, to have commenced independent actions in the State Court after the Federal receivership and foreclosure proceedings had been begun, for the purpose of having their rights declared and preserved, subject to enforcement in the Federal Court having custody of the property.

Now, as we understand the opinion of this Court in the

present case, the vice of the judgment below consisted in the order for seizure and sale of the property to enforce the lien of the equipment bonds. But nothing can be clearer, as it seems to us, than that reversal of that portion alone of the judgment will bring the case well within the decisions just cited. To give the judgment of reversal of this Court any broader effect, would treat the commencement and seizure of the property in the Federal Circuit Court as an ouster of the whole jurisdiction which the State Court had obtained prior thereto. The mistake made by defendants in error, was not by delaying the trial of their cause as they did out of deference to the Federal receivership and foreclosure suit, but failing to observe the scope and effect of the decree of sale in that Court as it is now construed in this Court's recent opinion; but we insist that it does not attempt to forbid the State Court to adjudicate the rights of holders of the equipment bonds, subject to being required to intervene in the Federal Court suit to enforce their judgment. We repeat, that it is this error which we wish to have corrected through modification of the judgment of the Ohio Supreme Court.

VI.

SINCE THIS CASE COULD NOT BE REMOVED TO THE FEDERAL COURT AND NO EFFORT WAS MADE TO BRING DEFENDANTS IN ERROR INTO THAT COURT UNDER SECTION 8 OF THE ACT OF CONGRESS OF MARCH 3, 1875, THEY SHOULD NOT FOR THESE ADDITIONAL REASONS BE FORBIDDEN TO HAVE THEIR RIGHTS DECLARED AND PRESERVED IN THE STATE COURT.

When it was attempted to remove this cause to the Federal Circuit Court, the effort failed for lack of diversity of citizenship. (Joy vs. Adelbert College, 146 U. S. 355, at 356).

There was, however, a Federal act which in express

terms gave the right to force defendants in error into the Federal foreclosure suit on penalty of having their lien and rights thereunder foreclosed. We refer to Section 8 of the Act of March 3, 1875 (1 U. S. Comp. Stat. 1901, p. 513). But complainants in that suit chose to ignore that remedy and to continue combatting the defendants in error in the State Court.

The plaintiff in error became the ultimate purchaser of the property, with full knowledge of all this.

There is far more reason for holding that this conduct of the complainants in the foreclosure suit and of the plaintiff in error, operated as a waiver on their part, if not an estoppel against them, to claim that the defendants in error were bound to surrender their privilege to proceed in the State Court, at least to the extent of having their rights found and adjudicated, than there would be to hold that the defendants in error, by showing deference to the Federal jurisdiction, waived or otherwise lost *all* their rights in the State Court. Indeed, such failure to bring defendants in error into the foreclosure suit according to the mode prescribed by the Act of March 3, 1875, should, and we submit does, subject them to the rule that persons not made parties to a cause are not bound by its judgment. (Pittsburgh, etc., Ry. vs. Loan & Trust Co., 172 U. S. 493, 515).

Furthermore, the real object of the Act of Congress just cited, was to provide a remedy whereby property could be cleared of liens and clouds upon the title, and placed in a single ownership. This object is in accord with that theory so frequently expressed in judicial decisions, including the opinion of this Court in the present case, that railroad foreclosure proceedings should place the property as soon as may be in the control of a single responsible owner, and so enable the public to deal with it and reap the benefits it was designed to furnish, better than

can be done if the road be encumbered with all sorts of liens and claims, or operated through a receivership.

Similar legislation to that of the Act of March 3, 1875, is to be found in the States, and is upheld upon the theory that a State may provide means of clearing property of encumbrances and of clouds on the title, so that it may be transferred and conveyed freely. Arndt vs. Grigg, 134 U. S. 316, at 320, near bot., and 321, per Mr. Justice Brewer.

That section 8 of the Act of March 3, 1875, is broad enough to include all questions touching the lien involved in this action and would so have enabled complainants in the Federal foreclosure proceedings to bring these defendants in error into the cause, is shown by Citizens Sav. & Tr. Co. vs. Illinois Cent. R. R. Co., 205 U. S. 46, and the decisions therein cited by Mr. Justice Harlan in delivering the opinion. But since this remedy was ignored, it would seem plain that its summary purpose can be more nearly accomplished now by granting the motion under consideration than in any other manner.

Moreover, this action was commenced nearly a quarter of a century ago. The aggregate of the judgments rendered by the Ohio Circuit Court in January, 1896, was more than $800,000 (R. 8, 9). It is alike important to the defendants in error and the public that the action be brought to an end as speedily as may be consistent with the due administration of justice. No question has ever been made of the validity of the bonds, or of the amount found to be due upon them, or of the fact that full value in money was received for them. Can it be then that the portion of the judgment below, declaring the rights of the parties, should be reversed?

Furthermore, the lien securing the bonds arose under an agreement of consolidation made in pursuance of Ohio Statutes. The Court of last resort of Ohio, not to speak

of its subordinate Courts, has twice held that a lien was created under those statutes. This Court permitted recovery upon this very class of bonds, when it decided the Compton case (167 U. S. 1). If the whole judgment be reversed, and if by the decision of this Court it be meant that the cause in the State Court shall be dismissed and commenced in the Federal Circuit Court, then every matter will have to be tried over again, and it is impossible to state when the end wll be reached.

As it seems to us, a similar evil, if not the very result suggested in the recent opinion, would in that event arise. Mr. Justice Moody said, p. 11:

"Some time, it is to be supposed, there will be a sale by order of the Federal Court to satisfy Compton's lien. If the sale by the State Court of the same property to satisfy other lien holders of equal rank with Compton is allowed to proceed, which sale will convey the better title? Who would be bold enough to determine for himself that question? How much longer would the litigation with respect to this property continue if two persons could be found to purchase at the two sales? It is no answer to these questions that Compton has been made a party to this suit in the State Court. He is still a party to the proceedings in the Federal Court and he must find satisfaction for his claim there."

Now, if we assume that these defendants in error were forced out of the State Court altogether and required to commence anew in the Federal Circuit Court, is it not clear that they would have to litigate for years before obtaining a final decree and order of sale? Would the Compton sale have to await the ultimate issue of this litigation? If not, then if defendants in error were to succeed there would be two sales. True, they would be made under orders of the same tribunal; but there would be the same doubts in the minds of intending purchasers at the Compton sale, because

of the prospect if not the certainty of a later sale at the instance of these defendants in error. Even if conflict in title could be avoided, still the property could hardly be expected to bring its true value at the first sale. All of this could be avoided by granting the present motion to modify.

If the defendants in error were allowed to intervene in the Federal Circuit Court with their judgment modified as now sought, only one sale would be required to clear this railroad property of the lien and all indebtedness due under the equipment bonds. As stated by Mr. Justice Moody, in the language just quoted, Compton though a party to the action of these defendants in error in the State Court, must find satisfaction for his claim in the Fedreal Court. The judgment of the Ohio Circuit Court, affirmed by the Ohio Supreme Court (R. 11), carefully guards the rights of all the parties, in that it permits Compton to share in the proceeds of any sale of the road which might be made by the Adelbert College and the cross-petitioners, and "without disparagement or prejudice to the claim of the said plaintiff and the said cross-petitioners that his" (Compton's) "said right extend no further than to divide proportionately with them the proceeds of any sale of said railway property and franchises * * * ." The question in what order Compton and the present defendants in error would share in the proceeds of a sale, would be a matter of no concern to the railroad company; but it is manifest that one sale would be a very decided advantage to the company by clearing its title once and for all, and, if made when an immediate distribution of all the proceeds could be allowed, would also be but just to Compton and defendants in error, by making the property bring its true value.

VII.

MODIFYING AND LIMITING THE JUDGMENT AS REQUESTED, THERE CAN BE NO REAL DISTINCTION STATED BETWEEN THE RIGHT NOW SOUGHT TO BE ENFORCED AND THE PRINCIPLE OF THE COMPTON CASE (167 U. S., 1), SUSTAINING COMPTON'S RIGHT UPON THE VERY CLASS OF BONDS HERE INVOLVED, NOTWITHSTANDING THE DECISION IN THE HAM CASE (114 U. S. 587).

It will be remembered that when Compton sought to enforce his judgment in the State Court, he was brought into the Federal Circuit Court and required to intervene and present his claim there (R. 235 (60)). From the manner in which he was served with a copy of the order in the District of Columbia, it would seem that resort was had to the Act of Congress, before cited, of March 3, 1875.

The result was to deny him the privilege which the judgment of the Ohio Court in terms gave to conduct proceedings for enforcement through the State Court, and to compel him to conduct them in the Federal Court. This was done without formally revising and modifying the judgment of the State Court. What we now ask is to have our judgment modified so as to provide and require that we shall pursue the same course which Compton was forced to take. This would give to defendants in error no greater right and remedy than was accorded to Compton by sanction of this Court.

Indeed, in view of the decisions of this Court and of the Federal Circuit Courts, which we have heretofore cited and commented on, it is difficult to see any material distinction between a case like Compton's, which was commenced and carried to judgment in the *nisi prius* Court prior to the commencement of the Federal receivership proceedings, and a case like the present one, which was begun and brought to

issue prior to such Federal proceedings, so far as concerns the right to intervene in the Federal Court for enforcement. True, the judgment declaring the rights of the parties in the present case would have to be rendered in order to intervene as Compton did; but the point is, that the prior jurisdiction of the State Court is not different or more complete in character in the one case than in the other. The Compton case was litigated on proceedings in error after the commencement of the Federal proceedings, quite as certainly as the present case was in the *nisi prius* court and the appellate courts. So long as the judgments in both cases are practically restricted to enforcement in the Federal Circuit Court, the jurisdiction of the State Court in its nature and essence in each case, both before and after the Federal receivership, must of necessity be the same. It is a mere accident that the power to hear and determine has been exercised in the one case, and not the other. This is made even clearer by the fact that when a state case like the present reaches this Court by a proceeding in error from the highest court of a state, no question as to the validity of a lien arising under a state statute can be reviewed; for "the settled rule of this Court in cases of this kind is to accept the construction placed by the Supreme Court of the State upon its own constitution and statutes as correct . . . ." Backus vs. Fort Street Union Depot Co. 169 U. S. 557, 566 per Mr. Justice Brewer.

See, also, Stone vs. Southern Illinois and Missouri Bridge Co. 206 U. S. 267, Mr. Justice Day delivering the unanimous opinion of the Court.

If it should be claimed by our adversary that the holding made in the recent opinion in this cause, to the effect that the Federal Circuit Court retained jurisdiction of the railroad property, leaves no room to modify the judgment either of this Court or of the State Court, but requires dis-

missal of the cause in the State Courts, the obvious and conclusive answer would be that the settled rule of decision in the Federal Courts, including this Court, is, as repeatedly stated in this brief, that the rights of the parties in such an action may be declared and preserved by decree and then enforced by intervention in the Federal Circuit Court having jurisdiction of the property.

The more we study the opinion and judgment in this cause, the more we are inclined to believe that their true interpretation would entitle the Supreme Court of Ohio to modify its judgment to the extent that we urge specifically under the present motion. For, in view of the decisions, before cited, it seems clear that if the pleadings of the defendants in error had been so amended after seizure by the Federal Courts as to pray only to have their rights declared and preserved and then enforced by intervention in the Federal Circuit Court, there never could have been a doubt as to their right to affirmance here. Since then the Compton judgment, which in terms provided for a sale, has been practically so restricted as to compel him to enforce it only by intervention in the Federal Circuit Court, it is not possible as it seems to us, rationally to maintain that we should not have our judgment modified so as formally to bring about the same result as if our pleadings had been so changed as to have asked for the same relief.

We are encouraged to believe that the true meaning, the logic, of the opinion is as above stated, from certain passages and citations in it. Thus, the issue is stated by Mr. Justice Moody at the end of the first paragraph on page 9 of the opinion, as follows:

"We may now consider the question whether the State Court had the jurisdiction to render the judgment in the case at bar, *as* and when it was rendered." (Italics ours).

The learned Justice then proceeds to say, on the same page, that

". . . Courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the *possession* of the property while it is in the custody of the Court which has seized it." (Italics ours).

The principles announced in the decision are intended, as stated at the bottom of page 9 and top of page 10:

"to prevent a conflict over the *possession* of property, which would be unseemly and subversive of justice . . . ." (Italics ours).

And the great number of decisions cited in the same paragraph on page 10, are, as shown in our analysis of those cases below, instances of where one court was attempting to interfere with the possession of property in the custody, actual or constructive, of another.

The final sentence on this branch of the case appearing at the end of the first paragraph on p. 12, is:

"It follows, therefore, that the State Court was without power to decree a *sale* of the property, and its judgment must be reversed." (Italics ours).

It is true, that there is language in the opinion stating the power of a court to take "exclusive jurisdiction of claims against a *res* " (p. 11), but this is not inconsistent with the specific modification of the judgment we request: judgment claims might also be (and they frequently are, as the decisions cited above show,) presented to the court having custody of the property.

We trust we may be pardoned for citing the first paragraph of the head-note to the opinion in this case, as it appears in the advance sheets of the National Reporter System, Vol. 28, No. 5, of the Supreme Court Reporter, the date of which is February 1, 1908, at page 182:

"The exclusive jurisdiction of a Federal Circuit Court arising out of the possession of the *res* in a suit to foreclose a railroad mortgage may be so continued, after the delivery of the property to the purchaser under the foreclosure decree and the discharge of the receiver, by reserving in such decree jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise again the power of sale, as to prevent a State Court from thereafter *decreeing a sale* of the property to satisfy the lien of certain equipment bonds in a suit begun before the property latter was taken into the possession of the Federal Court. (italics ours).

We are quite aware that head-notes are not prepared by this Court and are not binding upon it. United States vs. Lumber Co. 200 U. S. 321. But the interpretation of the opinion, as made in this head-note, is, we think, consistent with our view previously expressed of the import of the decision; for it appears to accord to the State Court the power to declare and preserve the rights of the parties. If this is the true meaning of the opinion, our motion asks only that a specific direction be made in the mandate to the State Supreme Court, so as to prevent the trouble and delay of a return to this Court which might otherwise result from an erroneous judgment entered on the mandate in the State Court. If, however, the true meaning of the opinion is, that the prior jurisdiction acquired by the Ohio State Court was swept away, that *all* the acts of that Court, even such as could not possibly interfere with the possession of the property, were absolutely void,—we respectfully ask the Court to reconsider its opinion.

We do not maintain that actions can be rightfully brought in either a State or Federal Court to enforce a lien upon property through its seizure and sale, as distinguished from the right to have its validity determined and preserved, where the property is at the time in the custody of the

other Court. Nor do we contend that an action can be brought, like the State case involved in the Julian case, for the obvious purpose of nullifying a judgment of either a State or Federal Court. What we undertake to show is, that under the rule announced in the opinion in the present case, no conflict can arise between courts of co-ordinate jurisdiction through a judgment restricted in the manner now sought.

VIII.

Analysis of cases cited in the opinion of the Court.

None of the cases cited on page 10 of the opinion would, we think, prevent proceeding to judgment in a suit brought to issue in one Court before seizure or any other proceedings in another, if enforcement of the judgment were sought only in the Court which had seized the property.

The purport of the decisions cited, is, as stated by the Court, that conflict of jurisdiction between State and Federal Courts must be prevented. In a majority of the cases the conflict arose from attempted seizure of property in the actual or constructive possession of another Court: thus,

Hagan vs. Lucas, 10 Pet. 400, 402, holds that where one Court has *levied* on property, another Court can not by *levy* interfere with its *possession*.

Williams vs. Benedict, 8 How. 107, enjoined *execution* by a marshal on assets which the Mississippi Orphans Court had in process of distribution.

Wiswall vs. Sampson, 14 How. 52, held a *sale on execution* against land previously taken into the *possession* and control of another Court void.

Taylor vs. Carryl, 20 How. 583, held void the *sale* by a marshal of a vessel which had been previously *attached* in a Pennsylvania State Court.

The last syllabus of this case (p. 584) is as follows:

"In order to give jurisdiction *in rem*, the seizure by the marshal must have been valid; and this was not the case when the vessel was, at the time of seizure, in the actual and legal possession of the sheriff."

The whole proceedings in the District Court were void because the jurisdiction on which they were based depended on seizure of a vessel in the actual custody of the sheriff at the time of such seizure.

Freeman vs. Howe, 24 How. 450, holds a State Court can not *replevin* goods previously *attached* in a Federal Court.

The last syllabus (p. 451) shows a proper mode of relief in the Court having jurisdiction of the property, but is not opposed to a holding that if the litigant had begun in a State Court an action not depending as means of acquiring jurisdiction, on attachment or interference of any kind with a Federal Court such action could not be maintained to the point of judgment.

It is often stated that the power to render judgment includes, of course, the power to satisfy that judgment by execution; but certainly a court may give up this latter power, in a particular case either at the instance of the person for whose benefit it is intended, or by order of an appellate tribunal.

Buck vs. Colbath, 3 Wall. 334, holds that a marshal may be sued in a State Court for trespass by a third person who claims his seizure was wrongful, as this does not *interfere with property* in custody of the Court.

Peoples Bank vs. Calhoun, 102 U. S. 256, holds *attachment* in a State Court void while receivership and foreclosure proceedings are pending in a Federal Court. The whole proceedings in that case were void, because the juris-

diction of the State Court being founded on the attachment, necessarily depended on seizure of property then in the custody of the Federal Court.

Krippendorf vs. Hyde, 110 U. S. 276, decided a *replevin* suit was not maintainable in a State Court for property previously *attached* in a United States Court.

Covell vs. Heyman, 111 U. S. 176, holds property *attached* by a Federal Court can not be *replevined* by a State Court.

Mr. Justice Matthews, in the course of his opinion (p. 183), says: that if one court "takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void . . . ."

Heidritter vs. Elizabeth Oil-Cloth Co., 112 U. S. 294, *sale* under foreclosure of mechanics lien begun in State Court after *seizure* by marshal, held void, *but other proceedings in State Court not held invalid.*

Other cases cited in the opinion of the Court, show that persons having claims against property in the possession of a Federal Court, *may* intervene there irrespective of citizenship.

Pacific Railroad of Mo. vs. Missouri Pacific Ry. 111 U. S. 505, 521, bot., 522, held a bill to impeach a foreclosure decree for fraud ancillary to the foreclosure proceeding, and maintainable irrespective of citizenship.

Johnson vs. Christian, 125 U. S. 642, 646, held a bill to enjoin enforcement of judgment in ejectment in Federal Court, on equitable grounds not pleadable in the law action, ancillary to jurisdiction acquired by such action, and maintainable irrespective of citizenship.

Morgan's Co. vs. Texas Central Railway, 137 U. S. 171, 201, cross-bill maintainable irrespective of citizenship.

In Barton vs. Barbour, 104 U. S. 126, and Porter vs. Sabin, 149 U. S. 473, it was held that a court appointing a receiver, may protect him to the extent of forbidding suit against him in another jurisdiction. By statute now, however, Federal Court receivers may be sued even in State Courts without leave. (Sec. 3 of Act of March 5, 1887, as amended 1888, 1 Comp. Stat. 1901, p. 582, construed by Mr. Justice Brewer in Erb vs. Morasch, 177 U. S. 584.)

In Peale vs. Phipps, 14 How. 368, 374, it was attempted to sue in a United States Court after the claim had been presented to and rejected by the officer appointed, and administering the assets, in the State Court.

Pulliam vs. Osborne, 17 How. 471, involved a question of priority of liens under two executions upon judgments rendered by different Courts, one a Federal and the other a State Court, which was determined according to priority of seizure instead of priority of delivery of the writs into the hands of the execution officers, marshal and sheriff; and in view of a State Statute and in order to avoid conflict, the purchaser at the sale made under the first seizure took the property "discharged of the claims of creditors of *the same grade.*" (Italics ours).

FINALLY, TWO OF THESE CASES EXPRESSLY SANCTION PROCEEDING AS WE NOW ASK THE COURT FOR PERMISSION TO DO:

In Gumbel vs. Pitkin, 124 U. S. 131, it is decided that even if property is first attached in a Federal Court, rights to the property may be established in a State Court, and then presented in the Federal Court having custody of the property, and there recognized and enforced. The suit in the State Court was commenced and carried to judgment there, *after* seizure in the Federal Court. Justice Matthews, in delivering the opinion of the court, at p. 155, finds authority for "constructive levy by attaching creditors

under state process upon the property in possession of the marshal, and their intervention in proceedings in the Circuit Court of the United States." And in the last paragraph of the page he says, that the creditor making constructive levy in the State Court "would have thereby acquired the right, *after establishing his claim by judgment in the State Court and presenting proper proof thereof, to appear in the Circuit Court as an intervenor and secure his right to a share in the proceeds of the sale of the attached property in his proper order.*" (Italics ours).

In Yonley vs. Lavender, 21 Wall. 276, it is decided that a non-resident creditor can not, after obtaining judgment in the Federal Court, levy execution on assets in process of distribution in a State Probate Court; if he does his execution and sale are void. But it is expressly decided that he may secure a judgment in the Federal Court and present it in the State Probate Court, where it will be recognized and allowed.

Respectfully submitted,

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Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 40.

THE WABASH RAILROAD COMPANY, *Plaintiff in Error*,

vs.

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, et al., *Defendants in Error.*

Reply to Brief for Plaintiff in Error upon Motion to Modify Judgment.

Since filing the brief which the Court permitted us to write in support of our motion to modify the judgment of the Supreme Court of Ohio, by reversing that judgment so far as it ordered seizure and sale of the property, and affirming it so far as it found amounts due and existence and validity of liens, we have received the brief of plaintiff in error in opposition to our motion. Some of the statements therein required an answer, which, for convenience, we group under the two headings used by plaintiff in error.

ARGUMENT.

The Supreme Court has power to modify the judgment of the State Court as requested in the Motion.

If we have rightly interpreted the decision of this Court, the motion amounts only to a request for a modification which shall give a direction so specific as to avoid any doubt

in entering judgment in the Ohio courts. In case we have wrongly interpreted the decision, the motion asks the Court to reconsider its opinion. In neither event can there be any doubt of the power of this Court to modify its judgment at the term in which it was rendered.

The objection of want of power to modify the judgment of the Supreme Court of Ohio, made by counsel for plaintiff in error, is not that this Court does not possess power to modify the judgment of the highest court of a state where that court has jurisdiction to do something in the case and does it erroneously, but the objection is limited to cases where the State Court has no jurisdiction to do anything at all (B. 2, 3, 7, top). His objection is that the judgment now in dispute, being a decree *in rem* and nothing more, and therefore looking only to a disposition of property in the custody of the Federal Court, was in all its parts absolutely void.

This view we regard as fundamentally erroneous. The action was not *in rem*; it was rather *in personam*. It was an equitable action, and would bind such persons as were made parties to it by process or who voluntarily became parties. It was not against property alone, and jurisdiction did not depend upon seizure. It was to recover money, and, in case of default in payment, to enforce a pre-existing lien upon property, and jurisdiction was acquired both through personal services of process and appearance and answer. The decree embraced a judgment for money and declaration of lien, and an order of sale only in the event of non-payment. This was enough, however, as shown in our last brief (at pp. 8 to 11), to invest a State Court with power to decide every question that might arise, and the plaintiff with the right there to prosecute the action.

On counsel's proposition that the action was *in rem*, we are somewhat at a loss to know just what position plaintiff

in error now means to take. When this case was first argued, it was insisted by opposite counsel, both in brief and oral argument, that the action begun by the Adelbert College before the institution of any Federal seizure proceeding, was not an action looking to the ultimate seizure and sale of the property such as vested the State Court with power to determine the questions which might arise. Even in his latest brief (p. 4), the cases cited by us to show that the State Court had acquired jurisdiction (of which Farmers Loan & Trust Co. vs. Lake, etc., Co. is an illustration), are said not to be applicable to the Adelbert College case, although the latter case asked in addition to a decree for payment, an accounting, injunction and foreclosure of lien by sale. It is said that jurisdiction in the Lucas Common Pleas suit "was not that 'jurisdiction of the res' which is obtained by seizure of the property or any other process of the Court, or by acts which are equivalent thereto." (Id.)

Yet in some mysterious way, it is urged, the decree finally rendered in the cause was solely one for the seizure and sale of property; that is, an action purely *in rem*, so as to be, if the property was in control of another Court, absolutely void. In other words, an action which in its inception was not a proceeding *in rem*, is transmitted by decree into such action. This, we say, is an impossibility.

This action never was an action *in rem*, for in such an action jurisdiction is acquired by seizure of property, and the whole object of the action is merely to dispose of that property. As said by Mr. Justice White in Overby vs. Gordon, 177 U. S. 214, 221:

"In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the Court to adjudicate at all."

But, although the case at bar was not an action *in rem*, it was not necessary that it should be in order to vest the State Court with jurisdiction. Counsel fails to observe the distinction between a lien created solely by seizure, like attachment, which alone gives jurisdiction, and a lien created by mortgage, statute or contract, which, existing before suit to secure a debt, may, in an action to enforce payment of the debt, be declared and enforced through jurisdiction acquired by personal process served on the debtor.

As said in Roller vs. Holly, 176 U. S. 398, 405 (a case which clearly shows inapplicable to the case at bar the case of Cooper vs. Reynolds, 10 Wall. 308, largely relied on by counsel in his brief, p. 3, 4):

"In suits for the foreclosure of a mortgage or other lien upon such property, no preliminary seizure is necessary to give the Court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property is necessary to give jurisdiction, are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class Cooper vs. Reynolds, 10 Wall. 308, is the most prominent example. In that case a plaintiff in an action for false imprisonment had attached the property of Reynolds in certain lands which were sold upon execution to Cooper, who was put in possession by the sheriff. Reynolds, the original owner, brought ejectment against him and it was held by this Court that Reynolds' title to the land had been divested by the attachment proceedings, upon the ground that in this class of cases the levy of an attachment gave the Court jurisdiction. But the object of such attachment is merely to give a lien upon the property which the Courts may enforce; and if a lien already exists, whether by mortgage, statute or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution."

The present action was commenced in the Lucas Common Pleas long before the Federal receivership proceeding, with-

out any actual seizure, but jurisdiction of the person of the defendant was obtained by personal service of summons (R. 59), and jurisdiction of the property was acquired by the very nature of the action looking, in the event that the money judgment to be rendered were not paid, to sale of that property under foreclosure of lien.

Counsel omits a very material part of the petition in characterizing it as one asking only for sale. At the bottom of Record, p. 39):

"Plaintiff further prays that the defendant, the Wabash, St Louis and Pacific Railway Company, may be decreed to pay the amount due to the plaintiff upon the said bonds herein known as equipment bonds, which it holds and owns by a short day to be named by this Court, together with all proper costs and expenses, and in default thereof that the railroad" be ordered sold.

In the second paragraph of the prayer (R. 40) the plaintiff further prays that the railway company:

"may be decreed to pay to the plaintiff and others whose debts or bonds are secured by said consolidated mortgage, all arrears of interest now due, or that may hereafter become due and payable, together with all costs and expenses in this behalf incurred, and in default thereof" for a sale.

These excerpts clearly show that the action in its essence was to recover a money judgment, and only in default of payment to have a sale.

Process was issued on this petition and served May 5, 1883, on the Wabash, St. Louis & Pacific Railway Company (R. 59), and that company answered by a pleading, the verification of which is dated November 22, 1883.

Not alone does the petition pray that the defendant be required to pay the principal and interest on the equipment bonds, but the supplemental and amended petition prays as in the original petition (R. 67).

The cross-petitions all contain the prayer for general relief (R. 81, top), under which this Court has held a deficiency decree for money in a mortgage foreclosure may be granted. Shepherd vs. Pepper, 133 U. S. 626, 651, bot., 652.

In the second supplemental and amended petition the . . . "plaintiff prays as against the Wabash Railroad Company and all other defendants heretofore made parties hereto, as in its original and supplemental and amended petitions it has heretofore prayed, and without repeating said prayer but re-affirming it and asking that it may be taken as part of this its second supplemental and amended petition" (R. 110). The Wabash Railroad Company which had just come into being, was served with process issued on this last petition (R. 105), and before this second supplemental and amended petition was filed the other defendants, including the Toledo, Wabash and Western Railway Company (R. 98) had been likewise personally served with summons.

We had always supposed that actions in equity, where personal service is had on the defendant, partook more of the nature of actions *in personam*, than of actions *in rem*. The statutes of Ohio, under which this litigation was instituted, expressly allow a suit to recover a money judgment to be united with an action to foreclose a mortgage or other lien.

2 Bates' Annotated Stat., 5th Ed., Sec. 5058, Sub-Sec. 8.

And in Moore vs. Ogden, 35 Ohio State, 430, 435, it is held, that this provision applies not alone to the foreclosure of mortgages, but of all liens.

Equity Rules 8 and 92, prescribed by this Court, are the same in principle in allowing execution in aid of a decree.

And in Shepherd vs. Pepper, *supra*, 133 U. S. 626, 2d Syl., Sub-Sec. (6), it is said that under R. S., Sec. 808, relating to the District of Columbia, a decree *in personam* for a de-

ficiency, is a necessary incident of a foreclosure suit in equity.

Again, in characterizing the decree as one purely *in rem*, counsel is clearly mistaken. After finding the principal and interest due upon the equipment bonds held by the plaintiff and cross-petitioners and reciting such amounts (R. 8, 9), and after waiver by them of all right of sale as to the Indiana property, the decree of the Lucas Circuit Court, which was affirmed by the Ohio Supreme Court, proceeds as follows (R. 9, bot):

"And it is, by the Court, here further ordered and adjudged:

First. That the said plaintiff and cross-petitioners respectively recover against the Toledo, Wabash and Western Railway Company the said several sums of money hereinbefore stated as due to them respectively, with interest thereon from the first day of the present term of this Court, to wit, January 6th, 1896, and execution is awarded therefor, to be issued upon the precipe of the attorney for the plaintiff and cross-petitioners respectively."

This unmistakeably shows a money judgment. Although the Toledo and Wabash Railway Company was the promissor in the equipment bonds, each successor, including the Toledo, Wabash and Western Railway Company, through repeated consolidations, also set out in the original petition, became directly obligated to carry out the promise of the original obliger in the equipment bonds. This obligation was created not only by the various articles of consolidation, but also and especially by the statute of Ohio under and subject to which each consolidation was made. That statute during all the years in question provided and still provides that . . . "all debts, liabilities and duties of either of said companies, shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it."

1 Swan & Critchfield, Ohio Stat. p. 338, Sec. (166); 2 Bates' Annotated Stat. (5th Ed.) Sec. 3384.

It follows that the judgment for money was rightly taken as above set forth. It is only—

"unless within six months from the entry of this decree the Wabash Railroad Company or some other person or party for it pay to the clerk of this Court the costs to be taxed, and to the plaintiff the sum of money so as aforesaid adjudged to be due to it upon its said equipment bonds, and to each of the said several cross-petitioners the sum of money hereinbefore adjudged to be due to and collectable by said cross-petitioners upon said equipment bonds, each with interest from the first day of this term, and the amount due all other holders of equipment bonds whose holdings have been or may be proved herein, ..."

that the property is to be sold (R. 10.

Is not this the ordinary form of decree in which a debt is reduced to judgment, and a mortgage securing the debt foreclosed to satisfy that judgment? In case the judgment had been paid no sale would ever have occurred. Can it be doubted that such judgment would be treated as a conclusive adjudication between the parties in any court of the amounts to which the plaintiff and cross-petitioners were entitled, and that it might have been satisfied out of any property of the defendant company, if there had been any, by execution.

So the action begun by personal service of summons on the defendants, in the Lucas Common Pleas, looking to the recovery of a money judgment, a finding of lien, and in the event of failure to pay, a foreclosure to satisfy that judgment, was not in its inception, and never became, a suit purely *in rem* or even one *quasi in rem*, under the familiar classification of actions by Justice Field in Freeman vs. Alderson, 119 U. S. 185, 187.

The original and supplemental and amended petitions of

the Adelbert College, above quoted, together with the decree providing for a money judgment, conclusively show the real nature of the case; and they refute the claim of our adversary (B. 5, bot., and 6, top) that the decree "in no way sought to establish any judgment *in personam* against any of the defendants."

This is not saying, however, that the Lucas Common Pleas did not have jurisdiction over the parties and the subject-matter. It is conceded by counsel, at least not disputed in his brief, that the claims of the cross-petitioners are to be treated by relation as if they had been filed at the same time as the Adelbert College petition. "Jurisdiction is the right to hear and decide, ..." (Mr. Justice White, in Overby vs. Gordon, supra, at p. 221). And, therefore, the Lucas Common Pleas had jurisdiction, which no Court could take from it, at least to render a decree establishing, without enforcing, the rights and lien of defendants in error. It follows indisputably that this judgment was not entirely void; and we insist that only that part ordering a sale was so found by this Court, and that that part alone should be reversed.

Our learned adversary (B. 2) says that a judgment "can not be void and valid at the same moment." But it certainly can be partially valid and partially void. Suppose in an action begun by attachment, where no personal service was had on defendant and he did not enter appearance, judgment were rendered an in part satisfied to the extent of the property attached; would not such judgment be valid so far as capable of satisfaction out of the property attached, and void beyond that? This is the holding in the well-reasoned case of Oil Well Co. vs. Koen, et al., 64 O. S. 422, relying upon the decisions in Pennoyer vs. Neff, 95 U. S. 714; Freeman vs. Alderson, *supra*, and Cooper vs. Reynolds, *supra*, and deciding that no execution can issue for any balance remaining

unpaid on the debt after exhausting the attached property, and that the judgment can not operate as a bar to a subsequent suit for the collection of such balance.

So we are making no unusual request when we urge the Court to permit what is valid in our State judgment to stand, and to declare void only that portion of the judgment, to wit, the part ordering a sale, which this Court finds would constitute an improper interference with property in the custody of another Court.

There is no question of fact in this case, as intimated on p. 8 and 9 of counsel's brief. The facts are not and can not be disputed. But the Ohio Courts found the facts. It is a mistake to say, as counsel does (B. 9), that we "ask the Court to re-examine the facts." We ask that the facts as found by the Courts below, together with the existence of the lien as there declared, be allowed to stand.

II.

The Court should Modify the Decree as requested.

By this motion we do not ask the Court to reverse its decision in the Ham case (114 U. S. 587). The correctness of that decision is not involved in this action. As shown in our brief (p. 25), in cases coming on writ of error from the highest Court of the State, the construction placed by the State Court on its statutes, is conclusive upon this Court, and the Ohio Supreme Court having decided that a lien arose under the Ohio consolidation statutes, this Court accepts that interpretation. We have never suggested or meant to suggest that by the Compton case (167 U. S. 1) the Ham case was reversed. We say that this Court permitted Compton to recover after he had obtained his judgment in the Ohio Court, and we ask to be treated only in the same way.

That the decision of the Ohio Court, finding a lien was created by the consolidation under Ohio statutes, will be

accepted as a conclusive interpretation of those statutes by this Court in an error proceeding from the State Court, was, we think, recognized by the learned counsel for the plaintiff in error in his failure in brief or argument to have made the Ohio Supreme Court's holding on this point a ground of attack. How, then, can affirming the judgment to that extent constitute a reversal of any decision of this Court? Affirming the judgment of the Ohio Supreme Court, to the extent that it is valid, can no more be overruling the decision in the Ham case, than was allowing Compton credit, by this Court, on his judgment, and ordering satisfaction of it by sale. This Court did not give the plaintiff in error leave to go into the merits of Compton's claim and to argue the underlying question of law there involved. And if the judgment rendered by the Ohio Supreme Court in ths case is large, that is because the litigation has been so protracted through efforts of this company to escape payment of a just debt.

It is suggested (B. p. 14), that plaintiff in error "has tried to bring them" (the defendants in error) "into the Federal Court, but has been at all times resisted by the defendants in error," and that the defendants in error have chosen the forum of the State Court, to avoid the decision in the Ham suit.

The answer to these contentions is: (1), it is not true in fact, as pointed out in our brief on the motion, that the plaintiff in error adopted all the means in its power to bring this litigation into the Federal Court (pp. 19-23). It failed to resort, against these defendants in error, to the certain remedy under the Act of March 3, 1875; and (2), the Adelbert College did not resort to the Lucas Common Pleas Court, to avoid a Federal Court, because in 1883, when its suit was brought, the Ham case had been decided favorably to the contention of the equipment bond-holders represented

in the Indiana Federal Court. The reversal was much later. If the cross-petitioners preferred to set up their rights in the suit so begun, rather than to resort to the Federal Court, their motive is immaterial.

Re Metropolitan Railway Receivership, 208 U. S. 90, 91, 5th Syl., and p. 111*, where, in the course of the unanimous opinion of the Court, Mr. Justice Peckham said:

"That the parties preferred to take the subject-matter of the litigation into the Federal Court, instead of proceeding in one of the Courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal Court attached, the motive for bringing the suit there is unimportant." Citing decisions of this Court.

It is sought to avoid the holding of this Court as to the right to prosecute cases to judgment in one Court, and to intervene with such judgment in another, although the latter court may have reserved to itself exclusive power to determine claims, by saying that these cases were all actions *in personam*. This is a mistake.

The case of Heidritter vs. The Elizabeth Oil Cloth Co. partook far more of the nature of an action *in rem* than does this action, inasmuch as its only purpose apparently was to foreclose a mechanics lien, and not, as in the case at bar, to obtain a personal decree or judgment.

In the case of Gumbel vs. Pitkin, the proceedings in the State Court depended upon a seizure, although a money judgment was also sought. This Court enforced a judgment based on constructive seizure by the sheriff, although the property had previously been actually seized by the marshal.

Moreover, even in actions *in personam*, the judgment,

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*This decision, as well as the decision in the case at bar, appears in the advance sheets of the Banks Publishing Co., dated Feb. 5, 1908, which reached us after our previous brief had been mailed.

when entered, becomes a lien on the property of the debtor, and if not paid is enforced by sale of the property. So that the attempted distinction can not stand, both for the reason that the present judgment does contain a judgment for money and a declaration of lien, and also because any money judgment necessarily contemplates such judgment becoming a lien which may be enforced.

Respectfully submitted,

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Supreme Court of the United States.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL,
Defendants in Error.

October Term, 1907.
No. 40.

BRIEF OF PLAINTIFF IN ERROR UPON MOTION TO MODIFY JUDGMENT.

The motion of the defendants in error to modify the judgment hereinbefore ordered in this Court, is open to very serious objections. We shall present what we have to say respecting it under two general heads.

FIRST. The Supreme Court has no power to modify the judgment of the State Court, as requested in the motion.

SECOND. If the power to modify is conceded, the Supreme Court ought not to exercise it as requested.

ARGUMENT.

The Supreme Court has no power to modify the judgment of the State Court as requested in the motion.

It is explicitly provided that the writ of error, under Section 709,

"Shall have the same effect as if the judgment or decree complained of had been rendered, or passed in a Court of the United States."

The broad power is then given upon which the defendants in error rely in support of their motion in the following words:

"The Supreme Court may reverse, modify or affirm the judgment or decree of said State Court, and may, at their discretion, award execution, or remand the same to the Court from which it was removed by the writ."

It is conceded that there is given this Court here very broad powers respecting a judgment or decree of the State Court which is brought before it for consideration, but the language must be construed with reference to its necessary limitations when applied to the subject matter. Evidently the defendants in error rely, in support of their position on the use of the word "modify," as conferring the power which they desire to have exercised by the Court in this instance, but very little thought is necessary to disclose the fact that the word "modify" necessarily implies that there is something in the State Court, which is in existence, and which may be changed and amended to suit the judgment of the tribunal which is to "modify." It is right here that the essential irreconcilability of this term with the situation in the State Court with respect to the decree in this case is to be found. The judgment in the State Court cannot be, and not be, at the same time. It cannot be void, and valid at the same moment. You can "modify" an existing judgment, but cannot modify a judgment which has no existence. The fundamental position decided by the Court in this case is that the whole proceeding in the State Court which eventuated in the judgment was without validity and effect. It was thus void, and without any existence or vitality, because the exclusive possession of the property with which it assumed to deal was in the Federal Court at the time this action was taken in the State Court, and this conclusion was in exact conformity to the line of decisions in this Court cited on page 10 of the opinion as printed. Either the State Court had jurisdiction to enter this decree, or it had not. If it had jurisdiction, then its decree in all respects is finally conclusive, for it was a determination upon a question of general law, upon which this Court could not overrule it or modify it. If it did not have jurisdiction to make this decree for the reasons above given, then the decree, and the action of the State Court in assuming to make it, in all respects is wholly void, and there is nothing whatever to modify. It is the latter position which the decision in this case conclusively

establishes. The motion to modify can only be granted by assuming that the proceedings in the State Court have validity for all the purposes of the decree, except its method of enforcement. It is impossible to construe this decision otherwise than that all the proceedings in the State Court were a nullity, and the decision is undeniably correct in that respect, and follows a long line of decisions of this Court.

It is clear that this decree was a decree not *in personam*, but a decree *in rem*, and at the time the decree was rendered the *res* was in the possession of another Court. Therefore, the thing essential to the valid action of the State Court, to wit, "jurisdiction of the *res*" was lacking in the State Court, and it necessarily follows that the decree is wholly and totally void in all its parts.

In Boswell's Lessee vs. Otis, 9 Howard, M'LEAN, J., says:

"Jurisdiction is acquired in one of two modes; first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant, within the jurisdiction of the Court."

In Cooper vs. Reynolds, 10 Wallace, 308, Mr. Justice MILLER thus defined jurisdiction:

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; this is conferred by sovereign authority, which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

"Jurisdiction of the person is obtained by service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the *res* is obtained by seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause. * * *

"While the general rule in regard to jurisdiction in *rem* requires the actual seizure and possession of the *res* by officers of the Court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter clause is the levy of a writ of attachment, or seizure of real estate, which, being incapable of removal and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the

Court by the officer's levy of the writ and return of that fact to court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court."

This case is a case of the latter class, where jurisdiction to decide anything depends upon the possession by the Court of the *res*. The brief filed in support of the petition for rehearing and referred to in the motion to modify considers the State Court as having acquired full "jurisdiction" because the suit was commenced in 1883, and answer was filed at that time, and cites quotations from the cases of Peck vs. Jenness, and Farmers Loan & Trust Co. against Lake, etc., Co. and Wallace vs. McConnell (Petition for rehearing, pp. 6-7), but an examination of the facts in each of these cases, in the light of which these quotations are to be considered, shows that not one of these cases, is in point upon the question now before this Court, because the facts are so entirely different from those in the case at bar. The jurisdiction in these cases was not that "jurisdiction of the *res*" which is obtained by seizure of the property or thing under the process of the Court, or by acts which are equivalent thereto. No such jurisdiction was obtained by the State Court in the case at bar, either on the original suit of the Adelbert College upon its petition filed in 1883, or upon the answers and cross petitions which were filed in 1889. Such "jurisdiction of the *res*" was obtained by the Federal Court by its seizure of the property in 1884, which "jurisdiction of the *res*" was continuous thereafter, and continues still upon the uncontradicted facts in the case, and such jurisdiction of the Federal Court was under the decisions of this Court so exclusive as that the State Court could not thereafter obtain "jurisdiction of the *res*" in order to enter any valid decree *in rem*. If no valid decree *in rem* could be thus rendered, then we submit it is impossible for this Court under Section 709 to do anything but declare the fact, that the whole proceeding, eventuating in the so-called decree in the State Court was ineffectual and void. There is then nothing to modify.

The decisions which are cited in support of the motion to modify, so far from conflicting with this view of Section 709, support it.

That this suit in all essentials was strictly a proceeding *in rem*, appears on examination of the pleadings in the case, as well as

from the decree rendered thereon. In the original petition filed by the Adelbert College, the prayer is:

"Whereupon plaintiff prays that this court will ascertain and determine the amount due to the said bonds known as equipment bonds, and held and owned by the plaintiff herein; and will adjudge and determine the said bonds known as equipment bonds and all moneys due and to become due thereon, to be a charge and lien upon all of the property of said defendant the Wabash, St. Louis and Pacific Railway Company that is situated in the States of Ohio and Indiana so far as the same was owned by the Toledo and Wabash Railway Company at the time the property and franchises of the Company last named were transferred to the Toledo, Wabash and Western Railway Company, etc." (Record, p. 39.)

The remainder of the prayer is concerned with the question of sale, with the request that an injunction issue, preventing the defendants from transferring, selling, incumbering or disposing of any of the property upon which, as above set forth, thelien is asked to be declared.

The prayer in the answer and cross petition of Redmond and others is to the same general effect. After asking that certain parties named as defendant may be required to answer as to such interests and claims as they have upon the Railway described, and that all liens and incumbrances upon this property may be marshalled, the prayer proceeds:

"That it may be found and held that the lien of the said equipment bonds as issued in the year 1862, to the total amount of six hundred thousand dollars ($600,000) at their par value, with all the interest thereon accrued and matured and that hereafter to mature at the rates aforesaid until and after judgment and until payment thereof, and the lien and encumbrances in favor of the holders of the same by virtue of the ownership thereof, including those of the plaintiff and the said James Compton, are the first and prior lien and encumbrance upon all the said railway premises, franchises and property and are superior in right to each and every claim of each and every defendant hereto; that a receiver may be appointed to take possession thereof and operate and manage the same; if and after the said receivers now in possession may have surrendered, or otherwise been divested of possession; that the said premises, franchises and property in Ohio and Indiana be sold at judicial sale by the Sheriff of said county or a master commissioner be appointed therefor by this court, etc." (Record, pp. 79 and 80).

The decree which was rendered, and which is for consideration by this Court in no way sought to establish any judgment *in per-*

sonam against any of the defendants who were brought in by the Adelbert College, or under the cross-petitions. Aside from the finding as to the ownership of the bonds by the plaintiff and cross-petitioners, and the amounts of interest due thereon, the essential parts of the decree, aside from the question of sale, are the following paragraphs:

"That thereafter, by intermediate consolidations, foreclosures and deeds of conveyance, the title to the said railway and franchises with its accretions and additions passed, as stated in said agreed statement of facts to the Wabash, St. Louis and Pacific Railway Company, and from it, after the commencement of this suit, to the Wabash Railroad Company, which company is now in possession of said railroad and franchises, and engaged in operating and maintaining said railway, and is seized and possessed of a perfect title thereto, so far as the said railway within the State of Ohio and the jurisdiction of this court is concerned, subject to the liens hereinafter described.

"And the court further finds that by the issue and sale of said equipment bonds and by the execution of said articles of consolidation, there was created and established and duly imposed upon all the said railroad and railroad property within the State of Ohio and the jurisdiction of this court, and upon said franchises, with the accretions to said property that have since been made, now in the possession and control of the Wabash Railroad a lien in favor of the several holders of the said equipment bonds for the amounts due thereon and the interest thereon, prior, preferable and superior to the title of the Wabash Railroad Company to any part thereof within the State of Ohio and prior to and superior to the title of any mortgagee of said property whose mortgage was made and delivered after said articles of consolidation, or of any other party to this cause, unless it be the mortgages to the Farmers Loan and Trust Co. and Edward D. Morgan, Trustees, respectively, described in said agreed statement of facts."

Record, pp. 6 and 7.

This is strictly and purely a decree *in rem*, directed against the specific railroad property, which formerly belonged to the Toledo and Wabash Railroad Company, the company which issued these equipment bonds. It was directed to the specific property which this Court has found in its opinion was at the time of entering this decree in the exclusive possession and control of the Federal Court.

The cases cited by defendants in error in support of the motion for modification of the judgment afford but little assistance upon the question presented on this motion.

In Maguire vs. Tyler, 8 Wallace, 650, there was a reversal by this Court of a decree of the Supreme Court of the State of Missouri, and an affirmance and direction to affirm of the St. Louis Court of Common Pleas. The federal question was the construction of certain patents issued by the United States, which had been erroneously construed by the State Court. The decree was reversed and originally the cause remanded, with directions to affirm, as heretofore stated. The modification of the judgment of this Court consisted in sending the cause back for further proceedings in conformity with the opinion of the Court. Here there was no attempt to modify that which was held to have no existence, but the direction was to modify a decree which the State Court had a right to make, but in making which it had erroneously interpreted the rights of the parties under the federal law.

In the case of Supervisor against Stanley, 105 U. S., 305, Mr. Justice MILLER, after deciding the case, which was on error from the United States Circuit Court for the Northern District of New York, and ordering judgment for the plaintiff for a certain amount taxed on one account, and on all the other accounts for the defendants, later modified this direction, and sent the case back to the court below, permitting it to hear evidence on a point not raised on the original trial, and if necessary, to allow an amendment of the pleadings to present the question properly.

The case of Stanley vs. Schwably, 162 U. S., 255, also cited, in support of the motion, makes for the contention we make on this matter, rather than against it, for in that case we find that the case was before this court twice. The first time in 147 U. S., 508, and again in 162 U. S., 255. It was brought in the courts of Texas as an action of trespass to try title, and when the case first came before the court, the United States was a party, and it was in effect decided by this court that the proceedings were void, because the United States cannot be made a party defendant to an action of this character. The merits of the case were not passed upon, but the judgment was reversed, and the cause remanded for further proceedings not inconsistent with the opinion. Following this reversal, the cause went back to the State Court, and later came again to this Court, the State Court not having followed the directions of this Court respecting the disposition of the cause, and when again before this Court in 162 U. S., 255, Mr. Justice GRAY in the two closing paragraphs of the opinion discloses the reason for the departure from the ordinary rule of sending the

cause back, and gave specific directions, not by way of modification of the judgment of the State Court, which was void, but such directions as would insure that the State Court would take no further proceedings in the way of an attempted enforcement of the cause of action.

"In the present case, the previous course of the proceedings has been such as to make it proper that the usual practice, by which, upon reversing a judgment of the highest court of a State, the case is remanded generally for further proceedings not inconsistent with the opinion of this court, should be departed from; and that this court should instruct the state court to enter a judgment finally disposing of the case.

The Supreme Court of Texas, after the first trial, held that the United States were not a party to the action, and dismissed it as to the United States; but held that the United States were not innocent purchasers for value, and denied to the United States and their officers the benefit of the statutes of limitations, and therefore gave judgment for the plaintiffs against those officers. This court, upon the first writ of error, reversed that judgment, and assuming the statutes of limitations to afford a conclusive defence, refrained from considering the case upon its merits, and remanded it for further proceedings in the courts of the State. The case was then submitted to the inferior court of the State of Texas, and to the Court of Civil Appeals, upon the same facts as before; and the Court of Civil Appeals, held that the United States were a party to the action, thereby in effect overruling the former judgment of the Supreme Court of the State; and decided, upon evidence wholly insufficient in law, that the United States had no valid title to the land, because they took with notice of a prior conveyance to McMillan; and gave judgment for the plaintiffs against the individual defendants, acting under lawful authority of the United States, for the title in an undivided third part of the land demanded, and for joint possession of the whole; and also gave judgment against the United States for costs, to which the United States are never liable. The Supreme Court of the State denied a petition for a writ of error to review that judgment; the Chief Justice of the Court of Civil Appeals refused to allow a writ of error from this court to review it; and the allowance of the present writ of error was obtained from a justice of this court.

Judgment of the Court of Civil Appeals reversed, and case remanded to that court with instructions to dismiss the action as against the United States, and to enter judgment for the individual defendants, with costs."

The jurisdiction of this Court over proceedings in the State Court is strictly limited to a re-examination of errors of law arising under the Federal Constitution and Laws and in no sense has this

Court been given any right to re-examine questions of fact. This is very clearly demonstrated in the opinion of Mr. Justice GRAY in the case of Dower vs. Richards, 151 U. S., 658, where the authorities are collated.

Now in the case at bar, the error complained of, which this Court was authorized to re-examine under Section 709, was that the State Court had acted without power, not that the State Court in acting upon a subject on which it had power, had wrongfully construed the rights of the parties in some particular respect arising out of the federal law, or the federal constitution. By the motion to modify the decree in the particulars named, the defendants ask the Court to re-examine the facts in a suit in equity in the State Court, and on those facts to decree, in effect, that certain amounts are due the defendants in error herein, and that these amounts are a lien upon certain described property, and that these findings shall be conclusive as to the property and parties in this cause. This would mean all the essentials of the decree, because it would be such a finding as the State Court itself made. If it is conclusive against the property, the property would have to be described, and this was the precise property which was in the possession of the Federal Court, and with respect to which the reservations were made in the foreclosure decree of March 23d, 1889. In short, the only thing that would be omitted, would be the direction for the sale. This would be, in effect, the entry of the decree by this Court which the Circuit Court of the United States in entering the foreclosure decree of March 23, 1889, had reserved to itself the right to make after a full and careful examination of all the features respecting the claim, and which this Court is given the right to examine and affirm only in due course of procedure after the Circuit of Appeals has considered it upon appeal to that Court from the Circuit Court.

II.

Should this Court modify the decree as requested in the motion to modify, in view of all the circumstances of the case?

The motion to modify the judgment amounts to a request to this Court to reverse the decision which it has previously rendered in Wabash, St. Louis & Pacific Railway Co. vs. Ham, 114 U. S., 587. The contention of the Wabash Railroad Company throughout the entire record of this case, from 1889, (when it was revived in the interest of bondholders holding bonds to the amount of over $260,000, who were not up to that time, represented in any suit respecting these equipment bonds), has been, that the proper forum to determine the lien of these equipment bonds, is the federal courts, which was in possession of the property against which these parties sought to enforce their lien. It has tried to bring them into the federal Court, but has been at all times resisted by the defendants in error. Removal of the cause was attempted, and on motion of the defendants in error, the cause was remanded. In their pleadings they continuously asserted, notwithstanding the prior and exclusive jurisdiction of the federal court was fully set up by the Wabash Railroad Company and its predecessor in title, that no such prior and exclusive jurisdiction did exist, and no jurisdiction could be obtained over them by the federal Courts, by reason of the residence of a large number of cross-petitioners within the same state as the plaintiff in the cause (Record, pp. 211–13). The purpose and object of these defendants in error in thus repudiating the exclusive jurisdiction of the Federal Courts, is perfectly obvious. They sought to avoid the application by the Federal Courts to the questions concerning the lien of their equipment bonds, of the conclusions reached by this Court, in Wabash, St. Louis and Pacific Railway Company against Ham, (114 U. S., 587). It is to be observed that this decision was announced two years before any decision by the Supreme Court of the State of Ohio on the same questions respecting these equipment bonds. The Federal Courts, in view of the foregoing facts, would probably adhere to their own decision, and would not feel compelled to adopt that of the State Court. The rule upon this question was very clearly laid down by this Court in the case

of Burgess against Seligman, 107 U. S., 20, and has been adhered to in a long line of cases since that time, all of which are clearly presented in the opinion of Mr. Justice HARLAN, in the recent case of Great Southern Fireproof Hotel Company against Jones, 193 U. S., 532.

The granting of the motion to modify this judgment in the particulars indicated, would now amount to a reversal by this Court of the decision in the Ham suit, because the affirmance of the judgment of the Supreme Court of the State of Ohio to the extent indicated in the motion, would mean the determination, in effect, by this Court, of all the questions decided in the Ham case, in direct opposition to the conclusion arrived at in that case. This is sought to be secured by the defendants in error, upon the ground as stated in the argument of the defendants in error in support of their petition for re-hearing, that this Court has already in effect reversed the ruling in the Ham case by permitting recovery upon these very bonds by its decision in the Compton case (167 U. S., 1; brief, p. 16). But as we understand that case, that statement is an inaccurate representation of the scope and effect of that decision. The Compton case, as presented to this Court, did not present the question of the lien of the equipment bonds in any respect, such as was decided in the Ham suit. Compton secured a final judgment in the Supreme Court of Ohio, and as the owner of such judgment, was brought into the Federal Court, and after he had been brought in, the foreclosure decree of March 23d, 1889, was entered, containing what this Court determined to be in the nature of a stipulation with Compton and upon which stipulation this Court decided that case. The question of lien of the equipment bonds by virtue of the statute of Ohio, or the terms of the stipulation in the articles of consolidation of 1865, all of which were repudiated in the opinion in the Ham suit, in no way was raised in this Court in the Compton case. That opinion should, therefore, have no weight in this matter.

The granting of the motion to modify the decree in the particulars named will not only have the effect of setting aside the decision of this Court in the Ham suit, but it will be doing this without having the questions involved in such a reversal presented and argued to this Court. As we understand the decision of this Court in the case of Burgess against Seligman, and in the line of cases following the opinion in that case, down to the opinion of Mr. Justice HARLAN, in Great Southern Fireproof Hotel Com-

pany against Jones, this Court reserves to itself, under conditions such as obtain in the differences of opinion between this Court and the Supreme Court of Ohio upon the lien of these equipment bonds, the right to exercise an independent judgment. This means that where, upon a reargument of the question, the members of this Court feel satisfied that the reasoning by which the State Court has reached its conclusion is the more satisfactory, that it will adopt such reasoning and conclusion. But, if the members of this Court are satisfied, upon a reargument of the question, that the reasoning by which the result has been arrived at in this Court is the better, then this Court will adhere to its original conclusion. Upon the reasons, pro and con, respecting the liens of these equipment bonds, there has been no reargument of the question decided in the Ham case. There is no attempt to reargue the question upon the brief filed in support of the motion to modify the judgment. It would be, we submit, manifestly improper in this brief, to discuss this question, because it is not in any proper sense before the Court. But, very clearly, this Court ought not to determine a question of such moment to the parties to this cause, without argument, and without satisfying the members of the Court that the reasons given by Mr. Justice GRAY in deciding the Ham suit are overborne in weight by the reasons given by Judge MINSHALL of the Ohio Supreme Court, in deciding the Compton case (Compton against Railway Company, 45 Ohio State, 592).

This Court would not think of rendering a decree binding the property of the Wabash Railroad Company to the amount of nearly a million and a half of dollars, without giving the Wabash Railroad Company full opportunity to be heard upon the merits of the contention upon which the decree would be based, but here, by a mere motion to modify a judgment, it is proposed by the defendants in error, that this Court shall reverse an opinion solemnly rendered by this Court, after the most careful and elaborate argument, and which has been the law of this Court since 1885, and by so doing, decree that the property of the Wabash Railroad Company is bound to respond to the amount of nearly a million and a half dollars, without according to the Wabash Railroad Company any opportunity to discuss the reasons underlying the decree. The effect of the motion to modify the judgment cannot be concealed, because if the motion is granted, and the judgment of the State Court is affirmed in the particulars asked for, all that will be neces-

sary for the defendants in error to do will be to go into the Federal Court with what will be, in effect, a decree as to all the essential matters of liability, and ask the Federal Court to expose the property to sale to meet the liability decreed by this Court, in the manner above suggested. The motion violates so many fundamental principles that we cannot conceive for a moment that this Court will grant the request.

The principle of the cases of Gumble against Pitkin, 124 U. S., 131, Yonley vs. Lavender, 21 Wallace, 276, Security Trust Company vs. Black River National Bank, 187 U. S., 211, Heidritter vs. Elizabeth Oil Cloth Company, 112 U. S., 294, Covell vs. Heyman, 111 U. S., 176, and Byers vs. McAuley, 149 U. S., 608, are invoked in the brief upon the petition for rehearing, in support of the motion to modify the decree in the State Court. But we think none of these cases sustain the position for which they are cited. Yonley vs. Lavender, 21 Wallace, 276, as we understand the case, simply affirms the proposition that while an estate is in the course of administration in a State Court, under probate proceedings, judgment against the administrator may be taken in a United States Court, but that such judgment creditor must file his claim in the probate proceedings in the State Court and participate ratably with all other creditors in the distribution of the proceeds, and cannot levy upon the assets of the estate under the judgment, and thus secure priority. This is, however, simply securing to the judgment creditor the right to a judgment *in personam* against the administrator as such, and a refusal to allow any decree as against the property in the exclusive possession of the State Court.

The case of Gumble vs. Pitkin is a case where a marshal had taken possession of goods under a void warrant of attachment, and while thus in possession kept, the Sheriff, who was seeking to levy a writ of attachment, issued by the State, from levying the attachment, and the Sheriff having come in subsequently into the Federal Court upon an intervening petition, this Court held that the Federal Court had an equitable power over its own process to prevent abuse, oppression and injustice, and therefore allowed the State attachment, the priority to which it would have been entitled, had not the marshal abused his power.

In Security Trust Company against Black River National Bank, the principle of Yonley vs. Lavender as to taking a judgment *in personam* against an administrator is affirmed. But where the

judgment was taken after the time fixed by the State Court for the administration of the estate has elapsed, and the assets had been distributed and the administrator has ended his functions as such, the judgment was held fruitless and invalid. Therefore, the judgment of this Court was that the judgment against the administrator should be reversed and set aside.

The case of Covell vs. Heyman was a case where property in the possession of a marshal of the court of the United States, by virtue of a levy under writ of execution issued upon a judgment recovered in a Circuit Court of the United States was sought to be replevined in an action in the State Court, and in which the exclusive control and right of the marshal was sustained, notwithstanding the fact that the plaintiff in the action of replevin claimed title to the property which she alleged was wrongfully detained from her by the marshal, and the precise distinction which we contend for is made by Mr. Justice MATTHEWS in that case, in the opinion at page 179 :

" When property is taken and held under process, *mesne* or final, of a court of the United States, it is in the custody of the law and within the exclusive jurisdiction of the court from which the process has issued for the purposes of the writ ; that the possession of the officer cannot be disturbed by process from any State Court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer ; that any person not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for the restitution of the property or its proceeds, while remaining in the control of that court ; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject matter."

The same distinction is made in the case of Heidritter against Elizabeth Oil Cloth Company.

The remedies which the defendants-in-error sought to prosecute in the State Court necessarily involved the withdrawal of the property, or its proceeds from the Court having exclusive jurisdiction over the same. They did not ask any judgment *in personam* against the Wabash Railroad Company or the other defendants, but their whole proceeding was against the property, in the custody of the Federal Court, and the determination by the State Court was neces-

sarily wholly inconsistent with the control reserved in the decree of March 23d, 1889, by the Federal Court of the right to adjudicate and determine as to all claims that were to be preferred against the property. As decided in Julian against Central Trust Company, the decree, with its reservations amounted to a stipulation with the purchaser of the property that the Federal Court would protect it as to all claims and require it to pay only such as that Court should thereafter adjudge to be lawful, not such as any other Court might adjudge and present in that Court for payment.

Respectfully,

RUSH TAGGART,

Attorney for The Wabash Railroad Company.

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WABASH RAILROAD COMPANY *v.* ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 40. Argued November 6, 7, 1907.—Decided January 6, 1908.

Where the Federal questions are clearly presented by the answer in the state court, and the decree rendered could not have been made without adversely deciding them, and, as in this case, they are substantial as involving the jurisdiction of the Circuit Court over property in its possession and the effect to be given to its decree, this court has jurisdiction and the writ of error will not be dismissed.

The taking possession by a court of competent jurisdiction of property through its officers withdraws that property from the jurisdiction of all other courts, and the latter, though of concurrent jurisdiction, cannot disturb that possession, during the continuance whereof the court originally acquiring jurisdiction is competent to hear and determine all questions respecting the title, possession and control of the property. Under this general rule ancillary jurisdiction of the Federal courts exists over subordinate suits affecting property in their possession although the diversity of citizenship necessary to confer jurisdiction in an independent suit does not exist.

The possession of property in the Circuit Court carries with it the exclusive jurisdiction to determine all judicial questions concerning it, and that jurisdiction continues after the property has passed out of its possession by a sale under its decree to the extent of ascertaining the rights of, and extent of liens asserted by, parties to the suit and which are expressly reserved by the decree and subject to which the purchaser takes title; and any one asserting any of such reserved matters as against the property must pursue his remedy in the Circuit Court and the state court is without jurisdiction.

It will be presumed that the Circuit Court, in determining the validity of liens affecting property in its possession, will consider the decisions of the courts of the State in which the property is situated with that respect which the decisions of this court require.

A suit brought by the holder of some of a series of bonds, the complaint in which alleges that the suit is brought on complainant's behalf and also on behalf of all others of like interest joining therein and contributing to the expenses, and of which no other notice of its pendency is given to the other bondholders, is not a representative or class suit the judgment in which binds those not joining therein or not privies to those who do. *Compton* v. *Jesup*, 68 Fed. Rep. 263, concurred in.

See also p. 609, *post.*

THIS is a writ of error directed to the Supreme Court of the State of Ohio. In that court the defendants in error obtained a decree declaring that certain negotiable notes held by them, which had been made by the Toledo and Wabash Railroad Company, were entitled to a lien on property once owned by that company and now owned by the plaintiff in error, and ordering a sale in satisfaction of that lien. The Federal questions presented and such facts as are deemed material to their decision are stated in the opinion.

Mr. Rush Taggart for plaintiff in error:

The Wabash Railroad Company claims that the prior and

exclusive jurisdiction of all the property involved in this case was in the Federal court from the time of the appointment of the receivers in May, 1884, and that as the Federal court has never relinquished such jurisdiction, the state court could have no jurisdiction to determine the questions presented in this case; also that the state court completely failed to give due force and effect to the decree of foreclosure entered in the Federal court on March 23, 1889.

The provisions of the decree of March 23, 1889, indicate a clear intention on the part of the Federal court to retain the final adjudication of all existing questions respecting this property, and there can be no question as to the power of the court to render a decree with such reservations. *Julian* v. *Central Trust Company*, 193 U. S. 93.

Under the reservations in the decree relating to the claim of James Compton, in view of the facts, it is perfectly clear that this property is still within the exclusive jurisdiction of the Federal court, and that while there, no state court could take jurisdiction for the purpose of ascertaining claims against it. *Hagan* v. *Lucas*, 10 Pet. 400; *Williams* v. *Benedict*, 8 How. 107, 112; *Peale* v. *Phipps*, 14 How. 375; *Yonley* v. *Lavender*, 21 Wall. 276; *Barton* v. *Barbour*, 104 U. S. 126; *Wiswall* v. *Simpson*, 14 How. 126; *Pulliam* v. *Osborne*, 17 How. 471; *Freeman* v. *Howe*, 24 How. 450; *People's Bank* v. *Calhoun*, 102 U. S. 256; *Porter* v. *Sabin*, 149 U. S. 473; Bispham's Equity, § 413; *French, Trustee*, v. *Hay*, 22 Wall. 250.

The Wabash Railroad Company, the plaintiff in error, has fully preserved all the questions under the decree by its pleadings in this cause. The Federal questions of the prior and exclusive jurisdiction of the Federal courts, resulting from the litigations in the Federal courts, and the decree of March 23, 1889, were presented upon the pleadings at every stage of the case to the state court, and were by the state court denied, and therefore the questions are fully presented upon the record justifying their consideration by this court.

The state court failed to give due force to the decree of the

Circuit Court for the District of Indiana in the case of *Ham* v. *Wabash, St. Louis and Pacific Railway*, which decree was a final and conclusive adjudication of all the issues in this case.

This Ham suit in Indiana, in July, 1880, whatever may have been its character prior to that time, became, in view of the allegations of the amended and supplemental bill then filed, distinctively a class suit on behalf of all the holders of equipment bonds.

The decree of the Circuit Court in the Ham suit, entered in accordance with the mandate of this court, was not a voluntary dismissal of the bill without prejudice on complainant's motion, nor is it an involuntary non-suit simply, but is a decree upon the merits of the contention, a decree in favor of the defendants against the complainant in that suit, finding authoritatively the absence of equity in the complainant's case, and concluding the complainants, and all of the class represented by them as to the merits of the questions involved in that litigation. Such is the proper form of a final decree in equity. It finds the equity of the case with the defendants, and dismisses the plaintiff's bill with costs to the defendants. 3 Daniel, Chy. Pldgs. (5th ed.), 2355, 2356; Ordinances of Lord Bacon, No. 13; Barton's Suit in Equity (p. 207); *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603; *Kendig* v. *Dean*, 97 U. S. 423, 426.

Mr. John W. Warrington, with whom *Mr. John C. F. Gardner*, *Mr. Thomas B. Paxton, Junior*, and *Mr. Murray Seasongood* were on the brief, for defendants in error:

Since this case is brought here upon a writ of error to the Supreme Court of a State, "there must be some fair ground for asserting the existence of a Federal question." It is not enough to show that the claim of a Federal question was set up. *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336.

The Federal question asserted must have merit. *Swafford* v. *Templeton*, 185 U. S. 487.

No question was made by the lienors as to the validity of

the foreclosure decree or the deed made in pursuance of it, or as to the regularity of the proceedings under which the order and deed were made, and it is admitted that the purchasers took all the title that the defendants in the foreclosure suit possessed. The judgments of the Ohio courts go no further than the claim made by defendants in error. The most that was claimed or decided in Ohio, was that the Federal court decree could not be so made as to impair or affect the lien of defendants in error, because they were not parties to the suit. *Avery* v. *Popper*, 179 U. S. 305, 314.

The reference to Compton's claim in the decree did not show a purpose to retain jurisdiction for all purposes. This court has decided that Compton's claim was really disposed of in the above mentioned decree. *Compton* v. *Jesup*, 167 U. S. 1, 31, at p. 31; *Julian* v. *Central Trust Co.*, 193 U. S. 93, discussed and distinguished.

As to the contention that a Federal question arises because the Ohio courts did not, as alleged, give due effect to the judgment of the Circuit Court of the United States in the Ham suit it need only be said that before any question could arise here as to what effect the Ohio courts in this cause gave to the judgment of dismissal in the Ham case, this court would have to determine whether the Ham suit was a class case. It is a question of general law, not a Federal matter, whether the Ham case was a class suit. If it was not, then the defendants in error could not be bound by it at all; nor were the courts of Ohio obliged to acquiesce in the judgment of dismissal of the Federal court in Indiana. *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S. 371, at 390.

The receivership and foreclosure proceedings in the Federal courts from 1884 to July, 1889, have no effect upon the case at bar, which was begun in the Ohio courts prior thereto, and the issues were not finally made up or trial had of the case in the state court until after the receivership and foreclosure proceedings had ended and the property been conveyed and delivered to the plaintiff in error. *Farmers' Loan &c. Co.* v. *Lake*

Street &c. Co., 177 U. S. 51, 61; *Louisville Trust Co.* v. *Knott* (1904), 130 Fed. Rep. 820, at p. 824, per Lurton, Severens and Richards, JJ.; *Zimmerman* v. *So Relle* (1897), 80 Fed. Rep. 417, at p. 420, per Sanborn, Thayer and Lochren, JJ.

The possession and exclusive control of the Wabash property ended in the United States courts when the property was conveyed by the master commissioners to the purchasing committee and the receivers were discharged.

The Adelbert College and the cross-petitioners, defendants in error, were not parties to the Ham suit; said suit was never a representative suit, and the result of said suit is not a bar to the assertion and validity of the claims of defendants in error.

MR. JUSTICE MOODY delivered the opinion of the court.

In 1862 the Toledo and Wabash Railway Company owned and operated a railroad in Ohio and Indiana, and was incorporated under the laws of both States. That part of the property situated in Ohio was then incumbered by two mortgages, one to the Farmers' Loan and Trust Company for $900,000, and one to Edwin D. Morgan, Trustee, for $1,000,000. That part of the property situated in Indiana was then incumbered by two mortgages, one to the Farmers' Loan and Trust Company for $2,500,000, and one to Edwin D. Morgan, Trustee, for $1,500,000. In that year the company issued and sold unsecured sealed negotiable notes to the amount of $600,000, called equipment bonds. In 1865 this company consolidated with certain Illinois railroad corporations, thus creating the Toledo, Wabash and Western Railway Company. This consolidation was authorized by and in part effected under a statute of Ohio. The holders of the equipment bonds have contended that the result of this consolidation was to give to these hitherto unsecured obligations an equitable lien upon the property of the corporation which issued them, and that the equity of redemption of that property went into the hands of the consolidated corporation incumbered by that lien. Upon this

question this court and the Supreme Court of Ohio have, in the past, arrived at opposite conclusions; this court holding (*Wabash, St. Louis & Pac. Ry.* v. *Ham*, 114 U. S. 587), that the equipment bonds remained unsecured, and the Ohio court holding (*Compton* v. *Railway Co.*, 45 Ohio St. 592), that the effect of the consolidation was to create the lien claimed. This suit was brought by the defendants in error, holders of some of the equipment bonds, in the courts of Ohio for the purpose of enforcing the lien stated. They prevailed by the judgment of the Supreme Court of the State, which affirmed a decree of a lower court establishing the indebtedness upon the bonds, declaring a lien to secure the payment of that indebtedness upon the property owned, subject to the mortgages hereinbefore stated, by the Toledo and Wabash Railway Company in 1865, and directing a sale of such of that property as was within the State of Ohio in satisfaction of the lien.

The case is here upon a writ of error to the Supreme Court of Ohio to review this judgment. There are two Federal questions, it is contended, which were erroneously decided in the court below. The plaintiff in error insists: First, that the Ohio court had no jurisdiction to render the decree entered in the case, because the property affected by that decree was in the possession of a Circuit Court of the United States, and the questions litigated in this case were within the exclusive jurisdiction of the latter court. Second, that the decree of the Circuit Court of the United States for the District of Indiana in the case of *Ham* v. *Wabash, St. Louis & Pacific Railway Company* was a final adjudication of the issues in the case at bar, binding upon the defendants in error, and conclusive against their right to maintain this suit. The defendants in error contend that these questions were not properly raised in the court below, or, if properly raised, that they are so unsubstantial as to be frivolous, and therefore move that the writ of error be dismissed. But the questions were clearly presented by the answer in the Ohio courts, the decree rendered could not have been made without deciding them against the contention of the railroad

company, and we think that they are substantial and important. The motion to dismiss is therefore overruled, and we proceed to the discussion of the merits of the questions.

1. The first question is whether a Circuit Court of the United States had exclusive jurisdiction of the issues determined by the Ohio court in the case at bar. Before beginning the discussion of that question it is necessary to state the facts out of which it arises. The Toledo, Wabash and Western Railway Company, whose property was incumbered, as we have seen, by mortgages of the Toledo and Wabash, for $5,900,000, and by the claim of lien of the equipment bonds, and by other mortgages upon the property of other corporations which entered into the consolidation, itself executed two mortgages upon all its property. By the foreclosure of one of these mortgages the property became vested in the Wabash Railroad Company. This company, after executing a mortgage on its property, consolidated with another railway company, creating the Wabash, St. Louis and Pacific Railway Company. This company executed in 1880 a mortgage on its property to the Central Trust Company of New York and James Cheney for $50,000,000. On May 27, 1884, the Wabash, St. Louis and Pacific Railway Company, having fallen into financial difficulties, filed a bill in the Federal courts in six States, alleging its insolvency and asking the appointment of receivers. Thereupon receivers were appointed, qualified and took possession of the property. Thereafter the Central Trust Company and Cheney began proceedings in several state courts for the foreclosure of their mortgage of $50,000,000. These proceedings were removed to the Federal courts, and upon them a sale, under the direction of those courts, was made in 1886 to a purchasing committee. Before this sale, however, on October 17, 1884, the Circuit Court of the United States for the Western Division of the Northern District of Ohio dismissed the bills for receivership and for the foreclosure of the Cheney mortgage as to all parties who claimed liens prior to that mortgage. After the sale upon the foreclosure of the Cheney mortgage,

proceedings for foreclosure of several other mortgages prior to it were begun in the Circuit Courts of the United States, consolidated, and resulted in decrees for foreclosure and sale under all the mortgages. These decrees were entered in the various Circuit Courts on March 23, 1889. In the meantime the property remained in the possession of the Circuit Courts through its receivers. The sale under these decrees was made to a purchasing committee, by whom it was conveyed to a new corporation, the Wabash Railroad Company, the plaintiff in error. By order of the Circuit Court for the Northern District of Ohio, made on June 18, 1889, possession of the property was delivered by the receiver to the purchasing committee, and he was discharged. Since August, 1889, the plaintiff in error, the Wabash Railroad Company, has been in possession of the property under the terms of the decrees of March 23, which presently will be stated. None of the defendants in error were parties to the proceedings in the Circuit Courts of the United States, and an attempt to remove this case from the Ohio courts to the Circuit Court of the United States, resisted by the defendants in error, failed. *Joy* v. *Adelbert College*, 146 U. S. 355.

It appears from this statement that the railroad property affected by this controversy was in the actual possession, through receivers, of Circuit Courts of the United States from the date of the appointment of receivers, May 27, 1884, to the date of their discharge and the delivery of the property to the purchasing committee, which was ordered on June 18, 1889, and was accomplished about July 1, 1889. It cannot be and apparently is not disputed that, during that period, the property was in the possession of the Circuit Courts of the United States, and that that possession carried with it the exclusive jurisdiction to determine all judicial questions concerning the property. But it is earnestly contended that, when the property passed out of the actual possession of the United States courts, in conformity with their decrees, into the hands of the purchasers under the decrees, the exclusive

jurisdiction of the United States courts came to an end. The applicability of this contention to the case at bar will appear upon a fuller statement of the origin and progress of the case at bar in the courts of Ohio. The suit was begun on April 28, 1883, by Adelbert College alone, which was the owner of two of the equipment bonds, each of the par value of $500, and prayed for the decree, which, with some variations, not material to be stated, was finally given. Nothing of moment, beyond the service of process and the filing of pleadings, occurred until 1889, when several other holders of the equipment bonds joined in the suit as co-plaintiffs, by filing, with leave of court, what is denominated an answer and cross petition, in which they prayed relief similar to that sought by the original plaintiff. This petition was verified on January 2, 1889, but the date of its filing does not appear in the record. Later other similar cross petitions were filed by leave of court. Pleadings continued to be filed from time to time by the different parties to the suit, the last appearing in the record being one verified March 9, 1896, thirteen years after the beginning of the suit and seven years after the discharge of the receiver by the Federal court. The cause was then heard by the Court of Common Pleas and judgment was rendered for the bondholders in July, 1897, which, after affirmance by an intermediate court, was affirmed by the Supreme Court of the State. It appears, therefore, that the trial and judgment in the state courts were long after the Federal courts had transferred the railroad property to the purchasers under the decrees for foreclosure, and had discharged the receiver. Since the Federal courts had parted with the physical possession of the property, they obviously could no longer exercise an exclusive jurisdiction respecting it, unless there was something in the decrees under which the property was sold and conveyed, which preserved to the courts the control of the property for the purpose of giving full effect to its judgments. We are brought then to the consideration of the terms of those decrees. Upon their proper interpretation and true effect our

decision must rest. For the correct understanding of the decrees, and especially of the reservations contained in them, it is necessary to ascertain the progress and present status of still another litigation. James Compton, an owner of some of the equipment bonds, in a suit brought upon them in the Ohio courts in 1880, obtained a decree by the judgment of the Supreme Court of the State, ascertaining the amount due him in respect of the bonds and accrued interest, declaring that he was entitled to an equitable lien on the property owned by the Toledo and Wabash Railway Company at the time of the consolidation of 1865, subject to the mortgages upon that property then existing, and ordering, in default of payment of the sum found due, a sale of that part of the property which was within the State of Ohio. *Compton* v. *Railway Company*, 45 Ohio St. 592. The entry of judgment on the mandate of the Supreme Court was made in the Court of Common Pleas in October, 1888. Thereupon the Circuit Court for the Northern District of Ohio, Western Division, made Compton a party to the consolidated foreclosure suit, and ordered him to appear and plead, answer or demur. Compton appeared specially and set up his Ohio judgment. Various proceedings have been had with respect to his claim, including a judgment in this court in May, 1897, *Compton* v. *Jesup*, 167 U. S. 1, affirming Compton's lien and right to a sale in satisfaction of it. After the decision of this court, Compton's claim was sent to a master, who, after some ten years, made a report, which is now pending on exceptions in the Circuit Court. At the time of the decrees of foreclosure of March, 1889, the questions concerning Compton's claim were, of course, undecided, and account of them had to be taken in these decrees.

The decree of March 23, 1889, is very elaborate. The parts of it material here may be stated with comparative brevity. It ordered the foreclosure of all the mortgages upon the railroad property in the possession of the court, and the sale of the property, and the disposition of the proceeds among those adjudged to be rightfully entitled to it. After reciting that

the property is in the possession of the court through its receiver, the decree directs that, in default of payment within ten days of mortgage bonds and their coupons, scrip certificates, funded debt bonds and their coupons, amounting altogether to some fourteen millions of dollars, the property should be sold at public auction to the highest bidder. It was ordered that the separate divisions should first be offered for sale separately, that afterward the whole property should be offered for sale as a unit, and that the method of sale which resulted in the better price should stand. The special masters appointed to conduct the sale were directed, on confirmation of the sale and payment of the purchase price, to execute a deed or deeds which "shall vest in the grantee or grantees all the right, title, estate, interest, property and equity of redemption, *except as hereby reserved*, of, in and to" the property in fee simple. The decree then proceeds to define what is "hereby reserved." The part of the decree which expresses the reservation is so vital in the determination of the case that it is printed in full in the margin.[1] In ascertaining its true

[1] All other questions arising under the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication; including the claim for unearned interest on bonds not yet due.

And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issues raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton to be filed herein have not been tried and determined, the court overrules such objection and the defendant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the Supreme Court of the State of Ohio in the suit brought by said James Compton against the Wabash, St. Louis and Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered and affected by the

meaning and effect the whole situation, as it could be and doubtless was seen by the court, must be kept in view. The property had been in the possession of the court and managed

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said lien, or the successors in the title of said purchaser or purchasers shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise, as this court may direct.

And it is further ordered and adjudged, that notwithstanding the entry of this decree the said issue concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in said property affected by such lien from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul or abridge any right, claim, interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

Any sale, conveyance or assignment of the railway and property hereinabove described made under this decree shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis and Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and Gen. John McNulta, or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis and Pacific Railway Company, or any part thereof, or said receivers or either of them, or the adjustment of any equities arising out of the same between the parties hereto, or their successors, either by this court or by the Circuit Court of the United States for the Eastern District of Missouri, or by any United States Circuit Court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis

through its receiver for five years. It was desirable that it should pass into the hands of responsible owners, freed, as far

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and Pacific Railway Company, or any part thereof, or by any United States Circuit Court to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis and Pacific Railway Company and others in the Circuit Court of the United States for the Eastern District of Missouri, including the receivers, have been by the said Circuit Court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court or otherwise.

Nor shall any such sale, conveyance, transfer or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof or said receivers as aforesaid shall not be paid within a reasonable time after being required by order of this or said other courts.

The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or said receivers, by order of said courts shall be fully paid and discharged.

The provisions aforesaid shall apply to the purchasers of the same under this decree, and all persons taking such property through or under them, but the foregoing provisions shall not nor shall any reservation in this decree contained have the effect or be construed, nor are they or any of them intended to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist.

The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist.

And the court reserves the right to make such further order and direction at the foot of this decree as may seem proper.

as possible, from all prior liens and incumbrances. The question whether Compton had a lien and right of sale to satisfy it was unsettled, and would naturally be so for some time to come. He was a party to the suit. Many other holders of the equipment bonds, whose primary rights were like his, were seeking in the Ohio courts to obtain the same judgment which had there been awarded to him. None of them were parties to the suit in the United States courts, but their claims and the relief which the state court might give them could not be overlooked by a discerning court or a prudent purchaser. These facts and the considerations which arose out of them called upon the court to continue its grasp upon the property and its control of exclusive jurisdiction over it, both for the sake of those who had just claims upon it and for the sake of those who might purchase under the decree. A sale could not properly or safely be made upon any other conditions. The decree reserves: 1. All questions arising under the pleadings and proceedings for further adjudications. 2. The rights of Compton, which, when determined, may be enforced, after a resumption of possession by the court, by a resale of the property or otherwise. 3. The costs, expenses, debts and liabilities of the receivers, which are made a charge upon the property, to be enforced by a retaking and sale of the property. All the foregoing reservations are clearly and unmistakably made, the purchasers are warned that they must take title subject to the rights thereafter to be ascertained, to which the reservations relate, and the jurisdiction of the court over the questions and the right of the court to retake and resell the property is in terms preserved. Moreover, we are of the opinion that the decree, fairly interpreted in the light of the circumstances, made a still broader reservation. It is ordered that "any sale . . . of the railway and property . . . shall not have the effect of discharging any part of said property from the payment, or contribution to the payment, . . . upon intervening claims allowed, or to be allowed, or upon any other claims or allowances that have been, or may hereafter

be, charged against the property;" and that the "jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property . . . shall be fully paid;" and that the reservations shall not have the effect "to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist;" and that "The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist." This sweeping language, colored as it is by the last paragraph quoted, with its reference to claims which are liens prior in right to the mortgages, must be held to include claims under the equipment bonds. Such a reservation would be natural, in view of the facts that the rights under the equipment bonds were uncertain, and their holders not parties to the suit, and therefore not affected by the foreclosure. *Wiswall* v. *Sampson*, 14 How. 52, 67; *United Lines Tel. Co.* v. *Boston Trust Co.*, 147 U. S. 431, 448; *Pittsburg &c. Railway* v. *Loan & Trust Co.*, 172 U. S. 493, 515. The effect of the decree is to say to any purchaser under it, you must take this property subject to all claims which this court shall hereafter adjudge to be lawful, and you may be assured that you will be held to pay none other, and for the purpose of making this statement good the court reserves jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise again the power of sale. It is obvious, therefore, that the court has parted with the possession of the property only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it. We may now consider the question whether the state court had the jurisdiction to render the judgment in the case at bar, as and when it was rendered.

When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union. *Hagan* v *Lucas*, 10 Pet. 400; *Williams* v. *Benedict*, 8 How. 107; *Wiswall* v. *Sampson*, 14 How. 52; *Peale* v. *Phipps*, 14 How. 368; *Pulliam* v. *Osborne*, 17 How. 471; *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Yonley* v. *Lavender*, 21 Wall. 276; *People's Bank* v. *Calhoun*, 102 U. S. 256; *Barton* v. *Barbour*, 104 U. S. 126; *Krippen-*

dorf v. *Hyde*, 110 U. S. 276; *Pacific R. R. of Missouri* v. *Missouri Pacific Railway*, 111 U. S. 505; *Covell* v. *Heyman*, 111 U. S. 176; *Heidritter* v. *Elizabeth Oil Cloth Company*, 112 U. S. 294; *Gumbel* v. *Pitkin*, 124 U. S. 131; *Johnson* v. *Christian*, 125 U. S. 642; *Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171; *Porter* v. *Sabin*, 149 U. S. 473.

The state courts in the case at bar, in deference, it is said by counsel, to these well-established principles, deferred action until after the property had been conveyed to the purchasers under the decree of foreclosure and the receiver discharged. Upon the termination of the receivership, it is urged, the exclusive jurisdiction of the Circuit Court ended, and the right of the state court to resume its normal jurisdiction revived. As this suit was begun before the property was taken into the possession of the Circuit Court, and when therefore the state court had jurisdiction over it, and remained dormant, except for the addition of parties and the filing of pleadings and service of process, until after the receivers had been discharged and the property conveyed to the purchaser, this would be true, if, as in *Shields* v. *Coleman*, 157 U. S. 168, the possession of the Circuit Court and its relation to the *res* had come to an end. But the Circuit Court attempted, in the decree of March 23, to prolong its control of the property, beyond the conveyance to the purchasers and the discharge of the receivers, up to the point of time when the claims therein stated should be ascertained and the just remedy for them applied, and to reserve the right to retake the property for those purposes. The effect of reservations in a decree of foreclosure, which to say the least were no broader than those in this decree, was before the court in *Julian* v. *Central Trust Co.*, 193 U. S. 93. The reservations in that case are stated on page 110, and of them the court said, p. 111: "It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser;" and again, p. 112:

"The Federal court by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court;" and again, p. 113: "the Circuit Court by the order made retained jurisdiction of the case to settle all claims against the property and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed." Here was a clear determination by this court that the exclusive jurisdiction of claims against a *res*, which had arisen out of the possession of the *res* in judicial proceedings for foreclosure of mortgages, might be continued after sale and conveyance of the property for the purpose of deciding what claims were legally chargeable against it. This is precisely what the Circuit Court attempted to do with respect to the property now before us, and its right to do it is clearly supported by the decision in the *Julian case*. Under the reservations in that case the Circuit Court was held to have power to protect the property sold by its order from sale on an execution issued by a state court. The state court was thought to be without power to direct such a sale, even though its judgment was based upon a claim arising after the conveyance of the property, because, under the peculiar facts of the case, the judgment and execution in effect annulled the Federal decree. The principle underlying that case, however, which is material here, is that the jurisdiction over the *res* could be continued by reservations, after the physical possession of the property had been abandoned. This court there said, p. 112: "The Federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun." It needs but a moment's consideration of the facts in the case at bar to convince that if the exclusive jurisdiction of the Federal court were denied every evil, which that doctrine was designed to avert, would be let in. Some time, it is to be supposed, there will be a sale by order of the Federal court to satisfy Compton's lien. If the sale by the state court of the same property to satisfy other lienholders of equal rank with

Compton is allowed to proceed, which sale will convey the better title? Who would be bold enough to determine for himself that question? How much longer would the litigation with respect to this property continue if two persons could be found to purchase at the two sales? It is no answer to these questions that Compton has been made a party to this suit in the state court. He is still a party to the proceedings in the Federal court, and he must find satisfaction for his claim there. We are of the opinion that by the effect of the reservation in the decree of March 23, 1889, the exclusive jurisdiction of the Federal court over the property therein dealt with has continued, notwithstanding the conditional conveyance and that it still exists. The defendants in error must pursue their remedy in that court, which doubtless will consider the decisions of the state courts on questions of state law with the respect which the decisions of this court require. It follows, therefore, that the state court was without power to decree a sale of the property, and its judgment must be reversed.

2. There remains for decision the question whether the court below erred in declining to hold that the case of *Ham* v. *Wabash, St. Louis & Pacific Railway Company* conclusively adjudicated the merits of the claims of the defendants in error.

The record in that case must now be examined. A suit brought in a state court in 1878 by David J. Tysen, a holder of equipment bonds, against the Wabash Railway Company, then the owner of this railroad property, was removed to the Circuit Court of the United States for the District of Indiana. The suit was heard on a supplemental bill filed by Benjamin F. Ham and several other persons, who together owned equipment bonds of the par value of $113,500. The complainants alleged that the suit was brought "on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit." No notice of the pendency of the suit was given to the other holders of the bonds other than by this allegation in the bill. The Circuit Court, after due hearing, entered a

decree declaring that the bonds were entitled to a lien on the property, owned by the Toledo and Wabash Railroad Company at the time of the consolidation of 1865, to secure the payment of principal and interest, and ordering, in default of payment, a sale of the property in satisfaction of the lien. This decree was reversed by this court. *Wabash &c. Railway* v. *Ham*, 114 U. S. 587. Thereafter the bill was dismissed for want of equity by the Circuit Court. It is contended that the judgment in this case is a bar to the claim for lien of all the holders of the equipment bonds, whether they were parties or privies to that suit or not. Accordingly the judgment in the Ham case was pleaded in the state court in this case as a bar to the suit. The theory of the plea in bar is that the Ham suit was a representative or class suit, and that the judgment in it bound all of the class, even if they were not parties or privies to it. It was held otherwise by the Circuit Court of Appeals with respect to this very judgment, *Compton* v. *Jesup*, 68 Fed. Rep. 263, and in that opinion we concur. We do not deem it necessary to follow the learned counsel for the plaintiff in error in his elaborate discussion of the nature of representative suits, and the effect of judgments in them upon those who are not parties or privies. Nor is it necessary to go beyond the facts of this case, or to consider what suits may be of such a nature and effect. In this suit Ham might have proceeded alone, as Compton did, or with others who chose to join with him. The allegation that the suit is brought in behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join. Some may have preferred another jurisdiction, some perhaps could not join without destroying the diversity of citizenship, upon which alone the jurisdiction was based, or some possibly had never heard of the pendency of the suit. It is clear if such suits in the Circuit Courts of the United States could have the effect here claimed for them, and the judgments in them were binding in all courts against all other persons of the same class, that injustice might result, and even collusive suits might be encouraged. We find

no controlling authority which leads us to such a conclusion. We think that the Ham suit was not a representative suit in the sense that the judgment in it bound the defendants in error who were not parties to it. But for the reasons already given the judgment must be *Reversed.*[1]

MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM dissent from that part of the judgment which decides that the jurisdiction of the Federal court was exclusive after the delivery of the property to the purchaser under the foreclosure decree, and the discharge of the receiver.